XLV POLISH YEARBOOK OF INTERNATIONAL LAW
2025
DOI 10.24425/PYIL.2026.3106
PL ISSN 0554-498X
e-ISSN 2957-1510

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THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE: JURISDICTION, IMMUNITIES, AND TRIALS IN ABSENTIA

Abstract: *This article examines the Special Tribunal for the Crime of Aggression against Ukraine, created by Ukraine and the Council of Europe in June 2025. The Special Tribunal was designed to address the jurisdictional gap of the International Criminal Court, which – due to the limitations of the Rome Statute – cannot exercise jurisdiction over the crime of aggression in relation to Ukraine. The article analyses the Special Tribunal's subject matter and territorial and temporal jurisdiction. The article further examines the issue of personal immunities and the provision regarding trials in absentia.*

Keywords: Ukraine, crime of aggression, Special Tribunal, accountability

INTRODUCTION

On 25 June 2025, Ukraine and the Council of Europe concluded an agreement establishing the Special Tribunal for the Crime of Aggression against Ukraine. The first initiatives to create a special international criminal tribunal with jurisdiction over the crime of aggression emerged almost immediately after the onset of Russia's aggression against Ukraine.[1] The establishment of the criminal tribunal represents the outcome of extensive efforts by certain states, legal experts and civil

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[1] P. Sands, *Putin's use of military force is a crime of aggression*, Financial Times, 28 February 2022, available at: https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c (accessed 31 March 2026).

society, primarily to address the jurisdictional gap of the International Criminal Court (ICC) in prosecuting the crime of aggression against Ukraine. This work was largely carried out by the socalled Core Group, which gradually expanded to include 40 states, predominantly European ones, but also encompassed states such as Canada.[2] This article discusses the Special Tribunal's jurisdiction in terms of subject matter, territory and time. It also addresses the question of personal immunity and considers the Special Tribunal's framework for conducting trials *in absentia*.

1. THE NEED FOR THE SPECIAL TRIBUNAL

Since February 2022, Ukraine has been subjected to a full-scale military invasion by the Russian Federation, which followed the earlier annexation of Crimea and Russia's proxy war in the Luhansk and Donetsk regions.[3] Despite certain attempts of the Russian Federation to justify its actions by referring to some circumstances that may indicate an alleged right of self-defence, the military invasion of Ukraine constitutes a clear violation of the rules of *ius ad bellum*.[4] Almost immediately after the Russian invasion of Ukraine began, a debate emerged regarding the need to ensure that individuals bear criminal responsibility for this unlawful use of force against Ukraine.[5] At the centre of this discussion was the question of which level is appropriate for investigating and adjudicating the crime of aggression –domestic or international – and whether such proceedings should be conducted by the ICC or a new ad hoc international tribunal, or through a hybrid mechanism.[6]

With respect to the exercise of domestic jurisdiction, both Ukraine and the Russian Federation have incorporated the crime of aggression into their respective criminal codes.[7] However, the debate over the domestic jurisdiction for the

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[2] C. Wenaweser, S. Alavi, *A Special Tribunal for the Crime of Aggression Against Ukraine: Origins, Debates, and Implications*, Yale Journal of International Law, 7 February 2026, available at: https://tinyurl.com/3dymadxc (accessed 31 March 2026).

[3] E. Tsybulenko, J.A. Francis, *Separatists or Russian Troops and Local Collaborators? Russian Aggression in Ukraine: The Problem of Definitions*, in: S. Sayapin, E. Tsybulenko (eds.), *The Use of Force against Ukraine and International Law*, TMC Asser Press, The Hague: 2018, pp. 123-144.

[4] UN General Assembly (GA) Resolution, Aggression against Ukraine, A/RES/ES-11/1, 18 March 2022; UN GA Resolution, *Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations*, 13 October 2022, A/RES/ES-11/4,; UN GA Resolution, 2 March 2023, A/RES/ES-11/6; International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022.

[5] Sands, *supra* note 1.

[6] T. Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, Just Security Blog, 10 March 2022, available at: https://tinyurl.com/5a2tyxb4 (accessed 31 March 2026).

[7] A. Reisinger Coracini, *Extended Synopsis: The Crime of Aggression under Domestic Law*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 1038.

crime of aggression has long been accompanied by doubts as to whether it may be exercised by a state other than the aggressor state itself. This is primarily because assessing the crime of aggression as a matter of individual criminal responsibility necessarily entails an assessment of whether a foreign state has committed an act of aggression.[8] Concerns regarding the exercise of domestic jurisdiction for the crime of aggression had already been expressed in the 1992 report of the ILC Working Group on International Criminal Jurisdiction, which stated that "[i]t may be very difficult for a national court, which may be a court of a party to the conflict in question, to determine in an impartial manner whether particular conduct constituted aggression, for example."[9] Moreover, there was the question of whether domestic jurisdiction is precluded by the existence of state immunities reflecting the principle *par in parem imperium non habet*, or by immunities accorded to the relevant individuals – whether functional or personal in nature.[10] Although some of these obstacles may not have been insurmountable and could have been at least partially addressed, there has been a strong belief that a judicial mechanism with international backing and components would reduce the risk of bias and strengthen the court's legitimacy.[11]

With regard to the ICC, Russia is not a party to the Rome Statute, and at the outset of the invasion neither was Ukraine. However, Ukraine had previously twice accepted the ICC's jurisdiction according to Art. 12(3) of the Rome Statute. Firstly, Ukraine had accepted the jurisdiction of the ICC over crimes committed on its territory between 21 November 2013 and 22 February 2014.[12] With its second declaration, Ukraine removed the time limitation, granting jurisdiction for crimes committed from 20 February 2014 onward.[13] On this basis, the ICC has already issued arrest warrants three times. In March 2023, it issued arrest warrants for Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova for the war

[8] C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, pp. 258-352.

[9] ILC, *Report of the Working Group on the Question of an International Criminal Jurisdiction,* II(2) Yearbook of the International Law Commission (1992).

[10] Dannenbaum, *supra* note 6.

[11] T. Dannenbaum, *A Special Tribunal for the Crime of Aggression?,* 20 Journal of International Criminal Justice 859 (2020); Ł. Kułaga, *Domestic and International Criminal Jurisdiction in the context of the initiative for a Special Tribunal for the Crime of Aggression*, 43 Polish Yearbook of International Law 339 (2023).

[12] *The declaration of Ukraine to the ICC*, 9 April 2014, available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (accessed 31 March 2026).

[13] *The declaration of Ukraine to the ICC*, 8 September 2015, available at: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (accessed 31 March 2026).

crime of unlawful deportation of children.[14] A year later, in March 2024, it issued arrest warrants for Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov for the war crime of directing attacks at civilian objects, the war crime of causing excessive incidental harm to civilians or damage to civilian objects and the crime against humanity of inhumane acts.[15] In June 2024 came the third set of arrest warrants, for Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov for the war crime of causing excessive incidental harm to civilians or damage to civilian objects and the crime against humanity of inhumane acts.[16] Ukraine ultimately ratified the Rome Statute in October 2024 and is currently a State Party to the International Criminal Court.[17] However, because of the jurisdictional framework governing the crime of aggression under the Rome Statute, the ICC does not possess jurisdiction over this crime in relation to the situation in Ukraine.[18] This is the strongest reason for establishing an ad hoc tribunal regarding the crime of aggression in Ukraine.

2. FOUNDATION AND JURISDICTION OF THE SPECIAL TRIBUNAL AND ITS RELATIONSHIP WITH THE ICC

The Special Tribunal was established by an agreement between Ukraine and the Council of Europe. In light of the principle of legality, it is necessary to clarify whether this agreement provides a sufficient legal basis for the Special Tribunal to be regarded as a court established by law.As a sovereign state, Ukraine may exercise criminal jurisdiction on the basis of the principle of territoriality, and nothing prevents it from doing so voluntarily in cooperation with an international organisation.[19] The situation is more complex regarding the Council of Europe (CoE). Its Statute does not expressly confer legal personality on the organisation, nor does it refer to any competence in matters relating to the exercise of criminal jurisdiction.[20] However, under the doctrine of implied powers, an international organisation may exercise powers that are not expressly set out in its founding treaty, provided that

[14] The ICC's Press Release, 17 March 2023, available at: https://tinyurl.com/nhb296xd (accessed 31 March 2026).

[15] The ICC's Press Release, 5 March 2024, available at: https://tinyurl.com/ytu44ydf (accessed 31 March 2026).

[16] The ICC's Press Release: 25 June 2024, available at: https://tinyurl.com/5axk2evf (accessed 31 March 2026).

[17] The ICC's Press Release, 17 July 2025, available at: https://tinyurl.com/4hf34rve (accessed 31 March 2026).

[18] C. McDougall, *The Imperative of Prosecuting Crime of Aggression Committed against Ukraine*, 28(2) Journal of Conflict and Security Law 203 (2023), p. 212.

[19] O. Owiso, *An Aggression Chamber for Ukraine Supported by the Council of Europe*, Opinio Juris, 30 March 2022, available at: https://tinyurl.com/3pfewbwx (accessed 31 March 2026).

[20] Statute of the Council of Europe, London, 5 May 1949.

such powers are "essential to the performance of its duties".[21] Pursuant to Art. 1(b) of the CoE Statute, the aim of the CoE is to safeguard "maintenance and further realisation of human rights and fundamental freedoms." According to Art. 15(a) of the CoE Statute, the Committee of Ministers "shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements." In this context it is also worth noting that the Preamble of the CoE Statute provides that the member states are "convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation." In light of the provisions cited above, it may be reasonably argued that the CoE has an implicit power to conclude an agreement with Ukraine concerning responsibility for the crime of aggression. Russia's aggression against Ukraine may be viewed as a violation of human rights, and the strengthening of accountability mechanisms may therefore fall within the core objectives of the CoE, leading to peace based on justice, as proclaimed in the Preamble.[22]

However, the participation of the CoE and the legal basis for it also entail certain limitations. Unlike the UN Security Council, the CoE does not possess the authority to impose binding obligations on its member states. The jurisdiction of the Special Tribunal was therefore derived directly from Ukraine's territorial jurisdiction, with the CoE merely assisting in its institutional organisation.[23] As the CoE cannot compel states to cooperate with a tribunal, each state must conclude its own bilateral agreement with the Special Tribunal. These agreements are further complemented by the Enlarged Partial Agreement, which serves as a flexible administrative and financial framework allowing both CoE and non-CoE states to manage the Special Tribunal's budget and operations without imposing rigid legal obligations on all member states. This instrument establishes a Management Committee to oversee governance and a Secretariat to ensure specialised oversight, while relying on a combination of membership dues and voluntary contributions.[24]

According to Art. 1 of the Statute of the Special Tribunal for the Crime of Aggression against Ukraine (the Statute), the Special Tribunal's *ratione materie* jurisdiction is limited exclusively to the crime of aggression against Ukraine. This limitation of

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[21] ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Rep 1949, p. 11.

[22] Owiso, *supra* note 19; A. Peters, *Implied powers under the Council of Europe Statute, Seminar on the Special Tribunal for the Crime of Aggression against Ukraine – What role for regional organisations such as the Council of Europe?*, 10 April 2024, available at: https://rm.coe.int/peters-cahdi-seminar-coe-competence/1680af60d6 (accessed 31 March 2026).

[23] Owiso, *supra* note 19; F. Hoffmeistr, *The Special Tribunal for the Crime of Aggression against Ukraine Legal assessment and policy recommendations*, Asser Institute, June 2025, available at: https://tinyurl.com/yfz8erju (accessed 31 March 2026), p. 26.

[24] Hoffmeistr, *supra* note 23.

subject-matter jurisdiction is directly linked to the fact that, with respect to other international crimes committed on the territory of Ukraine – namely war crimes, crimes against humanity and genocide – jurisdiction already lies with the ICC. The Special Tribunal is therefore conceived not as a substitute, but as a complementary mechanism to an existing international criminal institution, designed specifically to address the accountability gap concerning the crime of aggression.[25]

The relationship between the Special Tribunal and the ICC is further elaborated in Art. 46 of the Statute. Firstly, according to Art. 64(1) there is a general duty of the Special Tribunal to cooperate with the ICC. More importantly, paragraph 2 stipulates that "[w]henever a person subject to an arrest warrant by the International Criminal Court is detained in the detention facilities of the International Criminal Court, the Special Tribunal shall give priority to the proceedings before the International Criminal Court." This provision indicates the subsidiary nature of the Special Tribunal and reflects a deliberate effort to prevent possible jurisdictional conflicts in favour of the ICC. When considering the practical implications of Art. 46 of the Statute, it is particularly relevant that the ICC has already issued an arrest warrant against Vladimir Putin for the war crimes of unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.[26] Vladimir Putin is therefore a person "subject to an arrest warrant by the International Criminal Court" within the meaning of Art. 46(2) of the Statute. Consequently, it may reasonably be inferred that the Special Tribunal would be obliged to give priority to the proceedings before the ICC. Given the strong symbolic significance attached to prosecuting aggression as the "supreme international crime",[27] it remains an open question to what extent such a scenario – where priority would be afforded to proceedings before the ICC, potentially at the expense of trials for the crime of aggression before the Special Tribunal – would be perceived as satisfactory, particularly by the broader Ukrainian society.

The Statute contains its own definition of the crime of aggression, which closely resembles, yet does not fully replicate, the definition set out in the Rome Statute. Art. 2(1) and (2) of the Statute read as follows:

> (1) For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct

[25] Council of Europe, Press release, 25 June 2025, available at: https://tinyurl.com/adrextef (accessed 31 March 2026).

[26] ICC, *supra* note 14.

[27] MT Judgment (1946), Vol. 22, p. 427.

> the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
>
> (2) For the purpose of paragraph 1 of this article, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

This part of the definition of the crime of aggression in the Statute is identical to the corresponding definition enshrined in the Rome Statute. In line with the Rome Statute, it distinguishes between the "crime of aggression", which relates to an individual's criminal responsibility, and an "act of aggression", which is the conduct of a state.[28] The Statute of the Special Tribunal also mirrors the Rome Statute in the leadership requirement, i.e. only persons in a position "effectively to exercise control over or to direct the political or military action of a State" can bear a criminal responsibility for the crime of aggression. This component is unique to the crime of aggression and distinguishes this crime from other crimes under international law.[29] As a consequence an ordinary soldier actively executing the act of aggression against Ukraine will not bear criminal responsibility for the crime of aggression, though the person could be prosecuted for other crimes under international law. In accordance with the Rome Statute's definition, the "act of aggression" must be committed by a state against a state. The protected legal interest of the crime of aggression is the sovereignty and territorial integrity of a state, or in other words, its statehood[30] – in this case that of Ukraine. The definition excludes criminal responsibility for persons acting on behalf of non-state actors. As a consequence of this definition, the leaders or other members of separatist paramilitary forces cannot bear criminal responsibility for the crime of aggression against Ukraine, unless their relevant relationship to the state – in this case, the Russian Federation – is also established.

However, the subsequent two paragraphs of Art. 2 of the Statute set out a definition of the crime of aggression that departs from the wording of the Rome Statute:

> (3) For the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall

[28] McDougall, *supra* note 8, p. 85.

[29] C. Kress, L. von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 Journal of International Criminal Justice 1179 (2010), p. 1189.

[30] McDougall, *supra* note 8, p. 133.

> take into account United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974 and all relevant UN GA resolutions with respect to Ukraine, including those recited in the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine (Agreement).
>
> (4) For the purpose of this Statute, in the context of the aggression against Ukraine, an act of aggression which is determined by its character, gravity and scale to constitute a manifest violation of the Charter of the United Nations, shall also be deemed to constitute a war of aggression.

Unlike the previous parts of the definition, Art. 2(3) of the Statute departs slightly from the Rome Statute, doing so in several respects. Firstly, it introduces qualifying criteria for determining whether an act of aggression, by its character, gravity or scale, constitutes a manifest violation of the UN Charter. By contrast, the corresponding provision in Art. 8*bis*(2) of the Rome Statute enumerates specific categories of a state's conduct that constitute acts of aggression. It follows from the wording that the qualifying criteria are not intended for the Special Tribunal's determination of whether an act of aggression has occurred in the first place, but rather to assess whether an act of aggression already established by the Special Tribunal also meets the threshold of a manifest violation of the UN Charter. Nevertheless, it is argued here that this difference is unlikely to have much effect in practice on the assessment of what constitutes an act of aggression or manifest violation of the UN Charter.[31]

Secondly, for the purpose of assessing which acts of aggression constitute a manifest violation of the UN Charter, the Statute not only refers to GA Resolution 3314 (XXIX) of 14 December 1974, but also extends this reference to encompass all relevant United Nations GA resolutions with respect to Ukraine, including those recited in the preamble of the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal. A narrower approach was taken in the Rome Statute, since it determines which acts qualify as acts of aggression by direct reference to United Nations GA Resolution 3314 (XXIX) of 14 December 1974 only. This distinction is a logical consequence of the different scopes of the two instruments: whereas the Rome Statute is directed towards indeterminate possible future acts of aggression, the Statute of the Special Tribunal exclusively addresses the crime of aggression committed against Ukraine. Accordingly, the Special Tribunal's Statute provides that, when assessing whether an act

[31] K.J. Heller, *The New STCoA: The Good, the Bad, the Curious, and the Terrible*, Opinio Juris, 11 July 2025, available at: https://tinyurl.com/2hrdpcbb (accessed 31 March 2026).

of aggression amounts to a manifest violation of the UN Charter, the relevant GA resolutions pertaining specifically to the situation in Ukraine shall be relied upon.[32]

Further, Art. 2(4) of the Statute operates with the concept of a "war of aggression" as opposed to the term "act of aggression" used in the Rome Statute. It has been argued[33] that this terminological choice may represent a partial return to the Nuremberg standard, where the definition of crimes against peace centred on the planning, initiation or waging of a war of aggression.[34] Heller, however, disagrees with the reference that the operative part of the Statute's definition of the crime of aggression is identical to that of Art. 8*bis* of the Rome Statute and argues that if anything the wording expands the concept of a war of aggression.[35] As indicated above, by employing the concept of an "act of aggression" as the constitutive element of the crime of aggression, the Rome Statute marked a departure from earlier instruments. In the Statutes of both the Nuremberg and Tokyo Tribunals, crimes against peace were defined in terms of the planning, initiation etc. of "a war of aggression".[36] Moreover, Art. 5 of UN GA Resolution 3314 on the Definition of Aggression provides that a "war of aggression" constitutes a crime against international peace. In this context it has been argued that the Rome Statute's reliance on acts of aggression represents a departure from customary international law and that it its definition is broader because not all acts of aggression amount to wars of aggression.[37] Hoffmeister presents the view that employing the term "war of aggression" may facilitate broader support for the Special Tribunal among those states that might otherwise be inclined to endorse it, yet have been critical of the Rome Statute's definition on the grounds that it does not, in their view, fully reflect customary international law in this context.[38] While this might be true on a political level, it is argued here that the wording of Art. 2(4) of the Statute does not represent a return to the Nuremberg standards, but establishes a legal fiction whereby in the context of the aggression against Ukraine acts of aggression that simultaneously meet the threshold of a manifest violation of the UN Charter are to be regarded as constituting a war of aggression.[39]

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[32] Hoffmeistr, *supra* note 23.

[33] G. Pecorella, *The Crime of Aggression: A Preliminary Look at Ukraine's Special Tribunal*, International Law Blog, 1 July 2025, available at: https://tinyurl.com/kzcsx32r (accessed 31 March 2026).

[34] Art. 6(a) of the Charter of the International Military Tribunal.

[35] Heller, *supra* note 32.

[36] Art. 6(a) of the Charter of the International Military Tribunal; Art. 5(a) of the Statue of International Military Tribunal for the Far East.

[37] McDougall, *supra* note 8, pp. 192, 199.

[38] Hoffmeistr, *supra* note 23.

[39] The same view seems to be expressed by G. Nuridzhanian, *The newly established Special Tribunal for the Crime of Aggression against Ukraine: Jurisdiction, immunities and due process*, SSRN, 24 July 2025,

Regarding temporal jurisdiction the Statute does not contain any explicit rule. The fact that the Statute does not provide any initial date for the temporal jurisdiction means that the Special Tribunal will not be limited to assessing only the full-scale invasion that was initiated in February 2022. Instead, it will be able to also examine prior acts. This is particularly significant with regard to the annexation of Crimea, which took place in the winter and spring of 2014.[40] In this regard, it is noteworthy that the Preamble of the Agreement Establishing the Special Tribunal lists four GA resolutions concerning the situation in Crimea before the full-scale invasion of 2022.[41]

The Statute also does not specify any end date for the temporal jurisdiction. While it can be inferred from a present perspective that the Special Tribunal primarily targets acts related to Crimea and the ongoing Russian invasion of Ukraine, the absence of such a definitive endpoint opens the door to considering potential future acts of aggression against Ukraine. The experience with the ad hoc Tribunal for the former Yugoslavia, particularly cases related to Kosovo, has already demonstrated that a lack of a fixed end date for the temporal jurisdiction can lead to investigations of incidents that are not anticipated when a Tribunal is established.

Art. 1 of the Statute provides that the territorial jurisdiction of the Special Tribunal is based on Ukraine's territorial jurisdiction. According to the principles of territorial jurisdiction, any state may prescribe and enforce rules over the conduct occurring within its territory.[42] The territorial jurisdiction of states represents the current state of customary international law and is recognised in all legal systems; it is therefore agreed here that it represents the strongest basis for jurisdiction.[43] In the case of the crime of aggression against Ukraine, it is highly probable that a significant proportion of the individuals who may bear responsibility for this crime did not cross Ukraine's borders and were not on its territory at the time. Therefore, it will be necessary to examine the conditions under which the criterion that the act occurred within Ukraine's territory can be satisfied in the context of such cross-border criminal conduct.

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available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5359650 (accessed 31 March 2026).

[40] Heller, *supra* note 31; Nuridzhanian, *supra* note 39, p. 10.

[41] Preamble of the Agreement, recitals 1-4. listing the following UN GA resolutions: i.e. Resolution A/RES/68/262, 27 March 2014; A/RES/71/205, 19 December 2016; A/RES/73/194, 17 December 2018; and A/RES/76/70, 9 December 2021.

[42] J. Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press, Oxford: 2019, p. 440.

[43] A. Prayer, *The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross- Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries*, 23(2) International Criminal Law Review 175 (2023), pp. 176, 177.

Since the territorial jurisdiction of the Tribunal is based on Ukraine's territorial jurisdiction, it is appropriate to refer to Art. 6(2) of the Criminal Code of Ukraine, which provides that "[a]n offence shall be deemed committed in the territory of Ukraine if it has been initiated, continued, completed or discontinued in the territory of Ukraine."[44] It therefore follows that it is sufficient to show that one legal element of the crime of aggression occurred within the territory of Ukraine; the fact that the alleged perpetrator was located outside of the territory is irrelevant. Such construction of Ukrainian territorial jurisdiction is uncontroversial and can be found in a number of national laws or international instruments. For example, the Pre-Trial Chamber I, in its decision on jurisdiction in the situation in Bangladesh/Myanmar, referred to the Criminal Codes of Afghanistan, Australia, Czechia and Timor-Leste and to the European Convention on Extradition, the Criminal Law Convention on Corruption and the African Union Convention on Preventing and Combating Corruption.[45] All the referred legislation or conventions construed territorial jurisdiction in a way that the conduct occurs on the territory "wholly or partly" or "wholly or in part", etc. As a consequence, a mere part of the criminal conduct occurring in the respective territory triggers the respective territorial jurisdiction.

3. PERSONAL IMMUNITIES

The issue of immunities, and particularly the question of whether a treaty-based tribunal may set aside the personal immunities of leaders of non-member states, has been at the centre of numerous scholarly debates in recent years.[46] The customary-law status of personal immunities is particularly significant in the context of the

[44] Criminal Code of Ukraine, available at: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text (accessed 31 March 2026).

[45] ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,* ICC-RoC46(3)-01/18, PTC I, 6 September 2018, fn 109–110.

[46] M. Lipovský, *What is "a certain international criminal court" and does the choice of a fully international or internationalized (hybrid) court/chambers matter for the crime of aggression committed against Ukraine?*, 43 Polish Yearbook of International Law 213 (2023); G. Daugirde, *Crime of Aggression Against Ukraine: Legality and Legitimacy of Domestic Prosecutions in Third States*, 43 Polish Yearbook of International Law, 299 (2023); M. Biszczanik, *The Inadmissibility of Jurisdictional Immunity of Persons Responsible for the Commission of International Crimes in Terms of Domestic Universal Jurisdiction Proceedings*, 43 Polish Yearbook of International Law 311 (2023); Kułaga, *supra* note 11; C. McDougall, *Why Ukraine Needs an International – Not Internationalised – Tribunal to Prosecute the Crimes of Aggression Committed Against It*, 12(2) Polish Review of International and European Law 65 (2024); Supreme Court of Ukraine, Case No. 415/2182/20, Decision, 28 February 2024; J. Trahan, *The Role of the UN Security Council & General Assembly In Responding to the Invasion of Ukraine*, 12(2) Polish Review of International and European Law 23 (2024); G. Bogush, *Committed by Men: Individual Criminal Responsibility for Aggression Against Ukraine*, 12(2) Polish Review of International and European Law 93 (2024).

crime of aggression. As discussed above in the context of subject-matter jurisdiction, the crime of aggression is classified as a so-called leadership crime, which may only be committed by a "person in a position effectively to exercise control over or to direct the political or military action of a State."[47] It follows that the members of the so-called troika (the incumbent head of state, head of government or minister of foreign affairs) could fall into both categories, i.e. being leaders under the definition of the crime of aggression and simultaneously subjects of personal immunity from the criminal proceedings due to their position.

Art. 23 of the Statute governs the regime of immunities in relation to proceedings before the Special Tribunal. The provision draws a clear distinction between functional and personal immunities. In respect of functional immunities, Art. 23(4) expressly stipulates that they are inapplicable before the Special Tribunal. In contrast, with regard to personal immunities, Art. 23(6) of the Statute adopts a different approach, stating that

> [w]here the indictment concerns a head of State, head of government or minister of foreign affairs, the Pre-Trial Judge shall not confirm the indictment and shall order the proceedings be suspended until that person no longer holds that office or an appropriate waiver has been presented to the Special Tribunal. During the suspension, the Pre-Trial Judge shall not otherwise act upon the indictment.

It is evident that under Art. 23 of the Statute, personal immunities operate to shield members of the troika from criminal proceedings before the Special Tribunal. According to Arts. 23 and 25 of the Statute, the Prosecutor is permitted to prepare and submit an indictment against a sitting head of state, foreign minister or head of government; however, the Pre-Trial Judge is subsequently barred from confirming such an indictment. The inability of the Pre-Trial Judge to confirm an indictment against members of the troika has a direct procedural consequence: no arrest warrant can be issued for these individuals, since under Art. 25(3) of the Statute the Pre-Trial Judge is only empowered to issue an arrest warrant once an indictment has been confirmed. Beyond these restrictions, Art. 24(4) further limits prosecutorial powers by prohibiting the use of any investigative measures involving coercion with regard to the members of troika. This means that, even with respect to individuals protected by personal immunity, the Prosecutor is authorised to conduct investigations, to include collecting evidence, summoning persons under investigation and witnesses and questioning

[47] Art. 2(1) of the Special Tribunal Statute.

them. However, these actions must not be carried out in a manner that "amounts to measures of constraint".

The suspension of proceedings is not necessarily permanent. Pursuant to Art. 23(5) of the Statute, it endures only for as long as the member of the troika holds the relevant office or until the Special Tribunal receives an appropriate waiver of immunity. Both conditions reflect the principles of customary international law. Firstly, it follows from customary international law that personal immunities shield the individuals concerned solely during their tenure in office.[48] Once the official leaves their position, the procedural bar is lifted, allowing the Special Tribunal to continue the proceedings. The possibility for a state – in this case, the Russian Federation – to issue a waiver of immunity against the interests of the protected individual reflects the underlying rationale of personal immunities. These immunities are not designed to serve as a personal privilege, but rather as a safeguard for the state itself, ensuring the uninterrupted performance of its functions and the maintenance of diplomatic relations through its highest officials.[49] Beyond the possibility of the Russian Federation issuing a waiver, it is theoretically conceivable – under international law – that an "appropriate waiver" could also be effected by the UN Security Council acting under Chapter VII of the UN Charter. Neither of these options for obtaining a waiver appears realistic under the current political circumstances. Russia's domestic position and its status as a permanent member of the Security Council – which comes with veto power – render both scenarios highly improbable at present.

The fact that the Special Tribunal was established with the mandate to prosecute individuals "who bear the greatest responsibility for the crime of aggression", while current members of the troika enjoy personal immunities, has already been strongly criticised by some authors. In this context, McInnes argues that Art. 23(5) represents a troubling departure from the approach adopted by previous international tribunals. According to her, it constitutes a legal innovation that diverges from the prevailing state of international law, reflecting a compromise driven by political realities, since the provision was introduced to secure sufficient political support among states for establishing the Special Tribunal, even at the cost of limiting its jurisdiction over those who bear the greatest responsibility.[50] This view is grounded in the assumption that personal immunities shield members of the troika

[48] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 14 February 2002, ICJ Rep 3, para. 61.

[49] *Ibidem*, para. 54.

[50] K. McInnes, *The Strongman's Clause Article 23(5), the Rule-Based International Order, and Ukraine Tribunal's Troubling Precedent*, Opinio Juris, 1 September 2025, available at: https://tinyurl.com/5fsebetk (accessed 31 March 2026).

only from the exercise of domestic jurisdiction, while such immunities do not apply before international courts. The rationale is that these immunities derive from the principle of sovereign equality of states – a principle that governs inter-state relations but does not extend to international judicial bodies.[51]

A different position is adopted in this article, where it is asserted that Art. 23(5) of the Statute reflects the current state of international law, under which personal immunities apply even before a number of international courts and tribunals. This is particularly the case where such courts have been established by international treaty and exercise jurisdiction over members of the troika from states that are not parties to the founding treaty.[52]

According to the International Court of Justice (ICJ) in *Arrest Warrant of 11 April 2000*, personal immunities may be set aside by "certain" international criminal courts, but the ICJ left the key questions unanswered. It did not clarify what qualifies as such a "certain" international court, why these tribunals can disregard immunities while states cannot and, most importantly, to what extent this applies to officials of non-party states. This ambiguity makes it difficult to unequivocally determine whether treaty-based courts can override immunities of leaders from states that are not parties to those treaties. It is true that the ICJ listed the ICC, a treaty-based court, as an example of "certain" international courts which can set aside personal immunity. However, the ICJ never said that the ICC can do so with regard to nationals of non-party states. On this point, the ICJ offered no clarification. Given the fragmentary nature of the statement – further compounded by its *obiter dictum* character – it is highly problematic to draw a definitive, far-reaching conclusion that a treaty-based tribunal may disregard the immunities of officials from non-member states.[53] In the Jordan Appeal, the ICC Appeals Chamber asserted in strong terms that Art. 27(2) of the Rome Statute represents a "clear rule of customary international law". A closer examination of its reasoning, however, together with subsequent parts of the judgment and the Joint Concurring Opinion, shows that the Chamber ultimately did not base its conclusions on the purported status of customary law. Instead, it leaned primarily on Security Council Resolution 1593.[54] In addition, I have already argued elsewhere in detail that adopting the so-called surrogacy argument would enable

[51] *Ibidem.*

[52] K.J. Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A critical analysis*, 26(1) Journal of Genocide Research 1 (2024).

[53] S. Nouwen, *Return to Sender: Let the International Court of Justice Justify or Qualify International-Criminal-Court Exceptionalism Regarding Personal Immunities*, 78(3) Cambridge Law Journal 596 (2019).

[54] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Judgment in the Jordan Referral Re Al-Bashir Appeal), ICC-02/05-01/09-397-Corr, 6 May 2019 (Jordan Appeal judgment), paras. 144–146.

the states to circumnavigate their obligations under international law.[55] While international law can evolve and state practice may eventually give rise to new customary norms, it is not for the courts to create such customs on behalf of states. From the reason stated above, the approach taken by the Art. 23(5) of the Statute is welcomed here as a reflection of the current state of international law.

4. TRIALS IN ABSENTIA

Among the Statute's most distinctive provisions is the rule, set forth in Art. 28, which vests the Special Tribunal with the authority to conduct judicial proceedings *in absentia*. This constitutes a significant departure from the framework established for the ICC under the Rome Statute.[56] Nevertheless, this arrangement reflects the domestic legal framework of Ukraine, whose Criminal Procedure Code permits criminal proceedings to be conducted *in absentia.* Perhaps the most well-known such trial by a Ukrainian court was that against former President of Ukraine Viktor Yanukovych, who fled to Russia after the Maidan protests. Eventually, Yanukovych was found guilty of complicity in the crime of aggression.[57] Ukraine began to employ the mechanism of *in absentia* criminal proceedings on a large scale following the 2022 invasion. This expanding domestic practice has given rise to a number of debates concerning whether the guarantees of a fair trial are fully upheld within the framework of such proceedings.[58] The Special Tribunal's authority to conduct trials *in absentia* was supported by Ukraine, whose representatives have been expecting that its decisions would be recognised and enforced not only by Ukraine, but by the broader international community.[59]

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[55] K. Urbanová, *Relevance of Personal Immunities before Treaty-Based International Criminal Courts*, in: M. Lipovský, P. Šturma (eds.), *Special Judicial Mechanism for the Crime of Aggression Committed against Ukraine*, Brill, Nijhoff: 2025, chapter 6. For opposing opinion *see* Lipovský, *supra* note 46, pp. 213–238.

[56] Art. 63(1) of the Romes Statute provides: "[t]he accused shall be present during the trial."

[57] Kyiv Court of Appeals, Decision of 2 October 2020, Case No. 756/4855/17 (Proceeding No. 11-kp/824/314/2020); I. Marchuk, *Domestic Accountability Efforts in Response to the Russia-Ukraine War. An Appraisal of the First War Crimes Trials in Ukraine*, 20 Journal of International Criminal Justice 787 (2022), p. 791.

[58] Marchuk, *supra* note 57, p. 791. N. Naidiuk, *In absentia: Is Ukraine Upholding the Right to Fair Trial?*, IWPR, 12 December 2025, available at: https://iwpr.net/global-voices/absentia-ukraine-upholding-right-fair-trial; M. Micholson, *Ukraine's Precarious Pursuit of Justice Through* In absentia *Trials*, Lawfare, 18 June 2025, available at: https://tinyurl.com/yn2jehwp (both accessed 31 March 2026).

[59] Prosecutor General's Office, *Statement of Deputy Attorney General Andriy Leshchenko*, 19 September 2025, available at: https://tinyurl.com/bdh8538f. *See also Special Tribunal for the Crime of Aggression against Ukraine: Frequently Asked Questions*, updated 15 May 2026, available at: https://tinyurl.com/bddrd8u (both accessed 15 May 2026).

The possibility of conducting *in absentia* criminal proceedings before international criminal courts and tribunals was expressly incorporated into the Statute of the International Military Tribunal (IMT). Art. 12 of the Statute of the IMT expressly permitted trials *in absentia:*

> [t]he Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.[60]

This provision indicates that the IMT possessed a broad authority to conduct *in absentia* proceedings, not only in situations where the accused could not be located, but also whenever the Tribunal, for any reason, deemed it necessary to do so – thus granting the IMT a notably wide margin of discretion in this regard.

In the proceedings against major Nazi war criminals, the trial of Martin Bormann was conducted *in absentia*, as he had been declared a fugitive and his whereabouts remained unknown throughout the process. In his absence the Tribunal appointed Bormann a counsel, who argued that Bormann was dead; nevertheless, the IMT proceeded to hear the case in his absence and found Bormann guilty of war crimes and crimes against humanity (though not guilty for crimes against peace), and sentenced him to death. The IMT stated that if Bormann was ultimately found alive, the Control Council for Germany would be entitled to take any mitigating circumstances into account and, if appropriate, to reduce his sentence.[61]

Unlike the Statute of the IMT, the Statutes of neither the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) authorised the tribunals to conduct trials *in absentia*. To the contrary, both Statutes expressly granted the right of the accused "to be tried in his presence, and to defend himself in person."[62] These provisions were generally

[60] Charter of the International Military Tribunal, annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted and entered into force 8 August 1945), 82 UNTS 279.

[61] The International Military Tribunal, *USA, France, UK, and USSR v. Hermann Wilhelm Goring et al.*, Judgment, 1 October 1946, available at: https://www.legal-tools.org/doc/f41e8b/ (accessed 31 March 2026), pp. 171, 340. More generally *see* Q. Wright, *The Law of the Nuremberg Trial*, 41 American Journal of International Law 38 (1947).

[62] Art. 21(4)(d) of the Statute of the Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, established by UNSC Res 827 (1993), 25 May 1993, as amended; Art. 20(4)(d) of the Statute of the International Criminal Tribunal for Rwanda, established by UNSC Res 995 (1994), 8 November 1994, as amended.

understood as prohibiting trials *in absentia* before the ICTY and ICTR.[63] However, given the persistent difficulties in securing the physical presence of suspects – most notably before the ICTY – both ad hoc tribunals introduced Rule 61 into their respective Rules of Procedure and Evidence (RPE). This rule introduced an exceptional procedural mechanism at the pretrial stage, applicable in situations where an arrest warrant could not be executed. Under the circumstances of Rule 61, the Judge was authorised to order that the indictment be submitted by the Prosecutor to the Trial Chamber. The Prosecutor was allowed to present the evidence before the Trial Chamber, and the Trial Chamber was authorised to confirm the indictment and issue an international arrest warrant.[64] This rule was invoked in practice only by the ICTY, and even then it was predominantly during the early years of its operation, when international cooperation with the Tribunal was still insufficient. The procedure attracted the greatest attention in the case against Karadžić.[65] However, Rule 61 did not result in trials *in absentia* before the ICTY and the ICTR at the trial stage.

As noted above, the Rome Statute does not permit the trial phase to be conducted in the absence of the accused.[66] In the pre-trial stage, the hearing on confirmation of charges may be conducted in the absence of the person being charged,[67] and according to the amended RPE, the Trial Chamber may allow the accused to be present through the use of video technology during the trial and upon their written request.[68] However, none of this amounts to trials *in absentia*.

An exception that significantly differed from the legal framework of contemporary international criminal institutions was the Statute of the Special Tribunal for Lebanon (STL), which expressly allowed for trials *in absentia*. According to Art. 22 of the STL Statute, the STL was authorised to conduct trials *in absentia* if the accused: (i) waived their right to be present, (ii) was not handed over to the Tribunal by the authorities of the concerned state and (iii) absconded or otherwise could be found, and all reasonable steps were taken to secure their appearance.[69] Eventually,

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[63] A. Cassese, *International Criminal Law: Cases and Commentary*, Oxford University Press, Oxford: 2011, p. 392.

[64] M. Gureghian Hall, *Confirmation of Charges* in absentia *at the International Criminal Court and the Right to be Present*, Journal of International Criminal Justice 1 (2026, online first), pp. 3–5.

[65] *Ibidem*.

[66] Art. 63(1) of the Romes Statute. *See also* Pre Trial Chamber II (ICC), *Prosecutor v. Joseph Kony*, Decision on the Prosecution's Request to Hold a Confirmation of Charges Hearing in the Kony case in the Suspect's Absence, ICC-02/04-01/05-466, 23 November 2023, paras. 59–70.

[67] Art. 61(2) of the Rome Statute.

[68] Rule 134bis, ICC, RPE.

[69] *See also* P. Gaeta, *To Be (Present) or Not To Be (Present): Trials in absentia before the Special Tribunal for Lebanon*, 5(5) Journal of International Criminal Justice 1165 (2007); M. Gardner, *Reconsidering*

the main terrorism cases concerning originally five, and later four, alleged perpetrators were held in absentia.[70]

Although trials *in absentia* have been an exception in the practice of international criminal tribunals, such trials are not prohibited under international law.[71] Ukraine is a party to the European Convention on Human Rights. The European Court of Human Rights (ECtHR) held that the accused can waive their right to be present at a trial. However, it must be shown that the waiver is unequivocal,[72] the accused must be aware of the nature of the accusation and the consequences of their absence[73] and the accused must be given the right to have a defence counsel[74] and to a re-trial.[75]

The wording of Art. 28 of the Statute reflects the aforementioned requirements of ECtHR case law, because it authorises the Special Tribunal to conduct proceedings in the accused's absence if the accused unequivocally waives their right to be present and if all reasonable steps have been taken to secure their presence and the interests of justice so require. It also follows from Art. 28(2) of the Statute that the accused must be duly notified of the charges and proceedings, provided with legal representation and given the right to a re-trial unless they accept the judgment. In principle, the Statute therefore complies with the case law of the ECtHR; whether the Special Tribunal truly satisfies these standards shall be seen in its actual practice. Although trials *in absentia* may assist the Special Tribunal's work at a time when it is not factually possible to apprehend suspects, I would argue for a cautious approach to their use. Should the Special Tribunal come to rely predominantly on trials *in absentia*, while any convictions are never followed by the accused being arrested, confidence in criminal accountability and the Special Tribunal's overall effectiveness could be significantly eroded.

Trials in absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence, 43 George Washington International Law Review 91 (2011).

[70] STL, Appeal Chamber, *Prosecutor v Ayyash, Badreddine, Oneissi and Sabra*, Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial in absentia Decision, STL-11-01/PT/AC/AR126.1, 1 November 2012; *Fremuth ML. Prosecutor v. Ayyash et al.* (Special Trib. Leb.), International Legal Materials 2021;60(3), pp. 357–447.

[71] M. Lipovský, *Proceedings in absentia in International Criminal Law and the Mechanism for Accountability for the Crime of Aggression Committed against Ukraine*, in: M. Lipovský, P. Šturma (eds.), *Special Judicial Mechanism for the Crime of Aggression Committed against Ukraine*, Brill, Nijhoff: 2025, p. 204.

[72] ECtHR, *Sejdovic v Italy* [GC] (App. No. 56581/00), Judgment, 1 March 2006, para. 86.

[73] *Ibidem,* para. 99.

[74] *Ibidem,* para. 91.

[75] *Ibidem,* paras. 82-84, ECtHR, *Demebukov v Bulgaria* (App. No. 68020/01), Judgment, 28 February 2008, para. 45; *Sanader v Croatia* (App. No. 66408/12), Judgment, 12 February 2005, para. 78.

CONCLUSION

Although the ICC can exercise jurisdiction over war crimes and crimes against humanity committed on Ukrainian territory, the jurisdictional regime under the Rome Statute prevents the ICC from prosecuting the crime of aggression in the context of Russia's invasion of Ukraine. The Special Tribunal thus emerges as a mechanism intended to fill a critical accountability gap.

The article examined the Special Tribunal's jurisdiction. Its subjectmatter jurisdiction is narrowly defined, ensuring complementarity with the ICC's ongoing proceedings concerning other international crimes. Its territorial and temporal jurisdiction are rather extensive, enabling the Special Tribunal to examine not only conduct related to the fullscale invasion, but also earlier conduct, such as the 2014 annexation of Crimea.

A part of the analysis addressed the contentious issue of personal immunities. The Special Tribunal adopts a model which respects the personal immunities of sitting members of the troika. While this approach has been criticised, the article suggests that it reflects the way immunities operate before treatybased international courts when representatives of nonparty states are involved. The article also explored the Special Tribunal's ability to conduct trials *in absentia*, a feature that distinguishes it from most contemporary international criminal courts. While the mechanism raises concerns about fairtrial guarantees, it was shown that, at least in theory, the Statute reflects the jurisprudence of the ECtHR. Whether the Special Tribunal will be able to meet these standards in practice is yet to be determined.