A Ukraine Special Tribunal with Legitimacy Problems?

A Reply to Günter Krings (CDU), Volker Ullrich (CSU) and Sergey Lagodinsky (Bündnis 90/Die Grünen)

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The call for a Special Tribunal for the Russian war of aggression in Ukraine ('UkrTrib') is also getting louder in the German political discourse[1]. The proposal goes back to an initiative by the British international lawyer and writer Philippe Sands, who was quickly joined by a number of prominent politicians and international (criminal) lawyers[2]. Sometimes, a comparison is drawn with the Nuremberg International Military Tribunal (IMT)[3], but this is misleading for several reasons, not least because the IMT was a consequence of the defeat of Nazi Germany and the following regime change, which in the case of Russia is unforeseeable[4].

From a legal perspective, the proposal is necessary since the jurisdiction of the International Criminal Court ('ICC') in the case of a crime of aggression is limited to State Parties (Art. 15bis(5) ICC Statute e contrario), so both the attacking State (Russia) and the victim State (Ukraine) must be parties to the Statute. It was of course already known before the Russian invasion of Ukraine that this jurisdictional regime is much too narrow – why should the victim State, which is also a territorial State, not have jurisdiction over a crime of aggression committed on its territory?[5] Yet, when the crime of aggression was included in the ICC Statute in the course of the first review conference in Kampala in 2010, a broader jurisdictional regime was politically not feasible. In fact, the existing jurisdictional straightjacket was also promoted by France, the United Kingdom and the USA, i.e., the very Western States which now feel compelled to demand a UkrTrib[6], albeit being unclear whether they will join a respective treaty at all or whether they will refrain from doing so for fear of setting a precedent which could later turn against them[7].

Russia's war of aggression now painfully reveals that the ICC is a toothless tiger with regard to that crime. The possibility to circumvent the narrow jurisdictional regime by an UN Security Council referral (Art. 15ter ICC Statute) is doomed to fail due to the Russian veto power[8]. To change this jurisdictional regime, in particular waiving – for good reasons – the State Party requirement with regard to the victim/territorial state, is not easy, because it would have to be made via the ICC's Assembly of States Parties ('ASP'). Surprisingly, however, the issue was not even discussed at the ASP's 21st session just held in December; in fact, the Western State Parties calling most loudly for aggression liability, including Germany, did not even table a non-paper or proposal in that regard. At any event, such an amendment would require the approval of seven eighths of the State Parties (Article 121(4) ICC Statute), i.e. 108 of 123, a very qualified majority difficult to achieve.[9] Moreover, it is disputed whether such an amendment could have a retroactive effect (which depends on whether one wants to subject subsequent jurisdictional extensions to the principle of legality within the meaning of Art. 22-24 ICC Statute).

Against this background, it is understandable that especially Ukraine (which, however, also prosecutes

[1] See Krings, ZRP 2022, 129; Ullrich and Lagodinsky

[2] See here und here; from a Ukrainian perspective see Nuridzhanian. This must be distinguished from the proposal for a "High War Crimes Court of Ukraine", which would have jurisdiction over all international core crimes and operate as a special national court (like the "High Anti-Corruption Court of Ukraine"), cf. Scharf/Williams/Dutton/Sterio

[3] In this vein also Lagodinsky

[4] Crit. also Heller

the crime of aggression itself)[10] wants to close the resulting gap in criminal prosecution by creating a UkrTrib. However, there are quite a few issues to be solved, it is not – contrary to Lagodinsky – just about "formalistic concerns" but also about "weighty counter-arguments". First of all, as will be shown in the first section, it is not easy to provide a UkrTrib with sufficient legitimacy in the eyes of the world, above all in the eyes of the Global South (which is fundamentally sceptical about the Western Ukraine policy). There (and elsewhere) one wonders, among other things, why such a tribunal was not set up during the unlawful (US-led) invasion of Iraq. While it is disputed whether this invasion qualifies as a clear-cut war of aggression and, in any case, did not amount to a war of conquest, the complete absence of any accountability for those responsible at the leadership level at the time shows a strange understanding of the so-called rule-based international legal order, which should guarantee the same application of the law for everyone.[11] Follow-up questions and problems, arising or separate from this, are discussed in the second section. All of these and possibly other questions need to be explored thoroughly and impartially before hastily demanding the establishment of a UkrTrib.

Questionable Legitimacy

The main problem is the legitimacy of such a Special Tribunal. This problem can only be overcome, if at all, by involving the UN, in particular the General Assembly ('GA').[12] In contrast, regional initiatives (e.g. at the level of the Council of Europe, 'CoE') or a multilateral treaty between interested States and Ukraine (Nuremberg model)[13] may only produce a limited (only European) legitimacy. This also corresponds with the practically unanimous view of the tribunal advocates[14], which is why it is surprising that Krings, Ullrich and Lagodinsky focus so strongly on the European (EU/Council of Europe) and national-German level (Bundestag), even calling for a German leadership role.[15]

Thus, a GA-Resolution is not only desirable but necessary. In this resolution, the GA would have to recommend to the UN Secretary General the establishment of such a tribunal by concluding a bilateral treaty with Ukraine; or a bilateral agreement between the UN and Ukraine would be negotiated in advance and then be submitted to the GA for approval. The first procedure was chosen when the Special Court for Sierra Leone ('SCSL') was founded[16], although the UN Security Council (Res. 1315/2000) – without invoking its Chapter VII powers – mandated the UN Secretary General (see the agreement here), an option unavailable in this context given the Russian veto power.[17] The second procedure was used when establishing the Extraordinary Chambers in the Courts of Cambodia ('ECCC') (A/RES/57/228 B, 22 May 2003). The UkrTrib's jurisdiction would then ultimately be based on the territorial jurisdiction of Ukraine, which it would delegate to the UkrTrib. Given the practically worldwide recognition of the principle of territoriality, this is, in principle, legally unproblematic.[18] However, such an establishment of an international criminal justice institution by way of delegation of the territorial State has legal implications, to which we will have to return below.

The recourse to the UN GA, albeit necessary from a practical and legitimacy perspective, is also confronted with the problem that GA resolutions are not binding (Art. 10, 13 (1), 14 UN Charter). A further legal effect, for example as an *opinio juris* contributing to the creation of customary international law, and also the political weight of such resolutions largely depend on the concrete voting result and the resolution's concrete content, with the Uniting for Peace mechanism employed here by the UN Security Council

[5] The International Law Commission's ('ILC') argument in that regard rests on the par in parem (state immunity) rule and thus only applies to the horizontal inter-State level, cf. most recently ILC Report 73th session, 2022, p. 238, para. 21; concurring the influential, but largely conservative 2022 Report of the Dutch Advisory Committee on Public International Law ('CAVV'), p. 8

[6] Crit. Heller; Dannenbaum, Journal of International Criminal Justice ('JICJ' 20 (2022), 859, 860-1, 871 (but also rightly, at 868-9, pointing to Russia's role in limiting the ICC's aggression jurisdiction

[7] Crit. McDougall

[8] On a possible abuse of rights for the use of the veto power in this context see Tomuschat, ZfIStW 2022, 648, 649 f.

(S/RES/2623 (2022)) having certainly strengthened the GA's mandate.[19] Also, while enforcement action is reserved to the UN Security Council, the GA certainly has a role to play with respect to international peace and security, namely by recommending certain "measures for the peaceful adjustment of any situation" which may involve "some kind of action"[20].

As far as the voting result is concerned, it should be as overwhelming as the condemnation of the Russian aggression on 2 March 2022 (Res. A/ES-11/1, 141 votes in favour [out of 193 member States]) and the condemnation of the so-called annexations on 7 October 2022 (Res. A/ES-11/L.5, 143 votes in favour). Only then can one say that such a tribunal sufficiently reflects "the will of the international community" as a whole and can be considered as "truly international".[21] Such a voting result is however by no means certain. On the contrary, other resolutions passed in this context, such as the Russian exclusion from the UN Human Rights Council (Res. A/ES-11/3, 8 April 2022, 93 votes in favour) and on Russian reparation obligations (Res. A/ES-11/L.6, 7 November 2022, 94 votes in favour),[22] have received significantly less support and show that the western Ukraine policy does not enjoy global support.[23]

The voting result of such a resolution will also depend on its content. This, in turn, can prejudice the jurisdiction of the UkrTrib and other important legal issues, unless the bilateral agreement between the UN and Ukraine has been agreed upon in advance. The more explicit and prosecution-friendly the text of such a resolution, the more resistance can be expected from States that are critical of international criminal justice anyway and want to avoid a precedent that may possibly turn against them later. If, on the contrary, the text is vague and leaves crucial questions open, such as about immunity (see below), it can most probably count on greater support but will tend to limit the tribunal's capacity to act.

In addition, what makes matters worse in case of these kind of special tribunals is that they are exposed to serious legitimacy challenges anyway, precisely because of their exceptional character and their *ex post facto* nature. It should be recalled in this context that the establishment of the ICC – on the basis of an international treaty – is also to be seen as a response to these legitimacy challenges and, taken at its word, as a departure from the international *ad hoc* criminal justice *à la carte* common up to that date. Of course, the UN Security Council cannot be prevented from creating such tribunals directly under its Chapter VII powers; yet, this does not make the legitimacy challenges disappear. This may be different in the case of so-called hybrid or internationalized tribunals[24], which are established on the regional/national level with international staff, but on the basis of a (sole or additional) national law.[25] At any rate, it appears at least as an ambivalent signal when the same (Western) States that are among the most important supporters of the ICC, including Germany, now want to set up a UkrTrib instead of focusing their combined efforts on the ICC as the only universal international criminal tribunal (albeit in need of reform[26]). Chief Prosecutor Khan pointed to the implicit risk of a weakening of the ICC in his recent remarks before the ASP.[27] Khan is right and it is indeed, as already noted above, surprising if these same States did not use the last session of the ASP to kick off the discussion process on the (necessary) amendment of the ICC's jurisdictional regime regarding aggression. Such an amendment could also consist in enabling the GA, given its role in securing international peace mentioned above, to request the ICC, in combination with the consent of the territorial State, to exercise its jurisdiction. At any rate, with the total passivity at the last ASP, precious time has been lost and it is by no means certain that the setting up of a whole new Special Tribunal would be quicker than amending the ICC Statute (we will return on this practical issue at the end).

All in all, it is clear that a GA resolution passed by only a weak majority would prove a heavy mortgage on the legitimacy of a UkrTrib. There is a risk that a

[9] Sceptical also McDougall. Whether the jurisdictional regime of the crime of aggression is (materially) part of the crime or independent of it, is controversial and has an influence on the procedure in the event of a possible statutory amendment, see Clark/Heinze, in Ambos, Rome Statute of the International Criminal Court. Article-by-Article Commentary, 4th edition 2022, Article 121 marginal numbers 23 ff. (who themselves prefer Art. 121(5).

debate on legitimacy will arise and that the tribunal will not be able to concentrate fully on its actual task – investigating, prosecuting and trying the Russian war of aggression. Instead, it may have to defend its existence, possibly even more than other special tribunals, not least the UN Former Yugoslavia Tribunal (ICTY), given that the latter could at least rely on the authority of a UN Security Council resolution.

Further Questions and Problems

Beyond these fundamental concerns related to legitimacy, there are further problems, some due to the nature of such a tribunal, some of them independent of it:

(1) First of all, it is misleading when it is repeatedly argued that the crime of aggression is on the one hand the "supreme crime" and on the other hand the trigger for all further crimes.[28] The latter is incorrect because most armed conflicts, and thus the international core crimes committed as part of them, are not triggered by a war of aggression. In fact, for the first time we are now talking about a clear-cut war of aggression in connection with the Ukraine invasion, while this has been disputed in other cases, including the US-led Iraq invasion. Indeed, there is a fundamental and conceptual distinction between a violation of the prohibition of the use of force within the meaning of Art. 2 (4) UN Charter as the basis of an "act of aggression" (in the sense of GA-Resolution 3314 (XXIX) of 14 December 1974 forming the basis of Art. 8bis (2) ICC Statute) and a "crime of aggression" (within the meaning of Art. 8bis (1) ICC Statute). The former issue – the question of the position of the crime of aggression in a normative hierarchy of international core crimes – is controversial from the outset since many reject the possibility of such a hierarchization in the first place[29]. Even if one believes it to be feasible, there are good reasons for considering genocide, aimed at the complete destruction of a protected group, as the most serious international crime. Ultimately, this is a purely terminological discussion without great substantive importance, because all international crimes, including mere war crimes (as *ius-in-bello*-acts),[30] constitute serious criminal wrongs, which is why impunity is not really an option. Nevertheless, international criminal law, enforced centrally or decentrally, is selective with regard to the acts and the actors (perpetrators), so that the supposed avoidance of selectivity is not *per se* an argument for prosecuting aggressive wars in particular.

(2) Also, the argument is misleading that only by way of the crime of aggression the Russian leadership can be held responsible and that there are no evidentiary problems in this respect[31]. In fact, the crime of aggression as defined by Art. 8bis (1) ICC Statute, which would serve as a blueprint for the statute of a UkrTrib[32], raises considerable problems of interpretation:[33] Who belongs to the leadership level and thus can be a perpetrator of the crime, i.e. who "is actually in a position effectively to exercise control over or to direct the political or military action of a State"?[34] What is a "manifest" violation of the UN Charter by "character", "gravity" and "scale"? Of course, these problems are also linked to intricate questions of evidence: who – apart from Putin – was specifically involved in the decision to invade Ukraine? Who effectively made the decision to invade? What evidence do we have and how reliable is it? The *prima facie* advantage of the peculiar doctrinal structure of the crime of aggression as a leadership crime can easily turn out to be a problem because it requires a downward demarcation to those involved who do not belong to the relevant leadership level. This demarcation is dispensable in the case of the other international core crimes but there, too, the direct crimes of the subordinates can of course be attributed to the superiors at the leadership

[10] Article 437 of the Ukrainian Penal Code punishes "Planning, Preparation and Waging of an Aggressive War" and is thus based on the broad offense of the Nuremberg "Crimes against peace": "planning, preparation, initiation or waging of a war of aggression ..." (Art. 6(a) IMT-Statute). Ullrich seems to overlook this when he (with reference to §§ 1, 13 of the German Code of Crimes against International Law, CCAIL) states that the "domestic jurisdiction of Ukraine ... is subject to similar restrictions". The Russian Federation and Belarus contain largely identical aggression offences, but the Ukrainian parliament, on May 20, 2021, approved Law No. 2689 adjusting the domestic offence to Art. 8bis ICC Statute, which has however not yet come into force, cf. Reisinger Coracini, ZfIStW 2022, 651, 655.

[11] Crit. also Heller; Dannenbaum, JICJ 20 (2022), 859, 871-2; general on western "double standards" in this context Ambos, here and here

[12] Originally Johnson

level using the well-known instruments of criminal law doctrine (indirect perpetration by virtue of organizational control, joint criminal enterprise, command responsibility).[35]

(3) The above-mentioned establishment of a UkrTrib by delegating the territorial jurisdiction of Ukraine implies that this Tribunal is fundamentally to be regarded as a kind of jurisdictional annex of the territorial State. In terms of the law on immunity, this means that it does not act vertically-autonomously vis-à-vis (third) State (like a proper international tribunal), but horizontally-derived, as in a system of inter-state legal assistance. As a consequence, the Russian leadership, at least the troika (Putin as President, Mishustin as Prime Minister and Lavrov as Foreign Minister)[36] would benefit from (absolute) personal immunity derived from state immunity [37] (as long as they are in office).[38]. In terms of the law of cooperation, State obligations to cooperate would only arise for those States which accede to the founding treaty of a UkrTrib. For these and other reasons, an internationalization of the Tribunal would be necessary and this could only be achieved through the GA resolution mentioned above. However, this presupposes, on the one hand, an overwhelming support of such a resolution since only then can it claim to actually express the will of the international community. On the other hand, this resolution should also unequivocally commit itself to the exclusion of immunity (in the sense of Art. 27 ICC Statute), call on the UN Member States to cooperate [39] and regulate other relevant issues. Should it be possible to create an international or at least internationalized UkrTrib in this way, at least the exclusion of immunity including vis-à-vis third States (such as the Russian Federation) could be justified – as indeed done before the ICC.[40] In other words, an UkrTrib could at best, if internationalised, get around the immunity issue in line with ICC law but it could not – as wrongly claimed by some of its supporters, including the EU(!)[41] – overcome the immunity obstacle more easily or directly. Last but not least, one should recall in this context that, a UkrTrib could not – just like the ICC – get hold of the most responsible as long as they remain in power. Only if a regime change took place inside Russia, there would be fundamentally different perspectives, such as the possibility of a UN Security Council referral of the crime of aggression to the ICC (not blocked by a veto of a new Russian government) pursuant to Art. 15ter ICC Statute and/or the ICC's jurisdiction by way of a Russian accession to the ICC Statute pursuant to Art. 15bis (4) ICC Statute. Both scenarios would, however, make a UkrTrib superfluous.[42]

(4) Those in favour of a UkrTrib would also have to explain how this should relate to the ICC. It will certainly not be "affiliated" (Ullrich) to the ICC, but would a "cooperative relationship" analogous to the Relationship Agreement between the UN and the ICC be possible?[43] Would such a Special Tribunal be a national jurisdiction within the meaning of the principle of complementarity (Art. 17 (1)(a), (b) ICC-Statute: "State which has jurisdiction")? ICC President Hofmański rightly affirmed this before the ASP with regard to the above-mentioned Central African Cour Pénale Spéciale,[44] but this tribunal rests on a purely national legal basis and not – like an internationalized UkrTrib – on a GA resolution in conjunction with a bilateral or multilateral treaty. Due to the different relevant *ratione materiae* jurisdiction of the ICC (genocide, crimes against humanity and war crimes) and a UkrTrib (aggression), there would, in principle, be no concurring jurisdiction with regard to the applicable

[13] Krings, ZRP 2022, 129 equates the Nuremberg IMT with the Sierra Leone Tribunal, although its origins and legal basis, as explained in the main text, are quite different.

[14] See only Trahan and Hathaway

[15] Both Krings, ZRP 2022, 129, and Ullrich equate the UN with the CoEand the EU, but Krings at least concedes that a GA Resolution " would be desirable". According to Lagodinsky, Germany must "also become the driving force here", "courageous leadership from Berlin" is expected in Brussels and hoped for in Kyiv. Germany "should … deliver what we can really do: leadership in the area of global justice and criminal prosecution", it should "not voluntarily give up its leadership role in the area of judicial accountability". Is that then the new Green foreign policy: German leadership instead of humility and modesty, and this, in addition, – astonishingly ahistorical – in competition with France, which Lagodinsky mentions as the only country in this context? For a more sophisticated discussion of an involvement of the CoE see Dannenbaum, JICJ 20 (2022), 859, 872

[16] Contrary to Ullrich, this was not a "military court"

crimes. In practice, however, there would surely be parallel investigations into overlapping criminal complexes with the same suspects (in fact, the ICC Prosecutor now already collects and preserves evidence relevant for the crime of aggression too). How would these investigations then be coordinated? Would the ICC or the UkrTrib have priority?[45] How would the prohibition of double jeopardy (*ne bis in idem*, Art 20 ICC Statute) operate? Would such a tribunal be "another court" within the meaning of Article 20(2) ICC Statute, so that the same adjudication of an "idem" ("a crime" within the meaning of Article 20(2) or "same conduct" within the meaning of Article 20(3)) would represent a reciprocal obstacle to criminal prosecution?[46]

(5) The organization and financing of a UkrTrib also raise numerous questions: from which States would the personnel, in particular prosecutors and judges, be recruited?[47] Here, too, exists a risk of a lack of legitimacy, if only supporting States provided the (most important) staff. Where would the seat of the tribunal be? How would the UkrTrib be funded? Even if the costs may appear *quantité négligeable* in comparison to the past and future support of Ukraine,[48] the question is not entirely trivial, because the largest contributors to the ICC are – apart from the USA – also the main supporters of Ukraine and may not be able or willing to bear further expenditures of this kind. It is clear that funding within the framework of the UN is out of question because it could easily be torpedoed by Russia, China and other opponents of such a tribunal. But then only a system of voluntary payments remains – with its known challenges[49] –, be it through supporting States or private-sector instruments.[50] Last but not least, the UkrTrib supporters seem to underestimate the practical difficulties and the timeline in setting up a wholly new special tribunal. The creation of its proper and legitimate legal basis is, as explained above, difficult enough but in addition the actual implementation until having an operational tribunal (with building, staff etc.) takes years, not just months. It may then be quicker to amend the ICC's jurisdictional regime, using especially the GA-option mentioned above. It will certainly also be cheaper to increase the funding of an existing institution like the ICC than to finance a wholly new institution.

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[17] Note, that the "concurring votes of the permanent members" are only required for non-procedural, substantive legal matters ("all other matters") (Art. 27 (2), (3) UN Charter), with the delimitation between substantive and procedural matters sometimes difficult to make. A procedural decision, in which a majority of nine votes is sufficient (Art. 27 (2)), is in any case the referral of a matter to the GA if the Security Council is unable to act due to the veto (see S/RES/2623 (2022) referring the Ukraine situation to the GA).

[18] See also Hartwig, ZfIStW 2022, 642, 643.

[19] Likewise Reisinger Coracini/Trahan.

[20] cf. Article 14 UN Charter and International Court of Justice ('ICJ'), Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, p. 163/16

[21] SCSL, Prosecutor against Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para. 38; also Reisinger Coracini/Trahan, who however do not further qualify the concrete requirement of such a GA resolution.

[22] I note in passing that Ullrich only mentions the GA Res. from March 2022, but fails to mention the ones receiving much less support; nor does Hartwig, ZfIStW 2022, 642, 644-5 mention the resolutions with a lower approval.

[23] Sceptically also McDougall, who therefore supports the treaty option – without a GA resolution (!).

[24] More on these Ambos, Treatise on international Criminal Law. Volume I: Foundations and General Part, 2nd edition 2021, p. 62 ff.

[25] See, for example, the above-mentioned Sierra Leone Special Tribunal, the Kosovo Specialist Chambers or the Cour Pénale Spéciale de la Republique Centrafricaine.

[26] See Ambos/Aboueldahab, Deutsche Richterzeitung 2022, 316.

[27] Khan diplomatically but unequivocally demanded a "focus on the institutions we have built together" and warned against a "dilution": "We don't want dilution, we want consolidation", Opening Remarks, 21th session of the ASP, 5 December 2022; crit. regarding similar previous statements Dannenbaum, JICJ 20 (2022), 859, 863.

[28] See for example, the Lithuanian Foreign Minister Landsbergis in a video message to the ASP on 5 December 2022

[29] In our context, see Nuridzhanian.

[30] I only note in passing that Lagodinsky apparently conflates the difference between *ius in bello* (war crimes) and *ius ad bellum* (aggressive war) when he speaks of "other war crimes" as opposed to aggressive war.

[31] See Ullrich.

[32] Cf. CAVV, p. 10

[33] Cf. Ambos, Treatise on International Criminal Law. Volume II: The Crimes and Sentencing, 2nd ed. 2022, p. 196 ff.

[34] On that also recently CAVV, p. 9

[35] Misleading therefore Ullrich: "Aggression … in contrast [in contrast to other international core crimes] a leadership crime, which is why top Russian politicians can also be held accountable", and Lagodinsky: "Only the investigation of this crime [of aggressive war] would lead us to the actual responsible … – the Russian President, the Foreign Minister, the Prime Minister."; in a similar vein, although more sophisticated Dannenbaum, JICJ 20 (2022), 859, 864 ("Omitting aggression … facilitate impunity of Russian leaders.").

[36] Against an extension to a defence minister CAVV, pp. 10-1

[37] On the more flexible functional immunity see for the current state of the debate CAVV, p. 11-2 concluding, at p. 14, that "a good case can be made for restricting functional immunity for international crimes."

[38] The absolute personal immunity of these highest officials ends with their term of office, cf. ICJ, Case Concerning the Arrest Warrant of 11 April 2002, Democratic Republic of the Congo v. Belgium, Judgment of 14 February 2002, para. 61

[39] However, it should be noted, as already mentioned, that a duty to cooperate can only result from a voluntary treaty obligation of the respective States since, on the one hand, GA resolutions are not binding and, on the other, the GA cannot transfer any powers that it does not possess itself (Correctly Reisinger Coracini/Trahan).

[40] For the exclusion of personal immunity before "certain international criminal courts" see ICJ, Arrest Warrant Case, op. cit., para. 61; SCSL, Decision on Immunity, op.cit., para. 37 ff.; ICC, Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, Prosecutor v. Al Bashir (ICC-02/05-01/09-397), 6 May, 2019, paras. 1, 103-117 (113). See also in this context Johnson, Reisinger Coracini/Trahan; critical Heller and CAVV, p. 13-4 (invoking as counter-argument especially the principle of the relative effect of treaties pursuant to Art. 34 of the Vienna Convention on the Law of Treaties).

[41] The EU – in an "Options paper … on ensuring full accountability" regarding Ukraine – misstated the ICC's law on immunities (pp. 3-4, overlooking, inter alia, the Jordan Appeals Judgment just quoted and considering that immunity applies to nationals of non-State Parties) and implied that a UkrTrib may be advantageous in that regard allowing "for the prosecution of top Russian leaders who would *otherwise* enjoy *immunity*." (p. 7, emphasis added). Given that misreading of the ICC law the ICC Prosecutor rightly complained of a lack of clarity in discussions with the EU to date. The Options paper is not publicly available but there is a press release of 30 November 2022 referring to it.

[42] See also Vasiliev; concurring Heller.

[43] In favour Scheffer.

[44] In the same vein Nerlich/Waespi, ZfIStW 2022, 673, 678

[45] The Central African Cour Pénale Spéciale gives priority to the ICC, cf. Nerlich/Waespi, ZfIStW 2022, 673, 678.

[46] See also Scheffer.

[47] On this, for example, Reisinger/Coracini.

[48] See McDougall: "trivial criticisms"; rightly demanding "cost mitigation" and an "economically efficient" tribunal Dannenbaum, JICJ 20 (2022), 859, 865-6 (as to the "accordion structure" rightly citing the KSC's founding Law, Art. 26 [fn. 32] which however only refers to the "Roster of International Judges" and not to the whole structure).

[49] Recall the experience of other special tribunals, especially the Special Tribunal for Lebanon which basically had to close down for lack of further funding

[50] Cf. Scheffer.