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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?

Abstract: *When the International Court of Justice issued its Arrest Warrant Judgment in 2002, it indicated that personal immunities do not prevent proceedings in front of "certain international criminal courts" and provided three demonstrative examples of such courts.*

After the full-scale invasion of Ukraine commenced in February 2022, debates ensued regarding the elements necessary to qualify a court within the meaning of the Arrest Warrant Judgment. They particularly concern two types of tribunals ("fully international" and "hybrid / internationalized"). This article suggests that only fully international courts qualify as "certain international criminal courts", while hybrid tribunals are far too attached to the sovereignty of State(s) to meet its criteria. The determination of a court as hybrid or international is rather fluid however, and the qualification as "a certain international criminal court" depends on various elements (the establishing mechanism; applicable law; and reflection of the will of the international community) in each individual case.

Keywords: certain international criminal court, crime of aggression, fully international, hybrid; immunities

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INTRODUCTION

The debates over establishing a tribunal/chambers to investigate and prosecute the crime of aggression committed against Ukraine by those in leadership positions of the aggressive States (Russian Federation and Belarus) most often consider two options – a fully international tribunal; and hybrid/internationalized chambers.[1] Recently, as a consequence of disagreement between the proponents of these two forms, a third option has appeared, yet it is basically also of a hybrid/internationalized category. A great deal has already been written within (but not limited to) the international blogosphere in favour of both of those forms.[2] Even powerful States have started supporting the establishment of the tribunal.[3] No matter which category of mechanism will be chosen (assuming one eventually will be), the legal consequences of the choice will not only be ground-breaking (in a follow-up of adoption of the definition of the crime of aggression generally), but they will also raise many previously unsettled issues that need to be addressed.

While many international and hybrid/internationalized tribunals/courts and chambers have been created before, ever since the Nuremberg and Tokyo military tribunals, and with the exception of the International Criminal Court (ICC) none of them has had jurisdiction over the crime of aggression. Currently, while the ICC is endowed with jurisdiction over the crime of aggression, it is prevented from exercising it over the situation in Ukraine due to the *ratione personae* and *ratione loci* limits imposed by Art. 15*bis* (5) of the Rome Statute[4] and the lack of political will to trigger jurisdiction by Art. 15*ter*. Thus, there is a need to establish a new court, and as a consequence there are many debates over its nature and competences.

For the purposes of this contribution fully domestic proceedings in front of regular courts are omitted, as they present a whole different set of legal issues. In relation to the hybrid category, it must be stated that the terminology has shifted as the term "internationalized tribunal/chambers" is now preferred as opposed to

[1] *Ministerial side-event by Liechtenstein and Germany on the occasion of the 25th anniversary of the Rome Statute – The ICC and the Crime of Aggression: In Defense of the UN Charter*, UN Web TV, 17 July 2023, available at: https://media.un.org/en/asset/k1m/k1mdo8poz5 (accessed 30 August 2024).

[2] *E.g.* blog series dedicated to the topic of The Crime of Aggression (Just Security), available at: https://www.justsecurity.org/82513/just-securitys-russia-ukraine-war-archive/ (accessed 30 August 2024); or posts reacting to the topic in the section International Criminal Law (Opinio Juris), available at: http://opiniojuris.org/category/topics/international-criminal-law/ (accessed 30 August 2024).

[3] USA: J. Hansler, *US announces it supports creation of special tribunal to prosecute Russia for 'crime of aggression' in Ukraine*, CNN Politics, 28 March 2023, available at: https://tinyurl.com/49kp256n (accessed 30 August 2024); *similarly* the United Kingdom: P. Wintour, *UK offers qualified backing for tribunal to prosecute Russia's leaders*, The Guardian, 20 January 2023, available at: https://tinyurl.com/y5b58fn7 (accessed 30 August 2024).

[4] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

a hybrid one.[5] In order to simplify this text, while purely hybrid tribunals might rather be chambers within a domestic legal system (i.e. not an independent mechanism), this article uses the term tribunal/court as encompassing both a formally independent tribunal as well as chambers within a domestic legal system.

The debates over the establishment of a tribunal for the crime of aggression committed against Ukraine are unfortunately burdened as much by political preferences as by legal obstacles. While the political preferences should not matter, the crime of aggression is perceived by some as so political that they unfortunately matter. The legal issues connected to such a tribunal's establishment and competences are no less complicated though. One of the topics that is not fully settled, is the understanding (definition) of "a certain international criminal court" within the meaning of the International Court of Justice's (ICJ's) *Arrest Warrant* Judgment,[6] or to be precise within the meaning of international law that the ICJ interpreted and applied in the *Arrest Warrant* Judgment. This judgment stated that as opposed to domestic courts, before certain international criminal courts/tribunals (personal)[7] immunities do not apply and thus do not prevent the exercise of jurisdiction.[8] Because the focus of de-

[5] The term "mixed" tribunals has also been used to describe some examples within this heterogenous category. While there are various opinions regarding what a truly hybrid court is, this article treats the hybrid, internationalized, and mixed forms together as denoting various categories outside the definition of a fully international tribunal.

[6] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Rep 2002. This judgment is particularly important in its para. 61: "[A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the [ICTY and ICTR] established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'" (emphasis added). This famous paragraph is unfortunately everything that the ICJ (in majority decision reasoning) stated regarding the "certain international criminal courts". Virtually the same term appears e.g. in Art. VI of the Genocide Convention (Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277). It is not however defined there either.

[7] The ICJ did not mention the difference between personal and functional immunities, but it clearly referred to personal ones because the case was about immunities of an incumbent (at the time of issuance of the arrest warrant) minister of foreign affairs (paras. 51 and 55 of the *Arrest Warrant* Judgment).

[8] As a preliminary issue, it must be stated that the author of this article agrees with and develops further upon the opinion that a certain international criminal court is entitled to exercise its jurisdiction and disregard personal immunities regardless of the nature of its relationship to the state of the official to whose benefit the immunities are alleged to exist. This approach stems from the argument that the *ius puniendi* of the international community may be exercised by such court despite lack of agreement from the state concerned (for example when it is a non-state party to the court's statute). While there are of course opposing views stemming from the *nemo plus iuris ad alium transferre potest quam ipso habet* principle (that a treaty establishing a court containing a provision on removal of immunities may not oblige a non-state party when the parties could not remove immunities themselves), the debate over which of those two approaches is correct falls beyond the limits of this contribution. Consequently, the following text develops on the

bates about the new tribunal for the crime of aggression committed against Ukraine logically turns mostly to the highest-ranking state officials, personal immunities (from proceedings as well as particularly from the issuance of arrest warrants[9] that will likely occur in the absence of an accused) will be a significant issue. At the same time, the ICJ has never explained/defined "a certain international criminal court". Consequently, it is unclear how the debated categories of "fully international and/or internationalized tribunals" overlap with "certain international criminal courts" within the meaning of the *Arrest Warrant* Judgment.

The aim of this article is thus to examine and determine the features of the notion of "a certain international criminal court", as well as how that concept overlaps with a "fully international and/or hybrid tribunal." Additionally, it analyses the legal consequences of choosing any of the options with respect to the applicability of personal immunities to the exercise of their jurisdiction, particularly in relation to the situation in Ukraine.[10] Since the term 'hybrid' represents a myriad of possible choices, the goal is also to assess whether any of them are suitable to fit within the term "certain international criminal court/tribunal", although the hypothesis of the author is that only fully international courts/tribunals overlap with "a certain international criminal court". The following text is divided into sections that firstly explain the need for a new mechanism; what are fully international and hybrid tribunals; and what are the elements of "a certain international criminal court." In this chapter, the elements are compared and the hybrid form is in fact found to be incompatible with elements of "a certain international criminal court". As a conclusion, the article briefly discusses the consequences of the various possible choices in the Ukrainian situation.

ius puniendi approach, and only in a limited fashion considers its alternatives where they are relevant. For a detailed analysis on the topic of whether the *ius puniendi* or "delegation" approach is correct, *see* C. Kreß, *Article 98*, in: K. Ambos (ed.), *Rome Statute of the ICC*, Beck/Hart/Nomos, München, Portland, Baden-Baden: 2022, paras. 126–130.

[9] The connection is explained in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 58.

[10] While the evolution of international law towards the inapplicability of immunities in front of international criminal tribunals falls outside the scope of this article, it is worth reading the analysis in e.g. paras. 76–174 of the Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09-397-Corr, Appeals Chamber, Judgment, 6 May 2019 (ICC Jordan/al Bashir Referral Appeals Judgment). For analysis of prior 2013 cases, *see* K. Uhlířová, *Head of State Immunity in International Law. The Charles Taylor Case before the Special Court for Sierra Leone*, Masarykova Univerzita, Brno: 2013, pp. 95–126, available at: https://tinyurl.com/4vv34s8c (accessed 30 August 2024).

1. DO WE REALLY NEED A NEW TRIBUNAL FOR THE CRIME OF AGGRESSION?

The question whether we really need a new tribunal has a twofold aspect. Firstly, it must be answered in general – is it necessary to create a special tribunal for the crime of aggression when the (alleged) perpetrators of crimes under international law committed within the territory of Ukraine may be prosecuted for the other three categories of core crimes, i.e. crimes against humanity, crime of genocide, and/or war crimes?[11] In other words, does it matter what, legally speaking, the alleged perpetrators are going to be prosecuted for? The ICC has in fact already issued an arrest warrant even against the highest-ranking official of Russia.[12] So it might be said that the reach of international justice already goes as high as it can get. On the other hand, fulfilling international justice will simply not be complete without prosecuting the crime of aggression as well. Without it, the losses of lives of combatants suffered during the conflict and the losses of civilian lives and civilian infrastructure that keep being inflicted as incidental damage during attacks (conducted in compliance with international humanitarian law) will not be punished because the current ICC's competence to exercise jurisdiction *ratione materiae* does not cover such acts.[13] And the same applies to the barbaric decision of resorting to the war itself. The civilized world must not let such decision go unpunished, otherwise it would be a strong signal to others who might think of doing the same.[14] Not to mention the secondary harm to the victims caused by the failure to provide justice. Consequently, it certainly matters what the perpetrators of crimes under international law are prosecuted and possibly even punished for, because the purpose of

[11] The ICC may exercise jurisdiction over these three crimes under international law and already investigates. For further developments, see Ukraine (ICC webpage), available at: https://www.icc-cpi.int/situations/ukraine (accessed 30 August 2024).

[12] *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,* ICC, 17 March 2023, available at: https://tinyurl.com/482mc3jt (accessed 30 August 2024).

[13] C. Kreß, S. Hobe, A. Nußberger, *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System,* Just Security, 23 January 2023, available at: https://tinyurl.com/mtd4fbtd (accessed 30 August 2024).

[14] This was well formulated by Jenifer Trahan: "if the international community does not seize present opportunities for prosecuting the crime of aggression, this could have profound consequences for the preservation of international peace and security and the international legal order. One may well ask regarding the crime of aggression: if it is not prosecuted now, when will it be? The crime is too important to be confined to being a relic on a shelf, incapable of use" (J. Trahan, *The Need for an International Tribunal on the Crime of Aggression regarding the Situation in Ukraine*, 46 Fordham International Law Journal 671 (2023), p. 689).

criminal law is not only to punish, but also to act as a preventive mechanism *pro futuro*. That is what Robert H. Jackson had in mind in 1946 when he stated that:

> the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.[15]

Secondly, the question must also be answered in legal terms. The ICC may not exercise its jurisdiction over the crime of aggression in the Ukrainian situation. The reason is the unfortunate decision taken by the delegates of the Kampala review conference to exclude crimes of aggression committed by those (being citizens) in power of non-state parties or committed within territories of non-state parties in Art. 15*bis*(5) of the Rome Statute. Neither Ukraine nor Russia (or Belarus to be complete) are State-Parties to the Rome Stature and this obstacle may not be circumvented either politically (i.e. by enlarging the competence to exercise jurisdiction by the UN Security Council (UNSC) under Art. 15*ter* of the Rome Statute), nor legally based on Art. 12(3). Use of Art. 15*ter* of the Rome Statute is prevented by the Russian veto power in the UNSC, and while Art. 12(3) was used by Ukraine to accept jurisdiction of the ICC over the other three core crimes, it may not function similarly for the crime of aggression. Hence the need to establish a new mechanism.

2. WHAT IS A (FULLY) INTERNATIONAL TRIBUNAL AND A HYBRID/INTERNATIONALIZED TRIBUNAL AND WHY ARE WE DISCUSSING THE DIFFERENCE?

The reason why we even differentiate between fully international tribunals and hybrid/internationalized tribunals stems from the evolution of international criminal law. At the beginning of its modern era, building upon the legacy of tribunals in Nuremberg and Tokyo, there were only fully international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)[16] or the International Criminal Tribunal for Rwanda (ICTR).[17] Over time however, new tribunals emerged (e.g. the Extraordinary Chambers in the Courts of Cambodia

[15] *Opening Statement before the International Military Tribunal in Nurembe*rg, Robert H. Jackson center, 21 November 1945, available at: https://tinyurl.com/fvjpxvsp (accessed 30 August 2024).

[16] *Homepage* (ICTY), available at: https://www.icty.org/ (accessed 30 August 2024).

[17] *See* International Residual Mechanism for Criminal Tribunals, available at: https://unictr.irmct.org/ (accessed 30 August 2024).

(ECCC),[18] the Special Court for Sierra Leone (SCSL),[19] the Special Tribunal for Lebanon, the Kosovo Specialist Chambers[20]). Some of these new forms of tribunals began to be called hybrid, mixed, or internationalized.

Based on their assessment, it can be concluded that fully international criminal tribunals are established by a source of international law (often an international treaty, but as in the case of the ICTY and ICTR it may also be a resolution of an intergovernmental organization) and that they exercise international jurisdiction.[21] Unfortunately the use of terminology has not always been precise. In its resolution 1757(2007) establishing the STL, the UNSC repeatedly used the phrase "tribunal of an international character", even though defining that tribunal as (fully) international is incorrect.

The list of elements/definition of a hybrid tribunal is however more complicated. Despite the differences, what they have in common is that they are usually composed of both domestic and international personnel and apply both domestic and international law.[22] A hybrid tribunal in its pure (and rare) form would exercise only domestic jurisdiction.[23] The second element is its establishment by an act of either domestic or international law, but this is not so clearly agreed upon. A court/tribunal exercising domestic jurisdiction (at least in part) can certainly be created by a source of international law (as was the case of the SCSL[24]). However, a mechanism established by a domestic act of law *and* exercising only domestic jurisdiction is simply a domestic body (court/tribunal). Domestic courts may nonetheless be "elevated" by a confirmation through an international body (as it was in case of the

[18] *Homepage* (ECCC), available at: https://www.eccc.gov.kh/en (accessed 30 August 2024).

[19] *Homepage* (Residual SCSL), available at: https://rscsl.org (accessed 30 August 2024).

[20] *Homepage* (Kosovo Specialist Chambers), available at: https://www.scp-ks.org/en (accessed 30 August 2024).

[21] *See* the Statutes of the ICTY (Resolution 827 (1993), 25 May 1993, S/RES/827(1993)), ICTR (Resolution 955 (1994), 8 November 1994, S/RES/955 (1994)), and ICC (the RS).

[22] J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford: 2012, p. 682.

[23] *See* Statutes of the SCSL (Annex to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 August 2002), 2178 UNTS 137) and ECCC (The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/0801/12 and NS/RKM/1004/006, 10 August 2001, available at: https://www.eccc.gov.kh/en/document/legal/law-on-eccc (accessed 30 August 2024). But the SCSL was not a pure hybrid tribunal; it rather partially overlapped with a fully international one, because it exercised both international and domestic substantive law. So do the ECCC, but there is a difference putting it on another edge of the debate – it was created by an act of domestic law. While the domestic way of establishing the ECCC disqualifies it from being "a certain international criminal court/tribunal" (analysis set out below), it does not necessarily disqualify it from the definition of a hybrid tribunal because the point of a hybrid tribunal is not how it was established, but rather lies in what it applies: "the establishment of a tribunal as such cannot be 'hybrid'; a hybrid tribunal is either established under international law or under domestic law." A. Reisinger Coracini, J. Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed against Ukraine. Part VI: On the Non-Applicability of Personal Immunities*, Just Security, 8 November 2022, available at: https://tinyurl.com/275dj58j (accessed 30 August 2024).

[24] It was established by the Agreement between the UN and the Government of Sierra Leone, *supra* note 23.

ECCC[25]). But because it may apply domestic law and be established by a domestic act, such a court is rather closer to the state than to any international feature. For the purposes of this contribution, the differentiation between a truly hybrid and other forms of not-fully international mechanisms, is not that important however, as will be seen below, because even hybrid courts do not fulfil the criteria of a "certain international criminal court", the less those even closer to domestic courts.

Thus, a hybrid/internationalized court is defined by a) the exercise of domestic jurisdiction (although not necessarily only such jurisdiction); and b) its establishing source of law being a source of international law (or even a domestic act confirmed by an international act). It should also be noted that the third currently discussed option for the tribunal for the crime of aggression committed against Ukraine (a form based on Ukraine delegating its jurisdiction to another State[26] that would probably gain some sort of international confirmation) seems no different from a hybrid tribunal based on Ukrainian domestic jurisdiction for the purposes of the non-applicability of personal immunities.

The differentiation between fully international and hybrid tribunals matters particularly (though not only) when such a tribunal is supposed to investigate and prosecute the crime of aggression. The crime of aggression is a "leadership crime". Only those in "a position effectively to exercise control over or to direct the political or military action of a state"[27] can be held responsible for it.[28] While the leadership span of the crime may overcome the list of State representatives endowed with personal immunities,[29] the focus of tribunals endowed with jurisdiction over the crime of aggression is logically going to be primarily directed against the highest ranking officials, including the "troika", i.e. in fact mostly those endowed with

[25] The Law on the Establishment of ECCC (*see supra* note 23) was later confirmed and its existence and jurisdiction recognized by the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (adopted 6 June 2003, entered into force 29 April 2005) 2329 UNTS 117.

[26] P.I. Labuda, *Making Counter-Hegemonic International Law: Should A Special Tribunal for Aggression be International or Hybrid?*, Just Security, 29 September 2023, available at: https://tinyurl.com/56uzpu53 (accessed 30 August 2024).

[27] Art. 8*bis*(1) of the RS.

[28] Indeed, there are definitions of offenses criminalizing participation in a prohibited use of force under some domestic codes that do not include the leadership element. However, as will be proven below, in order to qualify as a "certain international criminal court", the mechanism must apply offenses compliant with customary definitions of core crimes under international law. And, latest with the negotiations of the definition of the crime of aggression, the leadership element has very likely gained the customary nature (*see* A. Reisinger Coracini, P. Wrange, *The Specificity of the Crime of Aggression*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 310).

[29] There has been a disagreement whether personal immunities extend beyond the "troika", but there is an agreement that "this immunity (...) does not extend to officials on a level lower than members of government with the rank of minister (footnote omitted)." H. Kreicker, *Immunities*, in: C. Kreß, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 684.

personal immunities.[30] Thus, the most important (yet not the only) reason why the difference between a fully international and a hybrid tribunal must be discussed is to find out whether personal immunities apply to the exercise of jurisdiction by these mechanisms.

In the *Arrest Warrant* Judgment, the ICJ did not say anything about hybrid/internationalized tribunals. While one may assume that such an omission hinted that it considered them domestic for the purposes of removal of personal immunities, it should be kept in mind that the hybrid tribunals were not an established category in 2002 when the *Arrest Warrant* Judgment was issued, so the ICJ likely did not consider them domestic because it simply did not consider them at all.

3. WHAT ARE THE FEATURES OF "A CERTAIN INTERNATIONAL CRIMINAL COURT" AND HOW DOES IT OVERLAP WITH FULLY INTERNATIONAL AND/OR HYBRID COURTS/TRIBUNALS?

Before assessing the overlap between fully international or hybrid courts/tribunals and "a certain international criminal court/tribunal", we must first analyse the elements (features) of the latter category. In the *Arrest Warrant* Judgment, the ICJ mentioned two types of courts/tribunals that certainly fit within the "certain international criminal courts/tribunals" category: those established by a resolution of the UNSC adopted under chapter VII of the UN Charter (ICTY and ICTR) and the ICC which was established by a multilateral international treaty. Other courts that are often mentioned alongside with the ICC, ICTY and ICTR as examples of mechanisms of application of international criminal law *largo sensu*, are a mix of categories. Though, the case-law of these mechanisms rarely refers to the features of "a certain international criminal court/tribunal", some comments can be found, as well as their analysis by some authors of doctrine.

To start with the latest, one of the cases in which an international criminal institution dealt with the topic of personal immunities, is the ICC case of former Sudanese President *Al-Bashir*.[31] Following the failure to arrest and surrender him while (at that time) he was an incumbent President of Sudan, during his visit to Jordan, the ICC issued a decision stating non-compliance of Jordan with its obligations under the Rome Statute. While doing so the Appeals Chamber briefly

[30] For confirmation of the categories, *see e.g.* O. Corten, V. Koutroulis, *Tribunal for the crime of aggression against Ukraine – a legal assessment*, Think Tank European Parliament, 14 December 2022, p. 21, available at: https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702574 (accessed 30 August 2024).

[31] ICC, *Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09.

mentioned the difference between international courts and domestic jurisdiction when it stated that

> [w]hile the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole. (footnote omitted).[32]

Consequently, in addition to the internationality of creation and applicable law, another element to be considered, is the expression of will of the establishing power, i.e. either the State(s) or the international community.

Unlike the Appeals Chamber in its majority decision, the joint concurring opinion to the judgment written by Judges Eboe-Osuji, Morrison, Hofmański and Bossa was much more generous (yet a bit systematically confusing due to its surprising jump from "certain international criminal courts" to defining *any* international court and only later specifying certain aspects of international *criminal* courts again) in articulating the characteristics of an international tribunal. According to it, an international court "is an adjudicatory body that exercises jurisdiction at the behest of two or more states."[33] The opinion is further surprising in its benevolent attitude towards the possibility of the international court being in fact of regional character[34] and seemingly also in the substance of jurisdiction it exercises. While it firstly claims that the jurisdiction may even be of civil nature, it later adds that for immunities not to apply in front of such court, it must be exercising jurisdiction over crimes under international law[35] and thus returns back to international *criminal* courts' elements.

The Joint Concurring Opinion thus elaborates upon the internationality of establishing mechanism as well, hints questionably on the need of representation of the will of the international community (by the comment on regionality) and adds the nature of the exercised jurisdiction.

Another court, the SCSL, also dealt with personal immunities inapplicability in its Appeals Chamber's judgment of the *Charles Taylor* case. It indicated, while

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[32] ICC Jordan/al Bashir Referral Appeals Judgment, para. 115.

[33] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to the ICC Jordan/al Bashir Referral Appeals Judgment, para. 56. Such a statement is way too liberal, as will be seen below, in hinting that only two states acting is a sufficient amount. It most certainly is not: O. Svaček, *Al-Bashir and the ICC – Tag, Hide-and-Seek ... or Rather Blind Man's Bluff?*, in: P. Šturma (ed.), *The Rome Statute of the ICC at Its Twentieth Anniversary. Achievements and Perspectives*, Brill/Nijhoff, Leiden /Boston: 2019, pp. 177–190.

[34] Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to ICC Jordan/al Bashir Referral Appeals Judgment, para. 57.

[35] *Ibidem*, paras. 57 and 66.

almost verbatim taking over the amicus curiae statement,[36] that there are three requirements for an international criminal court: a) the court is not part of the domestic judicial system, b) it was established by an international treaty and has characteristics of an international organization, and c) its competence and jurisdiction cover crimes under international law (the SCSL formed it as being *broadly* comparable to the ICTY, ICTR and ICC) and disregard immunities.[37]

While also talking about the mechanism of establishing the institution and hinting upon whether it is the representation of a will of a single State (or more actors), it also added the applicable law and the need for a provision removing immunities.

These first three indicated elements are also mentioned by the international doctrine. Although talking more about prevention of its politically motivated abuse by individual States, Claus Kreß has indicated the requirements of an international criminal court that would be above those interests. He distinguished national and international exercise of *ius puniendi* and by doing so, he also pointed out some of the definition requirements of a certain international criminal court/tribunal. Such a court/tribunal must a) represent the international community as a whole, i.e. be its direct embodiment, and b) the court's jurisdiction "transcends the delegation of national criminal jurisdiction by a group of States."[38]

It was also stated by Jennifer Trahan and Astrid Reisinger Coracini that "[t]o qualify as an international criminal court or tribunal, a court must fulfil two conditions: (1) it must be established under international law, and (2) it must sufficiently reflect the will of the international community as a whole to enforce crimes under customary international law."[39]

And since the understanding of crimes under international law means so-called core crimes, i.e. genocide, crimes against humanity, war crimes and crime of aggression, the applicable law of the STL not covering crimes under international law was exactly the reason why William Schabas doubted the tribunal to be "a certain international criminal court."[40]

Consequently, based on the elements of the institutions indicated by the *Arrest Warrant* Judgment, case-law of other judicial bodies, and their judges, as well as

[36] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76.

[37] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41.

[38] ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, 18 June 2018, written observations of prof. Claus Kreß as amicus curiae, paras. 13 and 14. In the following sentences, he also adds that this is the case when e.g. the UNSC establishes or endorses the establishment of a court/tribunal, or when such establishment is done by an international treaty that results from truly universal negotiations and must, among others, be jurisdictionally confined to crimes under international law.

[39] Reisinger Coracini, Trahan, *supra* note 23, part 2.

[40] W. Schabas, *The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?*, 21 Leiden Journal of International Law 513 (2008), p. 521.

authors of doctrine, to find the "appreciable level of verticality"[41] that distinguishes courts that may disregard personal immunities from those that cannot, there are three elements most often identified that need to be taken into account in assessing the term "certain international criminal court/tribunal" that will be dealt with in detail below: a) the internationality of the establishing mechanism,[42] b) the kind of jurisdiction to be applied,[43] and c) the will of the international community.[44] While some sources also add an element of formal provision removing immunities in front of the mechanism,[45] it may be considered an inherent part of the third element in case of fully international tribunals (explained below in part on the will of the international community). Nonetheless, in order to distinguish the content of the will of international community from its intentions in relation to hybrid tribunals, it is true that such provision helps evading misunderstandings. Additionally, adherence to standards of human rights protection, the right to fair trial, are also sometimes mentioned[46] as well as the need for international personnel. These additional elements are nonetheless either necessary anyway (human rights compliance) or mostly automatic (international personnel) regardless of the nature of a tribunal (international or internationalized).

Consequently, all three main elements must be fulfilled cumulatively in order for the particular mechanism to be considered "a certain international criminal court" and be entitled to disregard personal immunities. The following sub-chapters analyse those elements one by one.

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[41] The phrase is used by Kreß, *supra* note 8, para. 115.

[42] Also identified *e.g.* in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(2).

[43] Identified *e.g.* by SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c); SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(3). It was also implicitly demanded by the ICC in above-quoted ICC Jordan/al Bashir Referral Appeals Judgment, para. 115. The ratione materiae jurisdiction covering crimes under international law is demanded in Kreß, *supra* note 8, para. 124.

[44] In its judgment (ICC Jordan/al Bashir Referral Appeals Judgment, para. 115), the ICC mentioned that such courts act on behalf of the entire international community. The term "will of the international community" is used by the SCSL in its Appeals Chamber's Decision on Immunity from Jurisdiction, *Prosecutor v. Charles Ghankay Taylor*, 31 May 2004, SCSL-2003-01-I, para. 38. It is also required by Reisinger Coracini, Trahan, *supra* note 23, part 2. The court being a "direct embodiment of the international community as a whole and thus as an organ qualified to directly enforce the *ius puniendi* of this legal community" (footnote omitted) is a sentence used in Kreß, *supra* note 8, para. 124. Here, the author points out a similar requirement in the ICC Appeals Chamber (fn 366).

[45] Identified *e.g.* by SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c); SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 76(3).

[46] *E.g.* Kreß, *supra* note 8, para. 124.

3.1. Internationality of the establishing mechanism

The two types of sources of international law that surely can establish "a certain international criminal court" include international treaties and UNSC resolutions adopted under the UN Charter's chapter VII.

Other types of formal sources of international law are unsuitable, either because of their non-binding character (e.g. resolutions of the UNGA *on their own*; nonetheless, the UNGA may play a role in establishing such a mechanism by providing a mandate to negotiate a treaty by the UN Secretary General with a state of jurisdiction; for details, see below) or formal inaptitude (customs, general principles of law). Though the ICJ most likely did not intend the examples of individual courts as creating an exhaustive list, it made no comment as to whether the forms or only the particular examples within them were demonstrative or exhaustive. Demonstrative in terms of examples (and exhaustive in term of forms) is however much more likely, as there can certainly be other examples of tribunals and courts that can disregard personal immunities.[47]

The UNSC resolution path (adopted under chapter VII) is straightforward because Art. 25, in combination with Arts. 41 and 48 UN Charter, establish its binding character. If such a resolution establishes an international criminal institution and obliges States to cooperate with it (including the obligation to disregard immunities), the situation is legally clear. And the internationality of a mechanism established by the UNSC under chapter VII is given by the internationality of the UN itself, i.e. an intergovernmental organization established by an international treaty. Thus, while the UN is a single actor and possesses its own international legal personality, the character of its acts is international by virtue of the very actor adopting them.

However, international treaties as establishing mechanisms may present a challenge. Some of the previously mentioned mechanisms were established by an international treaty,[48] and others were established by a domestic act that was later confirmed by an international treaty. While a mechanism created by one State is (from the perspective of the first element only, i.e. from the perspective of how the mechanism is established) a domestic institution, not an international one, the question arises whether *ex post* confirmation of a domestic tribunal – for example by an international treaty between the State and an intergovernmental organization – qualifies that tribunal/court to fulfil the first element. Such a discussion may be irrelevant, as domestic criminal courts are usually established to investigate and

[47] Reisinger Coracini, Trahan, *supra* note 23, part 1; R. Hamilton, *Ukraine's Push to Prosecute Aggression Implications for Immunity Ratione Personae and the Crime of Aggression*, 55 Case Western Reserve Journal of International Law 39 (2023), p. 46.

[48] None of the treaties were however of a multilateral character, except for the RS. Clearly, this matter is not necessarily an obstacle because the multilateral support can be obtained by other ways (*e.g.* through a confirmation act of an intergovernmental organization).

prosecute domestic crimes, not crimes under international law (which is the second necessary element). However, if a State decides to establish a special court/chamber to investigate and prosecute *crimes under international law*, the question reappears.

Nonetheless, neither a subsequent confirmation by an act of international law (and we are only talking here about a confirmation) of a domestic act establishing a court can change its formal character. Afterall, it never did and it was not even necessary, because the confirmation of a mechanism established by a domestic act by an international treaty serves different purposes than to qualify it as international. Rather, it serves as a tool to help the legitimacy of the domestic mechanism and its financial and/or administrative support, as it typically was in case of the ECCC.

Thus, based on both practical reasons as well as legal principles, chambers established by domestic acts and later confirmed by an international treaty, such as the ECCC, do not fulfil the first condition. "A certain international criminal court" should be established either by a formal source of international law or by an act derived from a formal source of international law (such as a UNSC resolution adopted under chapter VII).[49]

If, however, the *establishing* source is an international treaty, it should be stated that inasmuch as it is irrelevant whether the treaty is multilateral or not, it is similarly irrelevant (purely for the purposes of this element), whether the treaty was concluded between States, or between a State and an intergovernmental organization, such as the UN (and concluded by the Secretary General upon recommendation of the General Assembly[50]). The SCSL was established by a treaty between the UN and Sierra Leone, and it later refused to apply personal immunities in the case of *Charles Taylor*. And as will be seen below, it acted rather as an international court than a hybrid tribunal in that particular case.

On the other hand, the treaty must establish the court/tribunal, not just confirm it. As discussed above, mere confirmation would not be capable of turning a domestic act into an international one. Thus, the conclusion of this element is that the tribunal *must* be established either by international treaty or a resolution of the UNSC adopted under chapter VII of the UN Charter.

3.2. The applicable law

Insofar as regards the applicable substantive law, the basic premise is that for the court/tribunal to qualify as "a certain international criminal court" it must apply

[49] Reisinger Coracini, Trahan, *supra* note 23, part. 2.

[50] Jennifer Trahan summarized the process of negotiation in relation to an *ad hoc* international criminal tribunal (in the Ukrainian situation) as follows: "The proposed STCoA could be created: (1) after a request by the Government of Ukraine; (2) upon a resolution of the UN General Assembly; (3) which would recommend the creation of the STCoA and request the Secretary-General of the UN to initiate negotiations between the Government of Ukraine and the UN; and (4) with the STCoA ultimately created by a bilateral agreement concluded between the Government of Ukraine and the UN" (footnote omitted). Trahan, *supra* note 14, p. 684.

international law, i.e. it must be established with jurisdiction over crimes under international law,[51] and the definitions of those crimes must be in compliance with their customary reflection.[52] Hybrid tribunals, by definition, apply both domestic offenses as well as international ones. At first glance, this could mean that they are automatically disqualified from fulfilling the second element (as opposed to the fully international ones). Nonetheless, this must be properly discussed in order to reach a proper conclusion.

Firstly, a counterargument might be that although exercising domestic jurisdiction, the court may in fact be enforcing international law to the extent that the domestic offenses within its jurisdiction are reflective of definitions of crimes under international law. And secondly, some of the hybrid tribunals (such as the SCSL and the ECCC) have only partially been applying domestic offenses and for the rest, crimes under international law. In fact, Charles Taylor for example was prosecuted for crimes under international law, not for domestic crimes that were also within the jurisdiction of the SCSL.[53] And the SCSL was of course fully aware of the fact that its jurisdiction covered both the crimes under international law as well as domestic crimes, yet it never paid any attention to the latter when it generally concluded that it was an international criminal court that was "not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone."[54] The closest moment where it lightly touched the issue was when it demanded the competences and jurisdiction to "be broadly similar to that of the ICTY and the ICTR and the ICC."[55] Consequently, it might seemingly be the case that as long as the court/tribunal is entitled to investigate and prosecute crimes (even of a domestic nature) reflecting customary elements of crimes under international law, it would fulfil this condition. Yet a significant problem remains.

The reason why in the end hybrid tribunals do not qualify as "certain international criminal courts" for the purposes of the *Arrest Warrant* Judgment (both

[51] As noted by Phillipe Sands and the SCSL, its jurisdiction must be "broadly similar to that of the ICTY and the ICTR and the ICC." SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c).

[52] ICC, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, ICC-02/05-01/09 OA2, 18 June 2018, Written observations of prof. Claus Kreß as amicus curiae, para. 14. The reason for compliance with customary definitions stems from the customary nature of the inapplicability of personal immunities. The same effects do not apply to treaty-based crimes regulated by a regime of a particular character. Additionally, for interesting suggestions regarding the relationship between regional customary international law and the crime of aggression's prosecution, *see* P. Grzebyk, *Crime of Aggression against Ukraine. The Role of Regional Customary Law*, 21 Journal of International Criminal Justice 435 (2023).

[53] *See* SCSL documents in the *Prosecutor v. Charles Ghankay Taylor*, Indictment, 7 March 2003; and Appeals Chamber's Judgment, 26 September 2013, part XI. Disposition.

[54] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, paras. 35, 40.

[55] *Ibidem*, para. 41(c).

with respect to this element and in general as well), is to be found elsewhere, albeit in the proximity. The reason resides in the sovereign equality of States, i.e. in the disqualification of sovereign unilateral activities that would violate the *par in parem non habet imperium principle*.[56] If the State whose law the tribunal applies possesses the capacity to amend the offenses at its will (which is of course its sovereign right to change its domestic law), such a capacity is problematic and negates the "internationality" of such a tribunal. If the State itself can change the law (even if, in doing so, it remains within the limits of customary definitions of the crimes under international law), there can be no sufficient distance from sovereignty of the State. At the same time however, this is the essence of hybridity – the exercise of domestic jurisdiction accompanied by the right to change domestic law at the will of the individual State concerned. Even if the establishing mechanism was an international treaty, but only referred to the applicable domestic law, the State would remain the sovereign over its changes/amendments. Seemingly, a solution would be possible if the establishing document (an international treaty or a resolution of the UNSC) defined the applicable domestic criminal offenses in detail, i.e. with all their elements, and precluded the sovereign power of the State concerned to change that definition. However, in such a case it would not (in terms of exercising jurisdiction over those crimes), be a hybrid tribunal because it would not apply domestic law as such. Not only would such a way of defining the jurisdiction *ratione materiae* of domestic offenses be unusual for hybrid tribunals,[57] it would materially turn the jurisdiction into quasi-international (if the crimes were not reflection of crimes under international law), or international (if they did reflect crimes under international law) that would copy the domestic legislation.

In conclusion, it must be stated that in order to be "a certain international criminal court", its applicable law must be international, not a reference to domestic offenses (which would make it hybrid). The mere compliance of the domestic offenses with international legal definitions would not suffice. In this regard, the

[56] For a similar point, *see* ICC Jordan/al Bashir Referral Appeals Judgment, para. 115; or SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 51. Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa to the ICC Jordan/al Bashir Referral Appeals Judgment, para. 54 develops the point: "The matter may also be considered from the perspective that the ICC's exercise of jurisdiction over a Head of State involves no legitimate anxiety whatsoever that the ICC is exercising jurisdiction in order to apply laws made by one sovereign for the exclusive benefit of his or her own domestic interests: that being a legitimate concern that fully justified, as a practical matter, the principle in the *maxim par in parem non habet imperium*. The ICC exercises its jurisdiction in no other circumstance than on behalf of the international community – represented under the Rome Statute or the UN Charter as the case may be – for the purpose of the maintenance of international peace and security according to the rule of international law."

[57] *E.g.*, the Statute of the SCSL referred to the domestic crimes that it had the right to exercise jurisdiction over, in Art. 5 of its Statute. In doing so it referred to the titles of the crimes and the provisions of Sierra Leonean law they were defined in. It did not contain any other details.

Charles Taylor case requires an additional comment. The SCSL was called a hybrid tribunal, yet it disregarded personal immunities. Thus, it seems at first glance to contravene the above-stated conclusion that a hybrid tribunal does not fall within the notion of "a certain international criminal court". But it is not so. In fact, the SCSL was *partially*, but not completely, hybrid, and in the case of *Charles Taylor* it did fulfil the definition of a fully international tribunal (established by an international treaty *and applying international jurisdiction*. Plus, there was the will of the international community, as discussed further). But should there ever be a case whereby an accused endowed with personal immunities is prosecuted in front of a hybrid tribunal (even if generally endowed with jurisdiction over both international and domestic offenses) for the *domestically* defined crimes, the court would have to refrain from exercising such jurisdiction because in such proceedings it would not qualify as "a certain international criminal court" (assuming a refusal to voluntarily waive the immunities). This element may thus be fulfilled in some of the proceedings, while not in others, in front of one particular body. The situation depends on whether such a court acts as an international or as a domestic tribunal in that very individual case. It should also be mentioned however that to qualify as a "certain international criminal court", a third element still remains necessary – the will of the international community (see below).

For the sake of clarity, procedural law needs to be mentioned here as well. The situation is similar, but perhaps even clearer. Because hybrid tribunals are often parts of domestic legal systems, they usually apply domestic procedural law.[58] The domestic procedural law may be qualified by references to (potentially superseding) international law standards set in the establishing sources of law,[59] however the basis remains domestic. As in the case of substantive law, if the State itself is the sovereign to amend the law (even if it still complies with the international standards when such limitations exist), this very fact is by definition of sovereign nature and domestic. The fact that international treaty establishing or recognizing such a tribunal imposes an obligation to consult such changes[60] with other parties is purely a matter of international responsibility.

In conclusion, and in relation to both substantive and procedural law, a hybrid tribunal that is part of a domestic judicial system (and thus applying even domestic

[58] Not always though. There may be a hybrid tribunal (from the viewpoint of substantive law) that applies international procedural law because it acts partially as hybrid and partially as international. Typically, the SCSL was partially a hybrid and partially an international tribunal. And in order to remain international in relevant cases, it logically had its procedural regulation based in international law – Art. 14 of the SCSL Statute that was an annex to the treaty on its establishment.

[59] *E.g.* Arts. 33 new – 37 new of the ECCC Law, *supra* note 23.

[60] *E.g.* Art. 2(3) of the Agreement between the United Nations and the Royal Government of Cambodia, *supra* note 25.

law), is disqualified from fulfilling the second element. Only if such a tribunal is additionally endowed with jurisdiction over crimes under international law (and applies international procedural law at the same time) does it fulfil this second condition in cases where it applies international jurisdiction. By their nature, fully international tribunals fulfil this second condition.

3.3. Reflection of the will of the international community (particularly the will to remove personal immunities)

Even when the previously mentioned two elements are fulfilled, the third is still necessary to fulfil the elements of 'a certain international criminal court.' The reflection of the will of the international community may be to some extent denoted as the material source of "internationality" of the court/tribunal within the meaning of the *Arrest Warrant* Judgment. While an endorsement of a hybrid tribunal by the international community may also serve as a source of internationality of its kind, such an endorsement serves the completely different purpose to enhance the legitimacy of the domestic jurisdiction, at times perhaps coupled with financial and personnel support. In the context of "a certain international criminal court", the purpose is different and specific. It is the will of the international community to punish crimes under international law with the effect of inapplicability of immunities in front of the mechanism in question. That is why the establishing mechanism should contain a provision stating the inapplicability of immunities.[61] This relates to personal immunities, and perhaps more to functional immunities, although in relation to them the argument might be much easier because there are strong suggestions that functional immunities do not prevent even the exercise of domestic jurisdiction for crimes under international law.[62]

Materially speaking, the will of the international community may in general be inherently present in the formal type of source of law that establishes the mechanism, as is the case of a UNSC resolution or in the case of a UNGA resolution giving a mandate to the UN Secretary General to conclude a treaty with a State.[63] When

[61] SCSL, *Prosecutor v. Charles Ghankay Taylor,* SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 41(c).

[62] While there are opposing arguments as well, this discussion is left for other contributions. It suffices to refer for example to the ILC, *Immunity of State officials from foreign criminal jurisdiction. Texts and titles of the draft articles adopted by the Drafting Committee on first reading*, A/CN.4/L.969, 31 May 2022, particularly to Draft Article 7. It does not contain the crime of aggression, however, and this very fact was criticized. For a persuasive critique, *see* the contribution by ILC Member, Charles C. Jalloh in *Ministerial side-event by Liechtenstein and Germany...*, *supra* note 1. On the other hand, for an argument that the customary nature of the inapplicability of functional immunities is questionable, *see* 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 (2023), p. 80.

[63] Reisinger Coracini, Trahan, *supra* note 23, part 3.

adopting a measure not involving the use of force under Art. 41 of the UN Charter, the UNSC resolution doing so is binding upon all UN Member States by virtue of their consent to allow the UNSC to obligate them expressed by ratification/accession to the UN Charter. Consequently, when the UNSC acts under (but not only under[64]) Chapter VII, it acts as a representative of the international community and thus reflects its will in the act. Still however, because of the differing purposes of international and hybrid tribunals, the removal of immunities must be present either explicitly or implicitly (in an unquestionable way). That was the case for the SCSL where the UNSC did not explicitly include the removal of procedural immunities in the resolution,[65] nor was it present in the agreement between the UN and Sierra Leone[66] or the Statute that was an annex to the Agreement – it only contained the no-impunity provision and a hint regarding punishment in Art. 6(2). Therefore, the Court was forced to rely on, among others, Art. 6(2) of its Statute and found that "punishment [as a result of a trial] implies a trial."[67] Thus, formalistically speaking the will of the international community to remove the immunities must be explicitly (a preferred way for obvious reasons) or implicitly (in an undoubted way) present within the establishing mechanism in order to qualify the court/tribunal as an international one.[68]

However, when the mechanism is established by an international treaty the will of the *entire* international community is not necessarily automatically present, even if the provision stating the inapplicability of immunities is included. Formally speaking, if two States (or even more, but still to a limited extent) conclude an international treaty establishing a criminal tribunal to prosecute and punish crimes under international law, the first two elements described above are fulfilled, but it will certainly not be "a certain international criminal court/tribunal" within the meaning of the ICJ *Arrest Warrant* Judgment.[69] Something more is necessary. In case of the ICC, it is the object and purpose of the Rome Statute combined with the number of State-Parties that represent more than two thirds of the international community,[70] in combination with factors such as the RS having been negotiated

[64] As was the case with UNSC Resolution 1315 (2000), 14 August 2000, S/RES/1315 (2000), adopted under chapter VI.

[65] *Ibidem*.

[66] Agreement between the UN and the Government of Sierra Leone, *supra* note 23.

[67] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, 31 May 2004, Appeals Chamber's Decision on Immunity from Jurisdiction, para. 48.

[68] On the debate whether a UNSC resolution must remove immunities explicitly or can be implied, *see* Kreß, *supra* note 8, paras. 141–148.

[69] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 78.

[70] Although in the *Arrest Warrant* Judgment the ICJ put too much emphasis solely on the object and purpose of the treaty, because when it adopted the judgment, the RS was not yet in force – it had less than 60 state parties, and still the ICJ counted it as a certain international criminal court without hesitation.

in a universal way, being adopted by consensus, and being a treaty opened for universal ratification.[71] Consequently, while the amount of State-Parties to the treaty is not the only factor, it still plays a significant role (in concert with the other factors). Determining the precise number of State-Parties is not an easy task, although it can be "circumvented" to a certain extent. In relation to the discussed tribunal for the crime of aggression committed against Ukraine (and based on the previous example of the SCSL), there were proposals that the international treaty establishing such a tribunal could be concluded between Ukraine and the UN, through the Secretary General (UNSG) acting upon the mandate to do so (owing to the lack of political will within the UNSC); a mandate provided to him by the vote in the General Assembly.[72] While such a treaty would, formally speaking, be bilateral, it would reflect the will of the international community through the consent given by the UNGA vote, which would empower the UNSG to negotiate and conclude such a treaty. As the UNGA is the world's largest and most representative forum, the vote therein would certainly bring about the "most powerful confirmation possible."[73]

When this proposal appeared criticism quickly ensued and now this solution seems improbable. The reasons are political in nature and not necessarily legal, though the legal challenges remain interesting. Firstly, it is of course an open question whether the UNGA would pass such a vote.[74] But even if it did, it has been asserted that the creation of such a criminal tribunal would amount to a coercive action, a power not given to the UNGA under the UN Charter, but only to the UNSC.[75] Thirdly, the debates also revolved around the question whether a vote on any such UNGA resolution should be taken under the two-thirds majority of those present and voting (Art. 18(2) of the UN Charter), or whether a simple majority of those present and voting (Art. 18(3) of the UN Charter) would suffice. While there is strong likelihood that it would be the former case,[76] in each case due to the

[71] Kreß, *supra* note 8, para. 124.

[72] *E.g.* the suggestion by Trahan, *supra* note 50, or O. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I). An agreement between the United Nations and Ukraine can pave the way*, Just Security, 20 September 2022, available at: https://tinyurl.com/c8d3cj5b (accessed 30 August 2024).

[73] Kreß, Hobe, Nußberger, *supra* note 13. *See also* Jennifer Trahan's support of the argument claiming that the UNGA vote "would carry the greatest legitimacy" (Trahan, *supra* note 14, p. 684).

[74] K.J. Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggressio*n, Opinio Juris, 16 March 2022, para. 2, available at: https://tinyurl.com/y9a73nev (accessed 30 August 2024).

[75] On raising the point and debating the options: *see e.g.* C. McDougall, *Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, Opinio Juris, 15 March 2022, available at: https://tinyurl.com/53fnawaa (accessed 30 August 2024).

[76] L.D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes,* Just Security, 1 March 2022, available at: https://tinyurl.com/2f69ujx6 (accessed 30 August 2024). Especially if the vote was taken during an emergency special session under Resolution 377(V), 3 November 1950, A/RES/377 (V).

"present and voting" requirement, there is a possibility that there would be a significant number of abstentions and the legitimacy would thus be strongly diminished.

To address these concerns consecutively, it must first be admitted that a vote within the UNGA could fail for purely political reasons.[77] Should that occur, the alternative path to conclude a multilateral treaty among a sufficiently representative number of State-Parties would remain open. There would certainly need to be a high number of State-Parties in order to qualify the mechanism as a "certain international criminal" one. Alternatively, the treaty could be concluded between another intergovernmental organization and Ukraine,[78] though the size of such an organization would certainly play a significant role because the reflection of will must be larger than that of a few States, or a regional group of States only.[79] Should the representation be smaller, it might happen that such tribunal would not qualify as "a certain international criminal one" and would "only" be allowed to prosecute accused endowed with functional immunities. Thus, once again, what is the specific number of State-Parties to a treaty establishing "a certain international criminal court/tribunal", remains unclear. One might wonder whether it is at least 60 (the number of ratifications required by the RS to enter into force) based on the reference by the ICJ to the ICC in *Arrest Warrant*; or whether it is in fact more? Unfortunately, there is no agreed-upon "safe" number yet. In any case, to conclude this examination of criticisms one should ask whether avoidance of the best available avenue was preferrable to seriously trying to pursue it – with the accompanying risk of failing, but also with a chance of success? And one should also ask the question – would a failure to establish an international tribunal via the UNGA vote necessarily result in the impossibility to pursue alternatives? In this author's view, the answer to both these questions is negative. Nonetheless, the current negotiations regarding Ukraine seem to have failed in that regard and the considered alternative is rather a hybrid form.

The second criticism has been based on the premise that the establishment of such a tribunal would be a coercive measure because it would constitute a new jurisdiction including the removal of personal immunities of certain accused persons without the consent of the States they represent. But it needs to be recalled that

[77] For raising a similar concern, *see* the speech of the German Minister of Foreign Affairs Annalena Baerbockin the *Ministerial side-event by Liechtenstein and Germany...*, *supra* note 1. For an interesting analysis challenging the narrative (as a possible reason for the lack of support) regarding the tribunal being another expression of the fight between the Global West and the Global South, *see* P.I. Labuda, *Countering Imperialism in International Law: Examining the Special Tribunal for Aggression against Ukraine through a Post-Colonial Eastern European Lens*, 49 Yale Journal of International Law 272 (2024).

[78] On the topic of a treaty between the Council of Europe or the European Union and Ukraine, *see* e.g. Corten, Koutroulis, *supra* note 30, pp. 18–20 (3.2.2–3.2.3).

[79] Hence the criticism of the ICC – *supra* note 33. *See also* Kreß, *supra* note 8, para. 124.

the UNGA has the power to establish an independent tribunal despite the lack of such explicit entitlement in the UN Charter.[80] Additionally, the creation of an international tribunal is by no means necessarily a coercive action of the kind that the UNGA does not have the capacity to adopt. After all, the SCSL was created based on a resolution adopted by the UNSC under chapter VI that did not include any obligations upon anyone except the UNSG (to negotiate). And last but not least, the argument that it is the removal of (personal) immunities that amounts to a coercive measure entails the outdated vision that personal immunities can only be removed through a waiver or by way of a binding decision to that effect by the Security Council. This approach has already been rejected by the ICJ in the *Arrest Warrant* Judgment, where the Court confirmed that immunities do not apply vis-à-vis "a certain international criminal court" as a matter of customary international law.[81] The vote by the UNGA allowing the UNSG to negotiate an international treaty establishing an international court to prosecute crimes under international law would not subject the home State to a new international legal obligation. Instead, it would simply make possible the exercise of an already existing jurisdiction.

The third criticism would have merit in the event the vote passed by the barest minimum. It could be argued that how many States must actively support the idea in order to express the consent of the entire international community varies depending on which formal path of establishing the mechanism is taken. If the establishing mechanism is a multilateral treaty, it should certainly be no less than 60 (although this might be legitimately criticized as a very small number), the absolute majority of the international community would be much more representative though. If

[80] While confirming that it was legal to establish it, the ICJ stated that the "[UN Administrative] Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions" (ICJ, *Effects of awards of compensation made by the UN Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Rep 1954, p. 10). And because the UN Charter did not contain any provision entitling the UNGA to establish the Tribunal, the ICJ confirmed that the competence of the UNGA is not limited by the explicit text of the Charter. Similar reasoning could have been applied in this case.

[81] Indeed, there are differing opinions. For example, in her inspiring book, Kateřina Uhlířová submits that the "SCSL's [Taylor] decision neither adequately interpreted nor usefully applied the criterion of 'certain international criminal courts'" (Uhlířová, *supra* note 10, p. 137). For the non-applicability of personal immunities she relies, among others, on the binding nature of the respective tribunals' statute upon the state of the official who those immunities are supposed to protect. Nonetheless, while it may seem that the *Arrest Warrant* Judgment left the matter of this binding character of the establishing mechanism (particularly when it is an international treaty) open, it should not be forgotten that the fourth circumstance of para. 61 of the *Arrest Warrant* Judgment (inapplicability of personal immunities in front of certain international criminal courts) only adds something to the second circumstance (when the represented state has waived the immunity) "if the reference to proceedings before the ICC (...) includes those cases, where the ICC, in accordance with Article 12(2)(a) of the ICCS exercises its jurisdiction over officials of States not party to the Statute" (Kreß, *supra* note 8, para. 92). Thus, the ICJ implicitly included situations where the respective tribunal's statute is not binding upon the state of the official.

the vote was taken in the UNGA to empower the UNSG to conclude a treaty establishing the mechanism in the name of the UN, then even if the vote was taken by low numbers of States, it could hardly be argued that mere abstention (not accompanied by opposing reasoning) of those States not casting a vote would be an intentional expression of their will against providing the mechanism with the status of "a certain international criminal court". By abstaining, it should be understood they would express their non-concern in an issue that might in future affect them as well, not necessarily a contrary opinion. It is certainly not an obligation to vote, but by not doing so in a situation of such severity, the lack of active opposition should be understood as (if not approval then) acceptance. While that is another matter, an analogy can be drawn from negative practice (and its relation to *opinio iuris*) in the creation of customary international law. When discussing the alleged custom of inapplicability of immunities from criminal jurisdiction in front of courts of other States, Judge *ad hoc* Van den Wyngaert stated in her dissenting opinion that "[o]nly if this abstention [to institute criminal proceedings] was based on a conscious decision of the States in question can this practice generate customary international law [prohibiting such proceedings due to immunities]."[82] Analogically, a conscious silent abstention in the UNGA vote should be understood as approval/acceptance; certainly when the customary law of non-applicability of personal immunities in front of certain international criminal courts already exists. It would of course be different if the rule was yet to be established. Afterall, the UNSC voting system also allows for abstention (even by the permanent members) and no one doubts the internationality of measures taken by a vote of the UNSC, even with some members abstaining, under the condition that the quorum is fulfilled.

A purely formalistic part of the (certain criminal) internationality of the tribunal element is the demand for the statute/establishing treaty to contain a provision stating the inapplicability of immunities. Most statutes of international criminal courts and tribunals provide a statement similar to both Arts. 27(1) and 27(2) RS. Interestingly, the latter was not present in the Statute of the SCSL, yet the object and purpose of the treaty establishing the tribunal were interpreted in such a way.[83] Given the difference between impunity and immunity, it should be added that the provision on substantive part, i.e. the so-called no-impunity provision (in the Rome Statute Art. 27(1)) should be accompanied by a provision removing immunities (as a procedural issue, in the RS this is reflected in Art. 27(2)).[84] In any case, in order

[82] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002), Dissenting opinion of Judge ad hoc Van den Wyngaert, para. 13.

[83] As seen in SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, paras. 78–102.

[84] For a debate reflecting on the possible problematic consequences arising from the differences of these provisions: *see e.g.* the Dissenting opinion of Judge *ad hoc* Van den Wyngaert, *supra* note 82, paras. 29–33.

to differentiate the will of the international community not to apply immunities from support provided to hybrid tribunals, the statute of such a mechanism should contain a provision comparable to Art. 27 to qualify as "a certain international criminal court".

3.4. Results

Summing up, the elements of "a certain international criminal court" were found to be the three described herein:

a) the crimes within its jurisdiction must be international and grounded in customary international law;
b) the establishing mechanism must be either a UNSC resolution adopted under chapter VII of the UN Charter, or an international treaty; and
c) the mechanism must sufficiently reflect the will of the international community to remove immunities, be it through a vote in the UNSC or in the UNGA or on the basis of a sufficiently representative multilateral representation.

It follows that hybrid/internationalized tribunals (when applying domestic law and/or established domestically) do not fulfil the elements of a "certain international criminal court". In fact, only a mechanism fulfilling the elements of a fully international tribunal (i.e. established internationally, applying international law, and supported by the will of the international community) can be considered to meet the requirements of a "certain international criminal court". Consequently, the as of yet judicially undefined notion of "a certain international criminal court" should be understood to be congruent with the term "a fully international tribunal", as developed in the foregoing considerations.

It is thus no surprise that Ukraine favours the international model.[85] For exactly these reasons, it is unfortunate that the relevant actors now (as of January 2024) seem to have failed in their efforts towards establishing a fully international tribunal.

[85] O.A. Hathaway, M. Mills, H. Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression Upon the Request of the UN General Assembly*, Just Security, 5 March 2023, available at: https://tinyurl.com/ycy85psp (accessed 30 August 2024).

4. TRIBUNAL FOR THE CRIME OF AGGRESSION COMMITTED AGAINST UKRAINE

Based on the conclusions reached above, it is surprising that some States favour a hybrid form of the tribunal for the crime of aggression committed against Ukraine.[86] Should such a tribunal nevertheless be established, it would not have the right to disregard personal immunities for the purposes of proceedings in front of it. It would consequently not even be endowed with the possibility to issue an arrest warrant against such individuals as long as they would hold office entitling them to personal immunities. The same applies to the debated third option, as the information provided suggests it would be hybrid.

Considering the fact that the crime of aggression is a leadership crime, the fact that an internationalized tribunal could prosecute officials holding lower state-positions (i.e. those endowed with functional immunities) is unsatisfactory.

It's true that with regard to the officials belonging among the troika, if they were suspected of having committed the crime of aggression, the situation would change should they ever leave the office. Functional immunities do not prevent States from exercising domestic jurisdiction (for crimes under international law) over another State's representatives (including former ones) endowed with functional immunities.[87] However, waiting till such a theoretical moment is a risk not worth taking.

Had States made the right decision and created a fully international criminal tribunal[88], the particular consequences of such decision would have been that such a court could disregard even personal (the more functional) immunities and issue arrest warrants against the accused otherwise endowed with personal immunities. Should such accused find themselves in hands of the tribunal, there would be nothing preventing it from conducting the trial.

The challenge however (which would equally apply to a hybrid court) would remain to get the accused before the tribunal. Should securing their presence in front of the tribunal appear to be impossible for the time being, despite all the good reasons not to do so a trial *in absentia* comes into mind. Of course, should

[86] *See above*. For pointing out the legal and practical complications related to establishing an internationalized tribunal, *see* McDougall, *supra* note 62, pp. 73, 81.

[87] SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-2003-01-I, Submissions of the Amicus Curiae on Head of State Immunity by Phillippe Sands and Alison Macdonald, para. 115. On the other hand, it must be admitted that there are currently heated debates about the fact that ILC's Draft Art. 7 (within the topic of Immunity of State officials from foreign criminal jurisdiction) does not include the crime of aggression among crimes under international law to which immunities ratione materiae do not apply (*see supra* note 62).

[88] And additionally, had there been a proper campaign in its favour among states. Unfortunately, the information available indicates that no such effective campaign was even attempted (McDougall, *supra* note 62, p. 74).

the court conduct a trial in absentia, it would likely receive heavy criticisms from some quarters. But this would likely happen in any case, whether the accused were present or not. And should it happen that after the end of the proceedings the accused would in fact find themselves in the hands of States willing to arrest and surrender them, the trial might need to be repeated. That would, however, not be a worse solution than doing nothing at all (after issuing the arrest warrant).

CONCLUSIONS

Building upon the case-law of several international judicial bodies and by comparing the elements of fully international courts (and hybrid tribunals) with the elements of "a certain international criminal court", this article concludes that only fully international criminal courts count as "certain international criminal courts" within the meaning of the *Arrest Warrant* Judgment of the ICJ. Thus, its hypothesis was confirmed.

The elements of "a certain international criminal court" as identified above include, among others: a) the international nature of establishing of the mechanism; and b) applying international law. It is predominantly in the second point that hybrid tribunals differ, because they apply domestic law. Even if, c) the third element of "a certain international criminal court" – i.e. its reflection of the will of the international community – is present, this third element serves different purposes in relation to the distinct categories. In the case of a fully international court (tribunal) it is the source for inapplicability of personal immunities before it. In the case of hybrid tribunals, it is rather a source of support from the international community towards domestic courts in their exercise of their sovereign rights.

Thus, it is surprising that some States favour the hybrid form in the case of establishment of a tribunal for the crime of aggression committed against Ukraine. The detrimental consequences of such decision include setting a dangerous example for other leaders who might be attracted by the idea of an immunity shield against the prosecution of crimes of aggression.