

AN ANALYSIS OF THE POTENTIAL JURISDICTION OF AN INTERNATIONAL CRIMINAL TRIBUNAL FOR THE PROSECUTION OF THE CRIME OF AGGRESSION IN THE RUSSO-UKRAINIAN WAR

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Since Russia launched its full-scale invasion of Ukraine in 2022, there have been calls for Moscow's political and military leadership to be prosecuted for the crime of aggression. Due to the International Criminal Court's inability to prosecute Russian nationals for aggression, efforts have turned to the creation of a "Russian Aggression Tribunal" for the task. However, proponents of the Tribunal have generally failed to articulate its jurisdictional basis in clear terms, in part because of the unclear terminology currently used to describe the jurisdiction of international criminal tribunals. This article seeks to clarify the orthodox jurisdictional bases of international criminal tribunals — emphasising the principle of non-intervention and the importance of consent to the extraterritorial exercise of a prescriptive criminal jurisdiction — and applies this approach to the proposed Russian Aggression Tribunal. The article argues that the Russian Aggression Tribunal would likely be required to prosecute the crime of aggression with reference to Ukraine's objective territorial jurisdiction or universal jurisdiction. Whilst the prosecution of Russian leaders for the invasion of Ukraine is not impossible under international law as it exists today, the task is more legally complex and practically challenging than supporters of the Tribunal have made out.

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I INTRODUCTION

On 24 February 2022, the Russian Federation launched a full-scale invasion of Ukraine.¹ The international response was overwhelmingly condemnatory.² The United Nations General Assembly ('UNGA'), meeting in an emergency special session authorised by the UN Security Council ('UNSC'),³ condemned the 'Special Military Operation' as an 'act of aggression' in violation of art 2(4) of the *UN Charter*.⁴ Outside of the UN, the Council of Europe ('CoE') took the extraordinary decision to expel Russia from the organisation.⁵ On its own terms, Ukraine opened 'lawfare'⁶ fronts at the European Court of Human Rights ('ECtHR')⁷ and the International Court of Justice ('ICJ').⁸ The conflict's most significant lawfare front, however, is not the inter-state front; it is the international criminal legal front. Domestically, Ukraine's Prosecutor General has gathered evidence relating to over 100,000 alleged war crimes,⁹ with some prosecutions having already occurred.¹⁰ Internationally, the International Criminal Court's

¹ For short, competing narratives on the causes of the conflict from Ukrainian and Russian perspectives, see generally 'Preliminary Objections Submitted by the Russian Federation', *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (International Court of Justice, General List No 182, 1 October 2022) 8–32; 'Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation Submitted by Ukraine', *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* (International Court of Justice, General List No 182, 3 February 2023) 5–8.

² Between 24 February – 4 March 2022, 141 UN member states, Kosovo and Taiwan made statements independently or jointly through international fora, including the UN Security Council and General Assembly, condemning the invasion as 'aggression'. In the same period, only four States (excluding Russia) expressed legal or political support for the invasion: Alonso Gurmendi, 'Tracking State Reactions to Russia's Invasion of Ukraine: A Resource for Research', *Opinio Juris* (Blog Post, 4 March 2022) <<https://opiniojuris.org/2022/03/04/tracking-state-reactions-to-russias-invasion-of-ukraine-a-resource-for-research/>>, archived at <<https://perma.cc/UV4S-QRZ6>>.

³ SC Res 2623, UN SCOR, 77th sess, 8980th mtg, Agenda Item 59, UN Doc S/RES/2623 (27 February 2022).

⁴ *Aggression against Ukraine*, GA Res ES-11/1, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/1 (18 March 2022) 3 [2].

⁵ Council of Europe, Committee of Ministers, *Cessation of the Membership of the Russian Federation of the Council of Europe*, CM/Res(2022)2, 16 March 2022.

⁶ Referring to litigation pursuing objectives which could be pursued in kinetic warfare to disadvantage one's enemy: Orde F Kittrie, *Lawfare: Law as a Weapon of War* (Oxford University Press, 2016) 6.

⁷ European Court of Human Rights, 'Inter-State Case *Ukraine v Russia (X)*: Receipt of Completed Application Form and Notifications to Respondent State' (Press Release, 28 June 2022) <<https://hudoc.echr.coe.int/eng-press?i=003-7372751-10076076>>, archived at <<https://perma.cc/5TEV-KXLB>>.

⁸ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation) (Provisional Measures)* [2022] ICJ Rep 211.

⁹ As of February 2024, the Ukrainian Prosecutor General claimed to be investigating over 122,000 war crimes: Nette Nöstlinger, Oliver Ellrodt and Sopia Linnebrink, 'Ukraine Probing Over 122,000 Suspected War Crimes, Says Prosecutor', *Reuters* (online, 24 February 2024) <<https://www.reuters.com/world/europe/ukraine-probing-over-122000-suspected-war-crimes-says-prosecutor-2024-02-23/>>, archived at <<https://perma.cc/PQ8B-LY6V>>.

¹⁰ The first reported conviction for war crimes was in May 2022 for the murder of a 62-year-old civilian: Patrick Jackson and James Waterhouse, 'Ukraine War: Russian Soldier Vadim Shishimarin Jailed for Life Over War Crime', *BBC News* (online, 24 May 2022) <<https://www.bbc.co.uk/news/world-europe-61549569>>, archived at <<https://perma.cc/4LEE-UAGB>>.

(‘ICC’) Prosecutor has opened an investigation into the commission of war crimes, crimes against humanity and genocide in Ukraine.¹¹ Arrest warrants have already been issued for high-ranking Russian officials, including President Vladimir Putin,¹² former Minister of Defence Sergei Shoigu¹³ and Chief of the General Staff of the Armed Forces Valery Gerasimov.¹⁴ Notably absent from the scope of the ICC’s investigation, despite its *prima facie* relevance, is the fourth core international crime codified in the *Rome Statute*: the crime of aggression.¹⁵

The reasons behind this absence are complex. Where an alleged crime was committed on a state party’s territory¹⁶ or by a state party’s national,¹⁷ the ICC can exercise jurisdiction following a state party referral under art 13(a) of the *Rome Statute* or following the commencement of an investigation by the Prosecutor *proprio motu* under art 13(c). Russia is not a party to the *Rome Statute*, but Ukraine has been a state party since 1 January 2025. Under the 2024 law *On the Ratification of the Rome Statute of the International Criminal Court and its Amendments*, Ukraine has retrospectively recognised the jurisdiction of the Court over war crimes, crimes against humanity and genocide as from 21 November 2013, as permitted under art 12(3) of the *Rome Statute*,¹⁸ affirming earlier ad hoc declarations recognising the Court’s jurisdiction.¹⁹ Ukraine has also, for the first time, recognised the Court’s jurisdiction over the crime of aggression as from 17 July 2018.²⁰ However, this acceptance of the ICC’s aggression jurisdiction does not mean that Russian nationals can be prosecuted for aggression in Ukraine. The ICC’s aggression jurisdiction comes with special caveats. Under art 15bis(5) of

¹¹ International Criminal Court, ‘Statement of ICC Prosecutor, Karim AA Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation’ (Press Release, 2 March 2022) <<https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>>, archived at <<https://perma.cc/J6X9-DQXQ>>.

¹² International Criminal Court, ‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova’ (Press Release, 17 March 2023) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>>, archived at <<https://perma.cc/T4HW-BS8T>>.

¹³ International Criminal Court, ‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov’ (Press Release, 25 June 2024) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and>>, archived at <<https://perma.cc/NK2J-BE6U>>.

¹⁴ Ibid.

¹⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 5(d), 8bis (‘*Rome Statute*’).

¹⁶ Ibid art 12(2)(a).

¹⁷ Ibid art 12(2)(b).

¹⁸ *Про ратифікацію Римського статуту Міжнародного кримінального суду та поправок до нього* [On the Ratification of the Rome Statute of the International Criminal Court and its Amendments] (Ukraine) 21 August 2024, Law No 3909-IX, art 2 (‘*Ukrainian Law Ratifying Rome Statute*’).

¹⁹ Before its accession to the *Rome Statute*, Ukraine made two ad hoc declarations — the first recognising the ICC’s jurisdiction over acts committed during the Euromaidan between 21 November 2013 and 22 February 2014; the second accepting the ICC’s jurisdiction generally and indefinitely for alleged crimes committed in the territory of Ukraine from 20 February 2014 onward: Dmytro Koval and Mykhailo Soldatenko, ‘Why Is Ukraine Ratifying the Rome Statute with an Article 124 Caveat?’, *Lawfare* (Web Page, 8 October 2024) <<https://www.lawfaremedia.org/article/why-is-ukraine-ratifying-the-rome-statute-with-an-article-124-caveat>>, archived at <<https://perma.cc/7UXF-G68P>>.

²⁰ *Ukrainian Law Ratifying Rome Statute* (n 18) art 2.

the *Rome Statute*, the ICC cannot exercise jurisdiction under art 13(a) or (c) when the aggression was committed by a national of a non-state party. Alternatively, the ICC may be conferred an aggression jurisdiction over the national of a non-state party where the UNSC has referred a situation to it under art 13(b) of the *Rome Statute*. Due to Russia's UNSC veto,²¹ the art 13(b) jurisdiction will not arise, notwithstanding that art 15*ter*(1) affirms that a non-state party may be subject to the ICC's aggression jurisdiction under art 13(b). In practice, Russian nationals are *completely* excluded from the ICC's aggression jurisdiction.²²

In response to this jurisdictional gap, civil society actors, states and international organisations have advocated for the creation of an ad hoc tribunal mandated to prosecute Russia's political and military leadership for the crime of aggression. The first major call for a tribunal was made by a collection of academics, lawyers and human rights campaigners on 4 March 2022, following an event at Chatham House endorsed by Ukraine's Minister of Foreign Affairs.²³ On 26 April 2022, the Parliamentary Assembly of the Council of Europe ('PACE') called for the creation of such an ad hoc international criminal tribunal based in Strasbourg.²⁴ In July 2023, the International Centre for the Prosecution of the Crime of Aggression against Ukraine was established within the European Union Agency for Criminal Justice Cooperation to gather evidence for future aggression prosecutions.²⁵ Support for the project has been expressed, inter alia, by the European Parliament,²⁶ the North Atlantic Treaty Organization ('NATO')

²¹ *Charter of the United Nations* art 27(3).

²² See Stefan Barriga and Niels Blokker, 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017) 652, 658–9. Were Russia also a state party, it could still exclude the aggression jurisdiction by declaration: *Rome Statute* (n 15) art 15*bis*(4).

²³ Office of Gordon and Sarah Brown, 'Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine', (Press Release, 4 March 2022) <<https://gordonandsarahbrown.com/2022/03/calling-for-the-creation-of-a-special-tribunal-for-the-punishment-of-the-crime-of-aggression-against-ukraine/>>, archived at <<https://perma.cc/U766-G757>>.

²⁴ Council of Europe, Parliamentary Assembly, *The Russian Federation's Aggression against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes*, Doc No Res 2436(2022), 28 April 2022, 2 [11.6].

²⁵ European Union Agency for Criminal Justice Cooperation, 'History in the Making — the International Centre for the Prosecution of the Crime of Aggression Against Ukraine Starts Operations at Eurojust' (Press Release, 3 July 2023) <<https://www.eurojust.europa.eu/news/history-making-international-centre-prosecution-crime-aggression-against-ukraine-starts-operations-at-eurojust>>, archived at <<https://perma.cc/3R7N-YS6H>>.

²⁶ *European Parliament Resolution of 19 May 2022 on the Fight against Impunity for War Crimes in Ukraine* [2022] OJ C 479/68, 72–3 [12]–[13].

Parliamentary Assembly,²⁷ key Ukrainian allies,²⁸ and President Volodymyr Zelenskyy.²⁹

This contribution does not address the normative question of whether prosecutions for the crime of aggression *should* occur. However, if the “Russian Aggression Tribunal” comes to fruition, it will be only the fourth international criminal tribunal to claim an aggression jurisdiction — following the International Military Tribunal (‘IMT’),³⁰ the International Military Tribunal for the Far East (‘IMTFE’)³¹ and the ICC — and it may be the first to exercise it since the Nuremberg and Tokyo trials. If we adhere to the view that international law is *law*, and not merely international politics cloaked with a legal vocabulary, then it becomes necessary to determine whether and how the Russian Aggression Tribunal could make a lawful claim to adjudicate the crime of aggression. This article analyses that question by explaining the general boundaries of international criminal jurisdiction for states and tribunals in Part II and then by identifying the Russian Aggression Tribunal’s potential jurisdictional bases in Part III. Part IV offers some concluding remarks.

II INTERNATIONAL CRIMINAL JURISDICTION AND INTERNATIONAL CRIMINAL TRIBUNALS

The term “jurisdiction” in international law is somewhat ambiguous. In the context of statehood, the term refers to the extent to which a state can exercise its sovereign power to regulate conduct,³² an iterative process which gives effect to and delimits state sovereignty.³³ By contrast, the “jurisdiction” of international tribunals is used interchangeably to describe two related, but nonetheless distinct, concepts. The first is whether the tribunal has been empowered to authoritatively determine certain legal matters.³⁴ The second, narrower, concept concerns the

²⁷ North Atlantic Treaty Organization Parliamentary Assembly, *Declaration on Standing with Ukraine*, Doc No 111 SESP 22 E rev.1 fin, 30 May 2022, 3 [18(j)].

²⁸ Ministry of Foreign Affairs (Lithuania), ‘The Ministers of Estonia, Latvia and Lithuania Call to Establish a Special Tribunal to Investigate the Crime of Russia’s Aggression’ (Press Release, 16 October 2022) <<https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression>>, archived at <<https://perma.cc/7CET-YAHD>>.

²⁹ Volodymyr Zelenskyy, ‘We Must Create a Special Tribunal on the Crime of Aggression against Ukraine’ (Speech, Public Debate ‘War and Law’ in Paris, 5 October 2022) <<https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285>>, archived at <<https://perma.cc/V3BA-7Q5E>>.

³⁰ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex (‘Charter of the International Military Tribunal’) art 6(a) (‘IMT Charter’).

³¹ *Charter of the International Military Tribunal for the Far East: Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, TIAS 1589 (signed and entered into force 19 January 1946) art 5(a) (‘IMTFE Charter’).

³² James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 440.

³³ Cedric Ryngaert, ‘The Concept of Jurisdiction in International Law’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 50, 51.

³⁴ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [10] (‘*Tadić Interlocutory Appeal on Jurisdiction*’).

temporal, spatial, personal and subject-matter conditions imposed on the exercise of that jurisdiction, otherwise describable as the tribunal's 'competence'.³⁵

Every determination which an international criminal tribunal purports to make in the name of the international rule of law is contingent on its exercise of an internationally recognisable form of jurisdiction. Thus, it is vital that its jurisdiction is clearly defined and understood. This proposition is fundamental, yet the proponents of a Russian Aggression Tribunal generally fail to articulate a precise jurisdictional basis for it.³⁶ For example, the PACE proposal moots the Tribunal's jurisdiction in vague terms. The 'best option', according to its explanatory memorandum, is

for a group of States to create a special international tribunal for the punishment of the crime of aggression against Ukraine ... on the basis of a multilateral treaty, granting it jurisdiction over the crime of aggression as defined in customary international law.³⁷

Such language is liable to create a false impression. A Russian Aggression Tribunal will either have a valid jurisdiction in international law, or it will not. This is an objectively ascertainable matter of law which depends on the Tribunal's constitution. It does not depend on a subjective intention to grant the Tribunal a particular jurisdiction.

Academic commentary has been more discerning, but the discussion is beset by opaque terminology. The established canon of the non-ICC international criminal tribunals typically adopts the following groupings: (i) the IMT and IMTFE, (ii) the ad hoc ICTY and ICTR, and (iii) the 'hybrid' Special Court for Sierra Leone ('SCSL'), Extraordinary Chambers in the Courts of Cambodia ('ECCC') and Special Tribunal for Lebanon ('STL').³⁸ This taxonomy assists little with the identification of the tribunals' jurisdictions. The IMT and IMTFE are grouped due to their contribution to international criminal law's 'Grotian moment'.³⁹ The ICTY and ICTRs' ad hoc prefix refers to the relationship between the tribunals and the events to which they relate, insofar as they were ad hoc responses to certain events. *Every* pre-ICC tribunal can be characterised as ad hoc. Although the "hybrid" designation may implicate jurisdiction, insofar as it superficially reflects the international community's participation in a mixed international/national tribunal, the term essentially describes the *institutional* fact of the tribunal's hybridisation. After all, international law recognises no "hybrid" jurisdiction. Rather, the term is an 'imperfect descriptive label conveying [the]

³⁵ Ibid.

³⁶ By contrast, a detailed analysis of the Tribunal's potential legal foundations and interaction with immunities was created for the European Parliament's Subcommittee on Human Rights ('DROI'): cf Oliver Corten and Vaïos Koutroulis, *Tribunal for the Crime of Aggression against Ukraine — A Legal Assessment* (In-Depth Analysis No PE 702.574, European Parliament, December 2022).

³⁷ Council of Europe, Committee on Legal Affairs and Human Rights, *The Russian Federation's Aggression against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes*, Doc No 15510, 26 April 2022, 15 [30].

³⁸ See, eg, Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 4th ed, 2019) 115–143; 173–202.

³⁹ Michael P Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press, 2013) 65–8.

special nature’ of a particular criminal tribunal resulting from a ‘distinct combination of international and national elements’.⁴⁰

In the commentary, these classifications are deployed loosely. For example, Tom Dannenbaum describes two potential judicial fora for an international aggression prosecution: the ICC and a new ad hoc tribunal.⁴¹ However, under the latter category, Dannenbaum describes a tribunal created via the pooling of states parties’ universal jurisdiction or a hybridised tribunal created pursuant to an UNGA resolution.⁴² In later commentary, Dannenbaum outlines possible problems which could beset a domestic aggression prosecution by Ukraine, including sovereign equality concerns and the risk of partiality.⁴³ However, despite analysing *these* issues cogently, Dannenbaum fails to express any specific jurisdictional basis for a Russian Aggression Tribunal, instead suggesting possible institutional frameworks such as creation under a CoE-coordinated multilateral treaty or endorsement by the UNGA.⁴⁴ Alexander Komarov and Oona Hathaway similarly distinguish between ‘international’ and ‘hybrid’ tribunals, favouring the former for reasons of Ukrainian constitutional law, and propose ‘an international tribunal established by [the] UN General Assembly’ and a ‘special tribunal modeled on Nuremberg’.⁴⁵ In essence, the commentators’ proposals fall into three groups. The first supports a tribunal created by agreement between Ukraine and the UN or CoE — albeit with disagreement as to whether this tribunal would be a

⁴⁰ Cryer, Robinson and Vasiliev (n 38) 174.

⁴¹ Tom Dannenbaum, ‘Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine’, *Just Security* (Blog Post, 10 March 2022) <<https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>>, archived at <<https://perma.cc/9JTG-UEYC>> (‘Mechanisms for Criminal Prosecution’).

⁴² Ibid. Carrie McDougall gives the same description of ad hoc tribunal options in her proposal in favour of internationalising the crime of aggression: Carrie 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* (Blog Post, 15 March 2022) <<https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>>, archived at <<https://perma.cc/7EPH-F44F>> (‘Special Tribunal for Aggression Against Ukraine is the Best Available Option’).

⁴³ Tom Dannenbaum, ‘A Special Tribunal for the Crime of Aggression?’ (2022) 20(4) *Journal of International Criminal Justice* 859, 861–2.

⁴⁴ Ibid 872.

⁴⁵ Alexander Komarov and Oona A Hathaway, ‘Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression’, *Just Security* (Blog Post, 5 April 2022) <<https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>>, archived at <<https://perma.cc/G7LX-39KD>>. See below Part III(A).

domestic court with international support or a “proper” international tribunal.⁴⁶ The second endorses, or suggests the availability of, a tribunal modelled on the Chatham House proposal — albeit without consensus as to the exact nature of its jurisdiction.⁴⁷ The third rejects, explicitly or implicitly, the internationalisation of the crime of aggression, supporting domestic Ukrainian prosecution instead.⁴⁸

This jurisdictional fuzziness is concerning. Should a Russian Aggression Tribunal come to be, it must be constituted to exercise a recognisable jurisdiction under international law which will provide it with a transparently lawful and legitimate foundation, not an imprecisely defined jurisdiction obscured by terminological opacity. To that end, it is necessary to systematically analyse the jurisdictional parameters under which international criminal tribunals act — without reliance on the traditional and unhelpful taxonomy — to demarcate the potential jurisdictional basis of a Russian Aggression Tribunal.

A Sovereign Equality and the Principle of Non-Intervention

An analysis of the jurisdictional parameters of international criminal tribunals should first consider the conditions under which their creators — states — can exercise their prescriptive criminal jurisdictions, ie the circumstances in which states can make criminal laws applicable to certain persons and activities.⁴⁹ The foundational principle as regards state jurisdiction is that of non-intervention, an innominate norm in the *UN Charter* whose existence flows from the recognition

⁴⁶ Jennifer Trahan, ‘UN General Assembly Should Recommend Creation Of Crime Of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model’, *Just Security* (Blog Post, 7 March 2022) <<https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>>, archived at <<https://perma.cc/4FMP-URJG>>; Kevin Jon Heller, ‘The Best Option: An Extraordinary Ukrainian Chamber for Aggression’, *Opinio Juris* (Blog Post, 16 March 2022) <<https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>>, archived at <<https://perma.cc/2BDQ-N57Y>> (‘The Best Option’); McDougall, ‘Special Tribunal for Aggression Against Ukraine is the Best Possible Option’ (n 42); Oona A Hathaway, ‘The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)’, *Just Security* (Blog Post, 20 September 2022) <<https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>>, archived at <<https://perma.cc/48VH-86AQ>> (‘The Case for Creating an International Tribunal’).

⁴⁷ Dannenbaum, ‘Mechanisms for Criminal Protection’ (n 41); McDougall, ‘Special Tribunal for Aggression Against Ukraine is the Best Available Option’ (n 42); Komarov and Hathaway (n 45).

⁴⁸ Sergey Vasiliev, ‘Aggression against Ukraine: Avenues for Accountability for Core Crimes’, *EJIL:Talk!* (Blog Post, 3 March 2022) <<https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>>, archived at <<https://perma.cc/W2LH-RCVA>>; Kevin Jon Heller, ‘Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea’, *Opinio Juris* (Blog Post, 7 March 2022) <<https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>>, archived at <<https://perma.cc/786Z-WK34>>. Cf Heller’s endorsement of a ‘hybrid’ tribunal model eight days later: Heller, ‘The Best Option’ (n 46).

⁴⁹ This jurisdiction is commonly contrasted with the state’s ‘enforcement jurisdiction’, ie the state’s power to act in pursuance of its prescriptions: Ryngaert, ‘The Concept of Jurisdiction in International Law’ (n 33) 54; Crawford (n 32) 440. In the context of criminal jurisdiction, a state’s prescriptive and adjudicatory jurisdiction is coterminous as a state’s courts will determine criminal matters under its own law: Michael Akehurst, ‘Jurisdiction in International Law’ (1975) 46 *British Yearbook of International Law* 145, 179.

of formal sovereign equality⁵⁰ and the right to self-determination⁵¹ in arts 2(1) and 1(2) respectively. The principle of non-intervention has since been explicitly recognised as a ‘basic’ principle of international law in the UNGA’s *Friendly Relations Declaration*⁵² whose customary status was confirmed by the ICJ in *Nicaragua*.⁵³ The crux of the principle is simple: states are sovereign equals which are entitled to exercise their sovereign rights in accordance with their self-determined interests. State A cannot interfere in the internal or external affairs of State B which bear on State B’s sovereignty as this would subordinate State B’s sovereign rights to State A.⁵⁴ For the non-intervention principle to be violated, a state must be coerced into action,⁵⁵ ie compelled to undertake conduct by threats or the imposition of negative consequences caused by another state.⁵⁶ Although the principle is well-known to be breached when the prohibition on the use of force is violated,⁵⁷ the principle may also be engaged by non-forceful conduct. As Dire Tladi summarises: ‘any form of intervention which is intended to coerce a State in a matter within the internal or sovereign domain of the targeted State would violate the duty of non-intervention’.⁵⁸

B The Principles of Territoriality, Extraterritoriality and State Consent

A fundamental element of state sovereignty is the exclusive regulation of a certain portion of the Earth’s surface.⁵⁹ For international criminal jurisdiction, this essential incident of sovereign statehood gives rise to the ‘territorial principle’ — the ‘most basic’ principle of international criminal jurisdiction⁶⁰ — under which the state enjoys criminal prescriptive jurisdiction over offences which take place in whole or in part within its territory.⁶¹ Accordingly, it is likely a *prima facie* violation of the principle of non-intervention for another state to assert its

⁵⁰ A necessary consequence of Westphalian statehood, although material equality remains elusive: Martti Koskeniemi and Ville Kari, ‘Sovereign Equality’ in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020) 166, 168, 181.

⁵¹ Dire Tladi, ‘The Duty Not to Intervene in Matters within Domestic Jurisdiction’ in Jorge E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press, 2020) 87, 87–90.

⁵² *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/RES/2625(XXV) (24 October 1970) annex paras 1, 3 (‘*Friendly Relations Declaration*’).

⁵³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 106–7 [202] (‘*Nicaragua*’).

⁵⁴ Ibid 107–8 [205].

⁵⁵ Ibid.

⁵⁶ Tladi (n 51) 91–2.

⁵⁷ Ibid 89.

⁵⁸ Ibid 93.

⁵⁹ Recognised in the *Island of Palmas* arbitral case: Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015) 36, quoting *Island of Palmas (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829.

⁶⁰ Ryngaert, *Jurisdiction in International Law* (n 59) 49, 101. The uncontested nature of this jurisdiction is well-documented: *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 18 (‘*Lotus*’); ‘Draft Convention on Jurisdiction with Respect to Crime’ (1935) 29(S1) *American Journal of International Law* 439, 480; Akehurst, ‘Jurisdiction in International Law’ (n 49) 152–3; Crawford (n 32) 442.

⁶¹ ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60) art 3.

prescriptive criminal jurisdiction over extraterritorial events.⁶² Although it is well-established that this jurisdiction is independent from the state's enforcement jurisdiction,⁶³ when the prescriptive jurisdiction is invoked in a specific case it is implicit that the state's enforcement jurisdiction may be engaged to support the assertion within the asserting state's territory, for example through the seizure of local assets.⁶⁴ The asserting state seeks to challenge the affected state's territorial jurisdictional monopoly, thereby satisfying the coercion requirement for the violation of the non-intervention principle.

In reality, a state's prescriptive criminal jurisdiction is not exclusively territorial. Rather, international law has developed a framework within which states can exercise this jurisdiction extraterritorially under certain circumstances. The exact nature of this framework is disputed: is an exercise of extraterritorial jurisdiction essentially permitted but restricted by customary prohibitions or essentially prohibited but permitted under certain customary permissions? The former view finds its classical statement in the Permanent Court of International Justice's ('PCIJ') *Lotus* judgment. The Court, having concluded that restrictions on state sovereignty cannot be presumed and having determined that a state's prescriptive criminal jurisdiction is essentially territorial,⁶⁵ explained that a state may exercise jurisdiction in relation to extraterritorial events as international law does not generally prohibit such an assertion:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules ...⁶⁶

Today, however, the latter view has eclipsed the *Lotus* approach.⁶⁷ This predominance is clear from the fact that the boundaries of international criminal prescriptive jurisdiction are orthodoxically explained with reference to four

⁶² As explained by Maziar Jamnejad and Michael Wood, the exercise of an extraterritorial jurisdiction without a recognised basis in international law, such as the exercise of jurisdiction over a non-national abroad concerning conduct which does not engage a universal jurisdiction, would 'very likely contravene the non-intervention principle': Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22(2) *Leiden Journal of International Law* 345, 372–3.

⁶³ Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735, 736–7 ('Universal Jurisdiction').

⁶⁴ An example given by Ryngaert in the context of an exercise of universal jurisdiction in absentia: Ryngaert, *Jurisdiction in International Law* (n 59) 134–5. Another example would be the usage of 'access blocking orders' to restrict local internet access to online locations which fail to comply with Correction Directions under Singapore's *Protection from Online Falsehoods and Manipulation Act 2019* (Singapore) s 16(2) ('POFMA'). On the extraterritorial reach of POFMA, see Dominic Bielby, 'Kerajaan Malaysia v Lawyers for Liberty: At the Confluence of Fake News and Extraterritoriality', *EJIL:Talk!* (Blog Post, 14 January 2025) <<https://www.ejiltalk.org/kerajaan-malaysia-v-lawyers-for-liberty-at-the-confluence-of-fake-news-and-extraterritoriality/>>, archived at <<https://perma.cc/J9LK-BDB9>>.

⁶⁵ *Lotus* (n 60) 18.

⁶⁶ *Ibid* 19.

⁶⁷ Ryngaert suggests that it remains unclear which approach is ascendent but later explains extraterritorial jurisdiction with reference to the four customary principles, an implicit rejection of the *Lotus* approach: Ryngaert, *Jurisdiction in International Law* (n 59) 29, 49–120.

permissive principles — the nationality/personality principle, the passive personality principle, the protective principle and the universality principle. These delimit specific circumstances in which a state may lawfully prescribe extraterritorial conduct.⁶⁸ If the *Lotus* approach were ascendent, international law would recognise prohibitive principles which demarcate when jurisdictional assertions are impermissible; this is clearly not the system which exists. There are also strong normative reasons to disfavour the *Lotus* approach. As Cedric Ryngaert notes, *Lotus* endorsed a concept of sovereignty which emphasised the independence of states in the extreme by failing to countenance the impact of the exercise of sovereign rights on the sovereignty of other states.⁶⁹ Such libertarianism grates against a modern international legal order which concerns itself intently with ensuring that states respect the rights of other states as exemplified by the principle of non-intervention. That *Lotus* represented a ‘high water mark of laissez-faire in international relations’ which has been ‘overtaken by other tendencies’ was observed in *Arrest Warrant* by Judges Higgins, Kooijmans and Buergenthal.⁷⁰ These judges rejected the *Lotus* approach *in casu* by recognising that the existence of universal jurisdiction depended on its positive recognition by states.⁷¹

For some, the distinction between the two approaches is minor. James Crawford suggested that the approaches boiled down to the requirement that states act within the boundaries of international law.⁷² Other scholars propose that the distinction essentially concerns the allocation of the burden of proof.⁷³ However, the rejection of the *Lotus* approach is important insofar as it clearly emphasises the fundamental principle which determines whether State A can exercise extraterritorial jurisdiction in State B: consent. If State B *consents* to State A’s exercise of jurisdiction concerning a matter within State B’s territory, then the mischief which the non-intervention principle prevents is nullified.⁷⁴ If State B does not consent, State A acts unlawfully if it makes such a jurisdictional claim.

⁶⁸ The principles articulation is commonly traced to the Harvard Draft Convention on Jurisdiction with Respect to Crime and is regularly, substantially reasserted in commentary: ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60); Akehurst, ‘Jurisdiction in International Law’ (n 49) 156–66, subsuming passive personality within universal jurisdiction; Alexander Orakhelashvili, ‘State Jurisdiction in International Law: Complexities of a Basic Concept’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 1, 23–5, 39; Ryngaert, *Jurisdiction in International Law* (n 59) 101; Crawford (n 32) 442–51; Kenneth S Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?* (Oxford University Press, 2022) 143 (‘*International Criminal Jurisdiction*’).

⁶⁹ Ryngaert, *Jurisdiction in International Law* (n 59) 32–3.

⁷⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 78 [51] (Judges Higgins, Kooijmans and Buergenthal) (‘*Arrest Warrant*’).

⁷¹ *Ibid* 79 [52]. *Lotus* was also subjected to incisive criticism from President Guillaume: at 42–3 [13]–[15] (President Guillaume).

⁷² *Lotus* (n 60) 19; Crawford (n 32) 442.

⁷³ ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60) 468; Ryngaert, *Jurisdiction in International Law* (n 59) 35.

⁷⁴ This could also be characterised as State B’s consent precluding the *prima facie* wrongfulness of State A’s act: *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 10, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex, art 20 (‘*ARSIWA*’).

Consent to an exercise of extraterritorial jurisdiction can be accorded generally via customary law or on a *sui generis* basis.⁷⁵ The former, and more common, option is considered first.

1 *General Consent to the Exercise of Extraterritorial Prescriptive Criminal Jurisdiction under Customary International Law*

The four positive principles of extraterritorial criminal jurisdiction are generally recognised as customary international law,⁷⁶ norms created through general state practice combined with *opinio juris*.⁷⁷ These are norms to which all states are bound, irrespective of whether they themselves have generated state practice or *opinio juris*,⁷⁸ due to their consent to the *system* of customary international law. However, a state may manifest a more specific consent to avoid being bound by a nascent rule of custom through persistent objection.⁷⁹ As such, consent is that which formally underpins the applicability of customary norms to a state. Accordingly, when we refer to the four principles of extraterritorial jurisdiction, we mean that states generally consent to four circumstances in which State A may derogate from the essential territoriality of its prescriptive criminal jurisdiction to exercise jurisdiction over an event in State B. In the case of the personality, passive personality and protective principles, states consent to an extraterritorial jurisdiction being exercised over an act in State B on account of a nexus which State A enjoys to the perpetrator or act. By contrast, the universality principle recognises that all states have an interest in exercising jurisdiction over *specific* offences due to their harm to the world order.⁸⁰ The offence classically subject to universal jurisdiction is piracy as an offence which wrongs all states — a *delictus juris gentium*⁸¹ — or as an offence which lacks a clear territorial nexus; the exercise of universal jurisdiction is required to prevent impunity.⁸² Crimes

⁷⁵ To this extent, *Lotus* is correct when it states that: ‘The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law’: *Lotus* (n 60) 18.

⁷⁶ Ryngaert, *Jurisdiction in International Law* (n 59) 101. See also the implicit recognition of the principles’ customary status in the ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60) 475.

⁷⁷ *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 44 [77] (*‘North Sea Continental Shelf’*); *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99, 122–3 [55]; International Law Commission, *Report of the International Law Commission: Seventieth Session*, UN GAOR, 73rd sess, Supp No 10, UN Doc A/73/10 (2018) 124.

⁷⁸ *North Sea Continental Shelf* (n 77) 38–9 [63]; Michael Akehurst, ‘Custom as a Source of International Law’ (1975) 47 *British Yearbook of International Law* 1, 18.

⁷⁹ Akehurst, ‘Custom as a Source of International Law’ (n 78) 23–7; James A Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016) 7. However, Green questions the extent to which the rule reflects the orthodox consent-focused understanding of international law: at 8–9.

⁸⁰ M Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42(1) *Virginia Journal of International Law* 81, 96.

⁸¹ See *King v Marsh* (1615) 3 Bulstrode 27; 81 ER 23.

⁸² ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60) 566; Bassiouni (n 80) 96–7; Sienho Yee, ‘Universal Jurisdiction: Concept, Logic and Reality’ in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, 2015) 76, 78.

which are today alleged to be subject to universal jurisdiction⁸³ are typically characterised as modern *delicta juris gentium*.⁸⁴

2 *Sui Generis Consent to the Exercise of Extraterritorial Prescriptive Criminal Jurisdiction by Treaty*

General consent to jurisdiction via customary norms is not the only way through which a lawful extraterritorial jurisdiction may arise: State B can consent to the extraterritorial exercise of State A's jurisdiction *sui generis*, usually by treaty. This method is exemplified by two types of convention. The first are 'universal suppression' conventions containing *aut dedere aut judicare* obligations, typified by the 1970 *Hague Convention for the Suppression of the Unlawful Seizure of Aircraft*.⁸⁵ The *aut dedere aut judicare* obligation requires a state party to prosecute an individual for conduct criminalised under the convention or to relieve itself of the prosecutorial obligation by extraditing the individual.⁸⁶ For a state party to discharge the prosecutorial obligation, it must have a prescriptive criminal jurisdiction over the offence. Due to the conventions' focus on transnational crimes, in many instances the jurisdiction which the state is required to exercise is extraterritorial. In some cases, a state may have recourse to one of the three customary principles of extraterritorial jurisdiction with a nexus to the state to prosecute the relevant transnational crime.⁸⁷ In the absence of such a nexus, the universality principle is described by the International Law Commission ('ILC') as being *necessarily* engaged in order to provide the jurisdictional basis on which the prosecutorial obligation can bite.⁸⁸

This proposition is misleading. Under some suppression conventions, a state subject to the prosecutorial obligation may be able to take universal jurisdiction over an offence due to that offence engaging the customary universality principle, eg torture under art 5(2) of the *United Nations Convention against Torture*

⁸³ Usually, the 'core international crime[s]' of genocide, crimes against humanity and war crimes, with torture sometimes included: Gallant (n 68) 466.

⁸⁴ *Arrest Warrant* (n 70) 81 [60]–[61] (Judges Higgins, Kooijmans and Buergenthal); Gallant (n 68) 468.

⁸⁵ *Convention for the Suppression of the Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971) ('1970 Hague Convention'). See *Arrest Warrant* (n 70) 38–9 [7]–[8] (President Guillaume); Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute* (Oxford University Press, 2018) 173–5.

⁸⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 456 [94]–[95].

⁸⁷ International Law Commission, *Report of the International Law Commission: Sixty-Sixth Session*, UN GAOR, 69th sess, Agenda Item 78, Supp No 10, UN Doc A/69/10 (2014) 149–50 [18].

⁸⁸ *Ibid.* See also Zdzislaw Galicki, Special Rapporteur, *Preliminary Report on the Obligation to Extradite or Prosecute ('Aut Dedere Aut Judicare')*, UN GAOR, 58th sess, UN Doc A/CN.4/571 (7 June 2006) 9–10 [31].

(‘*Convention against Torture*’).⁸⁹ However, some convention offences are patently not *delicta juris gentium*, such as the offence of performing an act of violence on an aircraft which is likely to endanger the aircraft.⁹⁰ As a suppression convention itself cannot expand customary law to include such an offence, it follows that the suppression convention — specifically its *aut dedere aut judicare* obligation — is itself the source of the consent to the other states parties exercising extraterritorial jurisdiction under the circumstances delimited by the convention.⁹¹ The alternative proposition — that a state can only take jurisdiction under suppression conventions pursuant to an existing customary principle of extraterritorial jurisdiction — is untenable: it would ignore the mandatory language of the “Hague formula”⁹² and it would be incompatible with the object and purpose of the conventions,⁹³ ie that individuals cannot find refuge anywhere in the world for their offences.⁹⁴

The second, less prolific, means through which State B can consent to State A’s extraterritorial jurisdictional exercise *sui generis* is through transfer of proceedings agreements, the paramount example being the 1972 *European Convention on the Transfer of Proceedings* (‘ECTP’).⁹⁵ Under such agreements, State B may transfer a criminal case to State A for prosecution. Often, States A and B will both have *prima facie* jurisdiction over the case through a territorial or customary extraterritorial jurisdiction, but there will be situations in which State A lacks such jurisdiction. To ensure that the transfer of proceedings agreement is not undermined, the agreement *creates* a jurisdiction,⁹⁶ subject to conditions,⁹⁷ allowing State A to lawfully prosecute the individual. A recent and relevant

⁸⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*Convention against Torture*’); *Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 451 [74]. For the applicability of the customary universality principle to torture, see *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/1-T, 10 December 1998) [153]–[154]; *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 198 (Lord Browne-Wilkinson) (‘*Pinochet (No 3)*’); Orakhelashvili (n 68) 39–41.

⁹⁰ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) art 1(a).

⁹¹ *Arrest Warrant* (n 70) 38–40 [7]–[9], [11] (President Guillaume); Crawford (n 32) 454.

⁹² 1970 *Hague Convention* (n 85) art 4(2): ‘Each Contracting State *shall* likewise take such measures as *may be necessary* to establish its jurisdiction over the offence in the case where the alleged offender is present in their territory’ (emphasis added). The words ‘may be necessary’ indicate that the state may already have jurisdiction under customary international law.

⁹³ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) (‘*VCLT*’).

⁹⁴ *Arrest Warrant* (n 70) 39 [9] (President Guillaume). On the *Convention against Torture* specifically, see *Pinochet (No 3)* (n 89) 199 (Lord Browne-Wilkinson).

⁹⁵ *European Convention on the Transfer of Proceedings in Criminal Matters*, opened for signature 15 May 1972, 1137 UNTS 29 (entered into force 30 March 1978) (‘ECTP’).

⁹⁶ *Ibid* art 2(1). See Council of Europe, *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters* (Report No ETS 73, 15 May 1972) 5 [13], 7 [19], 14 [32]; Boudewijn de Jonge, ‘Transfer of Criminal Proceedings: From Stumbling Block to Cornerstone of Cooperation in Criminal Matters in the EU’ (2020) 21(3) *ERA Forum* 449, 450.

⁹⁷ For example, that the requested state has criminalised the relevant conduct under its domestic law: *ECTP* (n 95) art 2(1).

example is the jurisdiction exercised by the District Court of The Hague in *MH17* over three Russians and a Ukrainian national for offences connected with the downing of Malaysia Airlines Flight 17 in July 2014. The defendants had been charged with two crimes under the *Dutch Criminal Code* — intentionally causing an aircraft to crash and murder on 298 counts⁹⁸ — pursuant to a transfer of proceedings agreement between the Netherlands and Ukraine which incorporated provisions of the *ECTP*.⁹⁹ Under customary extraterritorial jurisdictional principles, the Netherlands could only assume jurisdiction through the passive personality principle over the crash-related offence and the 205 counts of murder concerning Dutch nationals.¹⁰⁰ Thus, the jurisdiction which the District Court asserted over the murder of the 93 non-Dutch nationals was grounded in the *Netherlands-Ukraine Transfer Agreement* itself,¹⁰¹ as recognised in the Court's judgment:

[J]urisdiction is not self-evident in the event of offences that have taken place outside the Netherlands. However, *because flight MH17 was shot down over Ukraine, and Ukraine has transferred the resulting jurisdiction to the Netherlands, the Netherlands already has jurisdiction for that reason alone*. This means that prosecution is possible in the Netherlands, irrespective of the nationalities of the victims.¹⁰²

Hence, Ukraine, which self-evidently had territorial jurisdiction over the incident, consented to the Netherlands' *sui generis* assumption of jurisdiction over the connected offences via treaty. The Netherlands could *only* assume jurisdiction over all the offences it purported to adjudicate by virtue of that consent. We should be mindful that the examples given are merely illustrative of a general principle of extraterritorial jurisdiction: a state can consent to *any* exercise of extraterritorial jurisdiction within its territory, the state's consent precluding the engagement of the non-intervention principle whose violation the general prohibition on extraterritorial jurisdictional assertions seeks to prevent.

C *International Criminal Tribunals and the Nemo Dat Non Quod Habet Principle*

Having outlined the basic parameters of states' prescriptive criminal jurisdictions, it is necessary to address how these limitations affect international criminal tribunals. International criminal tribunals are a form of international organisation. Although they may enjoy international legal personality and be enlivened by institutional supranationalism, international organisations are ultimately state creations. It is axiomatic that an international organisation cannot

⁹⁸ Lachezar Yanev, 'Jurisdiction and Combatant's Privilege in the *MH17* Trial: Treading the Line Between Domestic and International Criminal Justice' (2021) 68(2) *Netherlands International Law Review* 163, 167.

⁹⁹ *Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation Regarding Crimes Connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014*, signed 7 July 2017, 3273 UNTS (entered into force 28 August 2018) ('*Netherlands-Ukraine Transfer Agreement*').

¹⁰⁰ Yanev (n 98) 170.

¹⁰¹ *Ibid* 171–3.

¹⁰² 'Transcript of the MH17 Judgment Hearing', *District Court of The Hague* (Web Page, 17 November 2022) <<https://www.courtmh17.com/en/news/2022/transcript-of-the-mh17-judgment-hearing.html>>, archived at <<https://perma.cc/6E6T-EVJA>> (emphasis added).

be granted greater powers than its creating states parties possess; this reflects the basic legal maxim of *nemo dat quod non habet*. For international tribunals of all types, this maxim manifests as the *Monetary Gold* principle: as international tribunals are created by treaties between states and treaties cannot bind third states,¹⁰³ an international tribunal cannot adjudicate a claim when a non-consenting third state's legal interests are the very subject matter of the decision.¹⁰⁴ In other words, as States A and C cannot themselves adjudicate on the legal interests of State B due to the principle of non-intervention, a tribunal created by States A and C by treaty *also* cannot adjudicate State B's legal interests.

This principle extends to international criminal tribunals. There is nothing special about such tribunals which allows them to defy the consent-based nature of extraterritorial criminal jurisdiction nor the *nemo dat* rule. Consequently, the following situations are *all* circumstances in which the non-intervention principle has been violated: (i) where State A exercises its jurisdiction over an act in State B where State B's consent is lacking due to the inapplicability of the four customary principles of extraterritorial jurisdiction or the absence of State B's sui generis consent to the jurisdictional exercise via treaty; (ii) where States A and C jointly exercise their jurisdiction¹⁰⁵ over an act in State B where State B's consent is lacking on the same basis as (i); and (iii) where States A and C create an international criminal tribunal by treaty which purports to exercise jurisdiction over an act in State B where State B's consent is lacking on the same basis as (i).¹⁰⁶ The second and third propositions are true irrespective of how many states purport

¹⁰³ *VCLT* (n 93) art 34.

¹⁰⁴ *Monetary Gold Removed from Rome (Italy v France, United Kingdom and United States of America) (Preliminary Question)* [1954] ICJ Rep 19, 32 ('*Monetary Gold*').

¹⁰⁵ That states can collectively exercise their jurisdictions was accepted by the IMT: 'The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly': International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946* (1947) 218 ('*IMT Judgment*'); Bassiouni (n 80) 91.

¹⁰⁶ This is recognised, albeit without substantial analysis in Cryer, Robinson and Vasiliev (n 38) 528–9. See also the recognition of this fact insofar as the *Monetary Gold* principle applies to international criminal tribunals: Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (Legal Research Paper Series No 10/2011, Oxford Institute for Ethics, Law and Armed Conflict, February 2011) 17–27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806>, archived at <<https://perma.cc/MH5K-RDVN>> ('Prosecuting Aggression').

to collectively exercise jurisdiction over an act in State B: State B's lack of consent cannot be overcome by States D to Z also participating in the tribunal.¹⁰⁷

This orthodoxy has been challenged by the emergent international court theory ('ICT') which concerns the disapplication of personal immunities enjoyed by heads of state, heads of government and ministers of foreign affairs (the "troika") before international criminal tribunals.¹⁰⁸ Although the theory may be thought irrelevant for present purposes as it relates to the related but independent question of immunities, it is worth assessing. This is because ICT rejects the *nemo dat quod non habet* principle:¹⁰⁹ it claims that an international criminal tribunal may disapply personal immunities enjoyed by defendants due to the transformative effect of the tribunal's international mandate although its creating states themselves *cannot* disapply those immunities. If such a proposition is accepted for immunities, it is perfectly imaginable that a jurisdiction may be claimed for an international tribunal which arises from its international nature as such, despite its creating states' inability to exercise that same jurisdiction. By rejecting ICT, one may also refute any derogation from the orthodoxy of *nemo dat quod non habet* for jurisdiction.

The substance of ICT was outlined by the SCSL's Appeals Chamber in *Taylor*.¹¹⁰ The SCSL observed that national courts cannot adjudicate the conduct of another state due to the applicability of state immunities which protect the

¹⁰⁷ This claim could be challenged on the basis that such an agreement, between enough states, could create a new customary rule of extraterritorial jurisdiction. Several commentators suggest that the UNGA could play a role in the creation and legitimisation of the Tribunal but do not make an explicit connection with custom: Hathaway, 'The Case for Creating an International Tribunal' (n 46); Dannenbaum, 'Mechanisms for Criminal Prosecution' (n 41); Trahan (n 46). If an UNGA resolution were to support an aggression jurisdiction over Russia notwithstanding Russia's lack of consent, reference could be had to the ICJ authority which affirms the potential of such resolutions to decisively evidence *opinio juris*: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 99–100 [188]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254–5 [70]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 131–3 [149]–[153]. However, two cautionary points are made. First, the cited examples concern the crystallisation of principles, such as colonial self-determination, which were supported by extant state practice but achieved customary status on account of the recognition of *opinio juris* through the UNGA resolution. The creation of a new extraterritorial jurisdiction untethered from state consent is not supported by extant state practice; in fact, it contradicts the core non-intervention principle. Second, to avoid a stark charge of instrumentalising international law for partial purposes, the UNGA resolution supporting the Tribunal would need to offer normative support for a new consent-less aggression jurisdiction applicable to all states. This may be unappealing to some states. However, the alternative, that a consent-less customary jurisdiction be created over Russia exclusively, is self-evidently untenable. Finally, heed should be paid to the "Baxter Paradox" if a consent-less customary jurisdiction was solely alleged from the treaty arrangements which create a Russian Aggression Tribunal: RR Baxter, 'Treaties and Custom' (1971) 129 *Collected Courses of The Hague Academy of International Law* 25, 64.

¹⁰⁸ *Arrest Warrant* (n 70) 20–2 [51]–[55]; Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *European Journal of International Law* 815, 820–1.

¹⁰⁹ The approach also violates *pacta tertiis* as it affects the immunities of a state for which the treaty is *res inter alios acta*: *VCLT* (n 93) art 34; Cryer, Robinson and Vasiliev (n 38) 528.

¹¹⁰ *Prosecutor v Taylor (Decision on Immunity from Jurisdiction)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2003-01-I, 31 May 2004) ('*Taylor*').

principle of sovereign equality.¹¹¹ However, so the Appeals Chamber reasoned, international criminal tribunals do not give rise to the mischief against which state immunities protect as they ‘derive their mandate from the international community’.¹¹² This conclusion was reached with reference to the constitutive documents of preceding tribunals which denied defendants’ immunities which were enjoyed by virtue of their former positions within the state apparatus.¹¹³ These authorities were tied together by the general finding in *Arrest Warrant* that the troika are not protected by personal immunities, ‘before certain international criminal courts, where they have jurisdiction’.¹¹⁴ Building on *Taylor*, the ICC’s Pre-Trial Chamber (‘PTC’) I in the *Al Bashir*-related *Malawi Cooperation Decision* affirmed that the ‘immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court’.¹¹⁵ The PTC drew on additional practice including art 6 of the *Charter of IMTFE*, the judgments of the IMT and IMTFE and the ICTY’s determination in *Milošević* that an individual’s status as head of state does not preclude their responsibility for international crimes.¹¹⁶ As regards *Arrest Warrant*, the PTC supported the SCSL’s conclusion that the ICJ accepted ICT by citing Antonio Cassese’s argument that the danger which national litigation exposes to sovereign equality is neutralised when litigation occurs before international courts due to the courts’ independence from states and their adherence to strict rules of impartiality.¹¹⁷

Despite the impunity-busting appeal of ICT, the theory suffers from fundamental flaws. First, the theory relies on an overly generous interpretation of

¹¹¹ Zsuzsanna Deen-Racsmány, ‘Prosecutor v Taylor: The Status of the Special Court for Sierra Leone and its Implications for Immunity’ (2005) 18(2) *Leiden Journal of International Law* 229, 303–6.

¹¹² *Taylor* (n 110) 24 [51].

¹¹³ Namely, *IMT Charter* art 7, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (‘ICTY Statute’) art 7(2), *Statute of the International Criminal Tribunal for Rwanda* (‘ICTR Statute’) art 6(2), *Statute of the Special Court for Sierra Leone* (‘SCSL Statute’) art 6(2) and *Rome Statute* art 27(2): *ibid* 21–2 [44]–[46].

¹¹⁴ *Arrest Warrant* (n 70) 25 [61].

¹¹⁵ *Prosecutor v Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 December 2011) [35]–[36] (‘*Malawi Cooperation Decision*’).

¹¹⁶ *Ibid* [23]–[32].

¹¹⁷ *Ibid* [34], citing Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 312. This reasoning was endorsed twice more in *Al Bashir*-related cooperation decisions: *Prosecutor v Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 13 December 2011) [13]; *Prosecutor v Al Bashir (Judgment in the Jordan Referral re Al Bashir Appeal)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09 OA2, 6 May 2019) [113]. The argument was also recently reaffirmed in the context of the failure of Mongolia to execute the PTC II’s arrest warrant against President Vladimir Putin: *Situation in Ukraine (Finding under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request by the Court to Cooperate in the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/22, 24 October 2024) [29]–[30]. Cf *Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 9 April 2014) [29]–[31].

Arrest Warrant. In *Arrest Warrant*, the ICJ was seized of a dispute between Belgium and the Democratic Republic of the Congo ('DRC') concerning the international legality of an arrest warrant issued against the then Minister of Foreign Affairs of the DRC, Mr Yerodia Ndombasi for grave breaches of the *Geneva Conventions* and crimes against humanity. After finding that there is no exception in customary international law to the personal immunity of a Minister of Foreign Affairs who is prosecuted by in foreign court for war crimes or crimes against humanity,¹¹⁸ the Court considered the circumstances in which such immunities could be disapplied. One circumstance, said the Court, would be when 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction'.¹¹⁹ It should be immediately obvious that this passage is not an unequivocal endorsement of ICT. Rather, it is a carefully hedged statement which qualifies the disapplication of an individual's immunities on their prosecution before certain international criminal courts where they have jurisdiction. The ICJ gave two examples of certain international criminal courts and — vitally — referenced the legal basis on which such tribunals could disapply the immunities of defendants. The first example was the ICTY and ICTR which, the Court observed, were 'established pursuant to Security Council resolutions under Chapter VII of the *United Nations Charter*',¹²⁰ implicitly referencing the obligation under art 25 of the *UN Charter* that UN member states carry out the decisions of the UNSC. The reason why immunities were irrelevant before such tribunals was that the defendants' home states were obliged under art 25 of the *UN Charter* to give effect to the UNSC's decision to establish the ICTY and ICTR, including the provisions in the Tribunals' *Statutes* disapplying defendants' immunities.¹²¹ The second example was art 27(2) of the *Rome Statute* of the then "future" ICC. Although ICT proponents would argue that the examples given by the ICJ were merely expressions of the ICT principle, this is highly unlikely. As explained, ICT requires a departure from the basic legal principle of *nemo dat non quod habet*. It would have been extraordinary for the ICJ to have done away with this principle in relation to the ability of international criminal tribunals to affect state officials' immunities without making that determination explicit, particularly where, strictly speaking, the Court's view on the matter was obiter dicta. This observation is supported by the complete absence of any statement supporting ICT in the separate or dissenting opinions which considered the Court's discussion of prosecutions before international criminal courts. In fact, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal and the Dissenting Opinion of Judge van den Wyngaert expressed considerable criticism of the Court's reference to prosecutions before international criminal tribunals as a means of holding state officials to account. Judge van den Wyngaert stated that '[t]he Court grossly overestimate[d] the role an international criminal court can

¹¹⁸ *Arrest Warrant* (n 70) 24 [58].

¹¹⁹ *Ibid* 25 [61].

¹²⁰ *Ibid*.

¹²¹ Specifically, *ICTY Statute* art 7(2) and *ICTR Statute* art 6(2): Cryer, Robinson and Vasiliev (n 38) 521. This dynamic in the context of the ICC's *Rome Statute* art 13(b) jurisdiction is well-explained by Akande: Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333, 340–2 ('The Legal Nature of Security Council Referrals to the ICC').

play in cases where the State on whose territory the crimes were committed or whose national is suspected of the crime are not willing to prosecute',¹²² whereas the judicial trio noted that 'the existence of a competent international criminal court to initiate criminal proceedings [against a Minister of Foreign Affairs] is rare'.¹²³ These comments cannot easily be reconciled with the claim that *Arrest Warrant* recognised the expansive, impunity-destroying ability of international criminal tribunals to disapply the immunities of non-consenting states' troika officials.

Second, the presupposition that international criminal tribunals cannot *as such* violate the principles of sovereign equality and non-intervention as they are independent of states and, accordingly, strictly impartial is unfounded. Regarding their independence from states, although it is correct that international criminal tribunals' actions are not attributable to their creating states,¹²⁴ an international criminal tribunal is just as capable of interfering with a state's sovereignty and internal affairs. To claim that by mere "international" character alone an international criminal tribunal is legally *incapable* of such interference is unduly formalistic and potentially undermines the principles of sovereign equality and non-intervention. From an affected state's perspective, it does not matter whether an interference with its sovereignty, such as the prosecution of a head of government, is attributable to the national courts of a state or states, or an international criminal tribunal created by other states. Provided that the affected state has not consented to the prosecution in some form, whether this be generally through the recognised customary bases of extraterritorial jurisdiction or *sui generis* by treaty, the affected state is facing an attempt to subordinate its sovereignty to another actor. This paradigm does not disappear when one defines the problem away by stating that, because the principles of sovereign equality and non-intervention can only be violated by a state adjudicating the conduct of another state, international criminal tribunals cannot violate these principles as they are not states. What is lacking is a *substantive* reason why the activities of international criminal tribunals are incapable of violating those principles.

A substantive reason proposed by Cassese and referenced by the PTC is that of impartiality: the mischief which immunities seek to prevent, ie the interference by a state in another state's sovereign affairs, does not exist before international criminal tribunals because they are impartial. That international criminal tribunals are treated as being impartial in law is correct; it is tricky to imagine any court, national or international, being legally characterised as institutionally partisan. However, it is impossible to argue that, as a matter of unassailable fact, international criminal tribunals are incapable of being partisan or being utilised by states to further their own interests. In fact, as Sarah Nouwen and Wouter Werner demonstrate regarding Uganda's self-referral to the ICC concerning its conflict with the Lord's Resistance Army, or the UNSC's referral to the ICC of the situation in Darfur, international criminal tribunals are attractive fora for political

¹²² *Arrest Warrant* (n 70) 162 [37] (Judge van den Wyngaert).

¹²³ *Ibid* 86 [78] (Judges Higgins, Kooijmans and Buergenthal).

¹²⁴ *ARSIWA* (n 74) art 4. Instead, conduct will be attributed to the international criminal tribunal directly in accordance with the principles in the Draft Articles on the Responsibility of International Organisations: see Mirka Möldner, 'Responsibility of International Organizations: Introducing the ILC's DARIO' (2012) 16 *Max Planck Yearbook of United Nations Law* 281.

actors, including states, to advance their agendas through the characterisation of their opponents as international criminals *because* such tribunals portray themselves as neutral organisations.¹²⁵ Examples or allegations of partisanship or the instrumentalisation by states of international criminal tribunals are plentiful. The vanguards of international criminal law, the IMT and IMTFE, have been criticised for hypocrisy and the influence of Allied political interests in guiding their activities,¹²⁶ the classic example being the IMT's failure to countenance the Union of Soviet Socialist Republics' ('USSR') own gross violations of the *IMT Charter* during its invasion of Poland.¹²⁷ The ICTY declined to even investigate the potential violation of international humanitarian law during NATO's bombing of the Federal Republic of Yugoslavia, following the recommendation of an extraordinarily constituted ad hoc Review Committee, leading Paolo Benvenuti to conclude that 'the impression is given that the Prosecutor's intent has been, on the whole, to prevent investigations against NATO officials'.¹²⁸ Even the context of the very proceedings in which the ICC staked its support for ICT is one which concerned an allegation of partisanship: the non-compliance of Malawi and other African states was based on the African Union's refusal to cooperate with the Court to arrest and prosecute Sudanese President Omar Al-Bashir due to the Union's longstanding concern that the ICC is a vector for neo-colonial Western power.¹²⁹

Third, and most troublesome, the definition of "international courts" by the theory's own standards is indeterminate. "International" is not a term of art and the leading judicial authorities leave it undefined. A definition can only be distilled by inductive reasoning considering the tribunals typically identified as being "international": the IMT, IMTFE, ICTY, ICTR, SCSL and ICC. However, there is no substantial constitutional or institutional thread which runs through these tribunals justifying their common characterisation as "international". Instead, the tribunals are more-or-less "international" depending on the particular characteristic assessed. Regarding applicable law, for example, the IMT, IMTFE, ICTY, ICTR and ICC exclusively applied substantive international criminal law.

¹²⁵ Sarah MH Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21(4) *European Journal of International Law* 941, 962–3.

¹²⁶ On the IMT, see Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' (1947) 1(2) *International Law Quarterly* 153; Richard Overy, 'The Nuremberg Trials: International Law in the Making' in Philippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge University Press, 2003) 1. Regarding the IMTFE, see Radhabinod Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice Pal* (Kokusho-Kankokai, 1999).

¹²⁷ Overy (n 126) 19.

¹²⁸ Paolo Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (2001) 12(3) *European Journal of International Law* 503, 505.

¹²⁹ Lee JM Seymour, 'The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy' in Kamari M Clarke, Abel S Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press, 2016) 107, 116–21. Regarding the African Union and ICC's relationship, see generally Gino Naldi and Konstantinos D Magliveras, 'The International Criminal Court and the African Union: A Problematic Relationship' in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (Oxford University Press, 2017) 111.

However, the SCSL also applied the domestic law of Sierra Leone,¹³⁰ and the STL — not referenced in the judicial ICT sources but commonly placed in the international criminal tribunal canon¹³¹ — exclusively applied Lebanese criminal law.¹³² Another characteristic, the number of creating states, also belies a spectrum of internationalism. At one end are those tribunals created by or with the assistance of the UN — the ICTY and ICTR by the UNSC, and the SCSL by agreement between Sierra Leone and the UN.¹³³ These could be considered the “most international” tribunals insofar as they derive their mandate, in full or in part, from the UN, an international organisation composed of almost all states. At the other end are the IMT and IMTFE which were created by relatively few states. The IMTFE was created by General Douglas MacArthur acting as Supreme Commander of the nine Allied Powers to which Japan had surrendered¹³⁴ — Australia, Canada, China, France, the Netherlands, New Zealand, the UK, the USSR and the US.¹³⁵ The *IMT Charter* was negotiated by only four states — France, the UK, the US and the USSR.¹³⁶ In between sits the ICC, an institution with a significant membership of 125 states, albeit with significant actors absent, including the US, China, India and Russia.¹³⁷

¹³⁰ *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex (‘*Statute of the Special Court of Sierra Leone*’) art 5 (‘*SCSL Statute*’).

¹³¹ See, eg, Cryer, Robinson and Vasiliev (n 38) 183–5.

¹³² SC Res 1757, UN SCOR, 62nd sess, 5685th mtg, Agenda Item 54, UN Doc S/RES/1757 (30 May 2007) annex (‘*Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*’) attachment (‘*Statute of the Special Tribunal for Lebanon*’) art 2.

¹³³ Regarding the SCSL, see Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing, 2012) 68–9 (‘*Hybrid and Internationalised Criminal Tribunals*’).

¹³⁴ Akande, ‘Prosecuting Aggression’ (n 106) 29–30.

¹³⁵ Additionally, India and the Philippines were invited to join the bench: Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Harvard University Asia Center, 2008) 26–8.

¹³⁶ However, an additional nineteen states became signatories by notice: Michael P Scharf, ‘Universal Jurisdiction and the Crime of Aggression’ (2012) 53(2) *Harvard International Law Journal* 357, 369–70.

¹³⁷ At time of writing, Hungary has ‘taken steps’ to withdraw from the *Rome Statute*: ‘Presidency of the Assembly of States Parties Responds to Announcement of Withdrawal from the Rome Statute by Hungary’, *International Criminal Court* (Press Release, 3 April 2025) <<https://www.icc-cpi.int/news/presidency-assembly-states-parties-responds-announcement-withdrawal-rome-statute-hungary>>, archived at <<https://perma.cc/36HA-EJEY>>. In accordance with art 127(1) of the *Rome Statute*, Hungary’s withdrawal will only take effect one year after the UN Secretary-General receives Hungary’s formal notification of its intention to withdraw from the *Rome Statute*.

The lowest decipherable common denominator of internationalism appears to be that the relevant tribunal is *created by at least two states*.¹³⁸ Accordingly, under ICT, it would be possible for States A and C to create an international criminal tribunal by treaty which would enjoy a legally distinct — and advantageous — position compared with States A and C acting on their own. This leads to an absurd result which undermines one of ICT's fundamental presuppositions: that there exists a principled divide between prosecutions before national and international courts, the former being limited by immunities to prevent abusive jurisdictional assertions. On ICT's terms, the dividing line between national and international prosecutions is vanishingly thin as State A can benefit from State C's cooperation to create an "international" tribunal which can disapply immunities irrespective of the malign motives of either state. Rather than believing in alchemy, we should accept the orthodox proposition that international criminal tribunals are international organisations constrained by their creators' powers as regards immunities *and* jurisdiction; nothing less, but certainly nothing more.

D *The Limits of International Criminal Tribunals' Jurisdictions*

Having rejected the proposition that international criminal tribunals can transcend their limits as products of state consent bound by *nemo dat quod non habet*, it follows that an international criminal tribunal can only exercise a valid jurisdiction when that jurisdiction could be exercised by its creating states. Accordingly, an international criminal tribunal's jurisdiction must be based on the consent of the state subject to the jurisdiction. Each of the international criminal tribunals falling within the usual canon can be characterised as exercising such a jurisdiction. In making such a categorisation, the real jurisdictional bases of international criminal tribunals more clearly emerge. The tribunals established prior to a Russian Aggression Tribunal have only been empowered to act under *two* types of international criminal jurisdiction: (1) the territorial and nationality jurisdictions enjoyed by a state prosecuting its own nationals and (2) *sui generis* consent given via treaty by the state subject to the jurisdiction. The second type can be thematically split between situations in which the subject state has consented to the tribunal indirectly through their consent to a treaty framework within which the tribunal is created and those in which the state has consented directly to the tribunal's creation.

¹³⁸ An alternative measure of internationalism proposed by Woetzel requires a tribunal to have been endorsed by the international community through an organisation which represents that community, such as the UN, or by a 'combination of states that represent the "quasi-totality of civilised nations"': Robert K Woetzel, *The Nuremberg Trials in International Law with a Postlude on the Eichmann Case* (Stevens and Sons, 1962) 53, quoted in Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) 111. This test is unsuitable. The 'quasi-totality of civilised nations' test is unacceptably indeterminate, and it is unclear why the endorsement of the UN (specifically, the UNGA) should alter a tribunal's legal character, other than to the extent considered previously: see above n 106.

1 Territorial and Nationality Jurisdictions: IMT, IMTFE and ECCC

The IMT and IMTFE exercised the territorial and nationality jurisdictions of the defendants' home states, albeit by a circuitous route.¹³⁹ It is generally accepted that the Allied Powers exercised jurisdiction *on behalf of* Germany and Japan through the Tribunals.¹⁴⁰ In the case of the IMT, following the unconditional surrender of Germany's armed forces, the Allies issued a joint declaration under which they assumed 'supreme authority' over Germany, including all powers possessed by the German civilian government.¹⁴¹ To administer this authority, the joint declaration divided Germany into four occupied zones to be administered by the Allies through their Commanders-in-Chief constituting the Allied 'Control Council'.¹⁴² It follows that the Allies could exercise the German territorial and nationality jurisdictions as an incident of that assumed sovereignty. The IMT appears to take this view in its judgment: 'The making of the *Charter* was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered'.¹⁴³ Dapo Akande notes that two alternative bases of jurisdiction, the protective and universality principles, were suggested as the IMT's jurisdictional basis by Secretary-General Trygve Lie in his report on the Tribunal in 1949.¹⁴⁴ However, Lie himself noted that these interpretations relied on the vague statement of the Tribunal that the Powers had 'done together what any one of them might have done singly',¹⁴⁵ a statement that could also accommodate the proposition that the Powers could jointly exercise the German territorial and nationality jurisdictions via the sovereignty which they had all assumed.

The IMTFE follows a similar pattern. The terms of the Japanese instrument of unconditional surrender included the subjugation of the authority of the Emperor and the Japanese government to the Supreme Commander of the Allied Powers.¹⁴⁶ In exercise of that authority, the Supreme Commander of the Allied Powers enacted the *IMTFE Charter*. Hence, the Allied Powers, through the Supreme Commander, were exercising the sovereign rights of Japan to create a tribunal which exercised the Japanese territorial and nationality jurisdictions. This was accepted by the IMTFE when it found that the Tribunal had been established 'by the Supreme Commander under authority conferred on him by the Allied

¹³⁹ Note that *both* jurisdictions were engaged as the offences related both to crimes which occurred in Germany and Japan, namely conspiracy to commit crimes against peace under the *IMT Charter* (n 30) art 6(a) and the *IMTFE Charter* (n 31) art 5(a), alongside those which occurred abroad *and* domestically, such as war crimes under the *IMT Charter* (n 30) art 6(b) and the *IMTFE Charter* (n 31) art 5(b).

¹⁴⁰ Akande, 'Prosecuting Aggression' (n 106) 28–32.

¹⁴¹ 'Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany and Supplementary Statements' (1945) 39(S3) *American Journal of International Law* 171, 171–2.

¹⁴² *Ibid* 176–7.

¹⁴³ *IMT Judgment* (n 105) 218.

¹⁴⁴ Akande, 'Prosecuting Aggression' (n 106) 31.

¹⁴⁵ International Law Commission, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, Memorandum Submitted by the Secretary-General*, 1st sess, UN Doc A/CN.4/5 (3 March 1949) 79–80.

¹⁴⁶ 'Surrender of Japan (1945)', *National Archives* (Web Page, 8 August 2023) <<https://www.archives.gov/milestone-documents/surrender-of-japan>>, archived at <<https://perma.cc/TVM9-HQ3M>>.

Powers'.¹⁴⁷ The same was acknowledged by the US Supreme Court in *Hirota v MacArthur* when it rejected the claim that the IMTFE was an American court.¹⁴⁸

A more recent, and straightforward, example is the ECCC. The ECCC's jurisdiction is based on Cambodian domestic law, specifically the *ECCC Law* promulgated in 2004.¹⁴⁹ Although the *modalities* of the jurisdiction were regulated through an agreement between the UN and Cambodia,¹⁵⁰ the agreement itself affirms that the ECCC was established as a domestic court,¹⁵¹ ie a court able to exercise Cambodia's territorial (and nationality) jurisdiction.¹⁵² Pithily summarised, the IMT, IMTFE and ECCC may be described as domestic courts of their respective countries that became "international" tribunals by virtue of being institutionally internationalised due to the participation of the Allied Powers in the case of the IMT and IMTFE, or through the UN agreement regarding the ECCC.

2 Indirect Sui Generis Consent: ICTY, ICTR and the ICC

The second means through which international criminal tribunals have established jurisdiction is through indirect sui generis consent arising via the state's consent to a treaty framework under which a binding jurisdiction is created over the subject state. The first tribunals to be created according to this approach were the ICTY and ICTR. The Tribunals were created pursuant to UNSC resolutions under ch VII arts 39 and 41 of the *UN Charter*:¹⁵³ Resolution 827 for the ICTY¹⁵⁴ and Resolution 955 for the ICTR.¹⁵⁵ The subject states, being states parties to the *UN Charter*, were obliged to accept and carry out the UNSC's

¹⁴⁷ 'International Military Tribunal for the Far East: Judgment of 12 November 1948' in John Pritchard and Sonia M Zaide (eds), *The Tokyo War Crimes Trial* (Garland Publishing, 1981) vol 22, 413, 436.

¹⁴⁸ *Hirota v MacArthur* 388 US 197, 198 (1948).

¹⁴⁹ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (Cambodia) NS/RKM/1004/006 [tr Council of Jurists and the Secretariat of the Task Force, 'Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea', *Extraordinary Chambers in the Courts of Cambodia* (Web Document) <https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf>, archived at <<https://perma.cc/SZ8K-8582>>] ('*ECCC Law*'); Caitlin Reiger, 'Hybrid and Internationalized Tribunals' in Chiara Giorgetti (ed), *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff, 2012) 283, 294.

¹⁵⁰ *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*, signed 6 June 2003, 2329 UNTS 117 (entered into force 29 April 2005).

¹⁵¹ *Ibid* Preamble para 4, art 2(1).

¹⁵² Williams, *Hybrid and Internationalised Criminal Tribunals* (n 133) 122–7.

¹⁵³ *Tadić Interlocutory Appeal on Jurisdiction* (n 34) [32]–[40]. Substantially the same conclusion was reached for the ICTR in *Kanyabashi*: William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006) 48–52.

¹⁵⁴ SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

¹⁵⁵ SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

decisions under art 25 of the *UN Charter*.¹⁵⁶ Regarding the ICTY, although the Federal Republic of Yugoslavia was not a UN member prior to 2000,¹⁵⁷ it was a state party to the *Dayton Accords* and was thus obliged to fully cooperate with the Tribunal,¹⁵⁸ hence the state consented to the ICTY's jurisdiction via that convention.¹⁵⁹ The ICC can also exercise a comparable jurisdiction under art 13(b) of the *Rome Statute* which can bind a non-state party by virtue of the state's UN membership and the overriding effect of art 25 of the *UN Charter*, as in the case of Sudan following the referral of the situation in Darfur to the Court under UNSC Resolution 1593.¹⁶⁰

3 *Direct Sui Generis Consent: SCSL and the ICC*

By comparison with the ICTY and ICTR, and the ICC under art 13(b) of the *Rome Statute*, some states have directly given their sui generis consent to certain international criminal tribunals' jurisdiction. The obvious example is the SCSL which was created by an agreement between the UN and Sierra Leone following the endorsement of the UNSC.¹⁶¹ By comparison with the ECCC, the SCSL draws its jurisdiction from the *SCSL Statute*, Sierra Leone's Parliament having legislated to ensure that the SCSL does not form a part of the domestic judiciary.¹⁶² Another clear example is the ICC. Under art 12(2) of the *Rome Statute*, states parties consent to the ICC exercising a jurisdiction over conduct committed in the territory of the state party under art 12(2)(a) or over conduct committed by a national of the state party under art 12(2)(b) following either state referral under art 13(a) or an investigation initiated by the Prosecutor *proprio motu* under art 13(c). Ostensibly, this jurisdiction appears identical to the territorial and nationality jurisdictions exercised by the IMT, IMTFE and ECCC. However, the ICC's framework is subtly different and is properly characterisable as direct sui generis consent to an extraterritorial exercise of jurisdiction. As described, the IMT, IMTFE and ECCC exercised the territoriality and nationality jurisdictions of Germany, Japan and

¹⁵⁶ This overriding effect is bolstered by the 'supremacy clause' in art 103 of the *UN Charter* which obliges, at least, the disapplication of other treaty law which conflicts with the obligations arising under the *UN Charter*: International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 168–9 [331], 170 [333].

¹⁵⁷ *Admission of the Federal Republic of Yugoslavia to Membership in the United Nations*, UN GAOR, GA Res 55/12, 55th sess, 48th plen mtg, Agenda Item 19, UN Doc A/RES/55/12 (10 November 2000, adopted 1 November 2000).

¹⁵⁸ *Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, UN GAOR, 50th sess, Agenda Item 28; UN SCOR, 50th sess, UN Docs A/50/790 and S/1995/999 (30 November 1995) attachment ('*General Framework Agreement for Peace in Bosnia and Herzegovina*'), annex 1-A ('*Agreement on the Military Aspects of the Peace Settlement*') art X.

¹⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 228 [447].

¹⁶⁰ Akande, 'The Legal Nature of Security Council Referrals to the ICC' (n 121) 340–2.

¹⁶¹ SC Res 1315, UN SCOR, 4186th mtg, UN Doc S/RES/1315 (2000) (14 August 2000); *SCSL Statute* (n 130) Preamble. Not, as suggested in *Taylor*, an agreement between the UNSC and Sierra Leone: Micaela Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?' (2004) 2(4) *Journal of International Criminal Justice* 1118, 1123–4.

¹⁶² Reiger (n 149) 286.

Cambodia respectively. Although complicated by the assumption of sovereignty in the case of the IMT and IMTFE, in effect, each of these tribunals exercised the jurisdiction of a single state over that state's nationals and territory. At the ICC, the dynamic is more complex: 125 states, cooperating in the form of the supranational ICC, can exercise jurisdiction over any one of its members' nationals or territories. In substance, it may make no difference whether the relationship between the ICC and an individual state party is conceptualised as a delegation of that state's nationality or territorial jurisdiction to the ICC, or as the state party consenting to other ICC states parties exercising an extraterritorial jurisdiction over its nationals or territory. Nonetheless, the latter conceptualisation is preferable as it better captures the reality that a particular state in whose territory or over whose nationals the ICC exercises jurisdiction is subjected to other states acting through the ICC exercising a jurisdiction, rather than that state itself exercising its nationality or territorial jurisdiction through an internationalised domestic court.

III CHARACTERISATION OF A RUSSIAN AGGRESSION TRIBUNAL

Having established the boundaries of states' prescriptive criminal jurisdiction, the way this jurisdiction is effected through international criminal tribunals and the jurisdictions exercised by other international criminal tribunals, the potential jurisdiction of a Russian Aggression Tribunal can be brought into focus.

The favoured jurisdictional basis for the prosecution of uncooperative states' nationals — indirectly secured *sui generis* consent — is unavailable. Russia's UNSC veto precludes the creation of any tribunal which can utilise the art 25 of the *UN Charter* obligation akin to the ICTY and ICTR, as well as the engagement of the ICC's aggression jurisdiction under art 15^{ter}(1) of the *Rome Statute*. Furthermore, there is no alternative international organisation which could create a tribunal to which Russia may indirectly consent by way of its consent to the organisation's own framework. For example, the CoE, which has declared an interest in the creation of a Russian Aggression Tribunal via the PACE proposal, lacks the mandatory powers enjoyed by the UNSC which could compel Russia to accept a CoE tribunal's jurisdiction.¹⁶³ Even if such powers existed, Russia is no longer a member of the organisation; the CoE could not compel a third state to consent to the exercise of the Tribunal's jurisdiction.

Beyond indirect *sui generis* consent, the obvious jurisdictional obstacle apparent for a Russian Aggression Tribunal is that Russia will not directly consent to its jurisdiction, nor will Russia establish its own Tribunal to exercise jurisdiction over its own nationals or territory. Absent a revolutionary regime change in Moscow,¹⁶⁴ the Russian Aggression Tribunal will not be constituted as an internationalised Russian court akin to the IMT, IMTFE or ECCC. Similarly,

¹⁶³ At most, it appears that the CoE could support the adoption of new conventions or common policies regarding the prosecution of the crime of aggression through non-binding recommendations: *Statute of the Council of Europe*, opened for signature 5 May 1949, 87 UNTS 103 (entered into force 3 August 1949) art 15.

¹⁶⁴ If such regime change occurred, Russia could accede to the *Rome Statute* and accept the ICC's aggression jurisdiction: Vasiliev (n 48). Cf McDougall's view that a future Russian government may have good reasons not to become a state party even if it were amenable to aggression prosecutions: McDougall, 'Special Tribunal for Aggression Against Ukraine is the Best Available Option' (n 42).

Russia's refusal to directly consent to a *sui generis* jurisdiction of the type exercised by the SCSL or the ICC under art 13(a) and (c) of the *Rome Statute* limits the jurisdiction which a Russian Aggression Tribunal could exercise. However, Russia's lack of consent to the jurisdiction of the Tribunal would not prevent the Tribunal from exercising Ukraine's territorial jurisdiction, or Ukraine from consenting to the Tribunal exercising a jurisdiction in its territory. Additionally, a Tribunal could try to exercise a universal jurisdiction over the crime of aggression. However, both jurisdictional bases have their challenges.

A Ukrainian Territorial Jurisdiction

In principle, Ukraine has territorial jurisdiction over the crime of aggression committed by Russia.¹⁶⁵ Territorial jurisdiction is understood as comprising *subjective* jurisdiction over an individual when an offence was initiated in the state's territory and *objective* jurisdiction over an individual when an offence is consummated in the state's territory.¹⁶⁶ As demonstrated in art 8*bis* of the *Rome Statute*, the aggression offence may be consummated in the territory of another state, therefore engaging the victim state's objective territorial jurisdiction. Article 8*bis*(1) defines the offence as

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the *Charter of the United Nations*.¹⁶⁷

Article 8*bis*(2) defines an 'act of aggression' as 'the use of armed force by a State *against the sovereignty, territorial integrity or political independence of another State*, or in any other manner inconsistent with the *Charter of the United Nations*'.¹⁶⁸ In other words, the use of force which constitutes a constituent element of the offence must occur against (and will likely occur within) another state. Indeed, in the context of the "Special Military Operation", it is quite clear that the offence of aggression, if made out, was indisputably consummated within Ukraine's borders: the use of force which commenced on 24 February 2022 and has continued since involves military operations which have affected every part of Ukraine, from Kramatorsk to Lviv, from Odesa to Chernihiv. Similar reasoning has been used by the ICC to explain the Court's territorial jurisdiction over the crime against humanity of deportation under art 7(1)(d) of the *Rome Statute* in the context of the *Situation in Bangladesh/Myanmar*. Myanmar is not a state party to the *Rome Statute*, but its neighbour, Bangladesh, is. Like the crime of aggression, the crime against humanity of deportation is transboundary in nature; as interpreted by the ICC, the crime of deportation is only completed when a person

¹⁶⁵ Pål Wrange, 'The Crime of Aggression, Domestic Prosecutions and Complementarity' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2016) 704, 714–5. Wrange also suggests that victim states of aggression have access to passive personality and protective jurisdictions, but it would be odd for these attenuated forms of jurisdiction to be exercised instead of a territorial jurisdiction which is well-established in international law: at 715.

¹⁶⁶ 'Draft Convention on Jurisdiction with Respect to Crime' (n 60) 484, 487–8. See generally Akehurst, 'Jurisdiction in International Law' (n 49) 152–3.

¹⁶⁷ *Rome Statute* (n 15) art 8*bis*(1).

¹⁶⁸ *Ibid* art 8*bis*(2) (emphasis added).

has been forcibly displaced over a state border.¹⁶⁹ Hence, when Rohingya are displaced over the Myanmar–Bangladesh border, part of the *actus reus* of the crime of deportation occurs in Bangladesh, bringing the crime within the jurisdiction of the ICC.¹⁷⁰

Returning to the new taxonomy explained in Part II(D) above, there are two ways in which Ukraine’s territorial jurisdiction could be used to constitute a Russian Aggression Tribunal with the jurisdiction to prosecute the crime of aggression.

The first option is for the Russian Aggression Tribunal to be established as an internationalised domestic court, akin to the IMT/IMTFE or the ECCC, exercising Ukraine’s territorial (but not nationality) jurisdiction. Ukraine is capable of prosecuting aggression under its municipal law.¹⁷¹ All persons who commit crimes in the territory of Ukraine are liable under its *Criminal Code*.¹⁷² In accordance with the subjective and objective territoriality principles, the *Criminal Code* considers a crime to have been committed in Ukraine when the offence was ‘initiated, continued, completed or discontinued in the territory of Ukraine’.¹⁷³ The crime of aggression is included in the *Criminal Code* in the form of the offence of ‘[p]lanning, preparation or waging of an aggressive war or armed conflict or conspiring for any such purposes.’¹⁷⁴ The idea of a domestic aggression prosecution by an extraordinary chamber of the Ukrainian courts has received some positive endorsement in the commentary,¹⁷⁵ notwithstanding that the creation of such a chamber may be incompatible with the *Ukrainian Constitution*,¹⁷⁶ specifically its prohibitions on the delegation of judicial power to ‘other bodies’¹⁷⁷ and the establishment of special and extraordinary courts.¹⁷⁸

The second option would be for Ukraine to consent to a Russian Aggression Tribunal exercising jurisdiction over the crime of aggression as a crime committed

¹⁶⁹ *Request under Regulation 46(3) of the Regulations of the Court (Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-RoC46(3)-01/18, 6 September 2018) [60], [64]–[66], [71].

¹⁷⁰ *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/19, 14 November 2019) [55]–[62].

¹⁷¹ Although states are not *obliged* to exercise a jurisdiction which they are entitled to exercise under international law: *Arrest Warrant* (n 70) 76 [45] (Judges Higgins, Kooijmans and Buergenthal).

¹⁷² *Кримінальний кодекс України* [Criminal Code of Ukraine] (Ukraine) 5 April 2001, Law No 2341-II, art 6(1).

¹⁷³ *Ibid* art 6(2).

¹⁷⁴ *Ibid* art 437(1).

¹⁷⁵ Heller, ‘The Best Option’ (n 46); Owiso Owiso, ‘An Aggression Chamber for Ukraine Supported by the Council of Europe’, *Opinio Juris* (Blog Post, 30 March 2022) <<https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>>, archived at <<https://perma.cc/4D7W-KJUQ>>.

¹⁷⁶ See Komarov and Hathaway (n 45).

¹⁷⁷ ‘Justice in Ukraine shall be administered exclusively by the courts. Delegation of the functions of courts or appropriation of such functions by other bodies or officials shall be prohibited’: *Конституція України* (Ukraine) 1996, art 124 [*Constitution of Ukraine*, 1996, <<https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80>>, archived at <<https://perma.cc/HW96-JYP3>>] (‘*Constitution of Ukraine*’).

¹⁷⁸ ‘The establishment of extraordinary and special courts shall not be permitted’: *ibid* art 125.

on Ukrainian territory according to the objective territoriality principle, akin to the consent states afford the ICC under art 13(a) and (c) of the *Rome Statute*. However, this option also faces compatibility problems with the *Ukrainian Constitution*. In 2001, the Ukrainian Constitutional Court determined that it would be unconstitutional for Kyiv to ratify the *Rome Statute* on the basis that judicial power would be delegated to the ICC as a court exercising a jurisdiction additional to the Ukrainian courts.¹⁷⁹ A similar concern would no doubt exist in relation to a Russian Aggression Tribunal.

Fortunately for Ukraine, these domestic constitutional problems can be easily overcome: it is open to Ukraine's Parliament, the Verkhovna Rada, to simply permit the creation of any extraordinary chambers in the national courts or consent to any delegation of jurisdiction to an international tribunal. This is not speculative: in 2016, the Verkhovna Rada amended the *Ukrainian Constitution* to expressly permit Ukraine to 'recognise' the ICC's jurisdiction,¹⁸⁰ paving the way for Kyiv's ratification of the *Rome Statute* in 2024. Moreover, from the international legal perspective, any domestic constitutional limitation on Ukraine's exercise of its territorial jurisdiction or on its ability to consent to other states' exercising a jurisdiction in Ukraine's territory is irrelevant to the question of the international legality of such an exercise or consent due to the well-established principle that municipal law, even constitutional law, is treated as mere fact.¹⁸¹

However, the question does arise under international law as to whether it is possible for an objective territorial jurisdiction to be exercised over the crime of aggression due to the principle of *par in parem non habet imperium*. As stated by the ILC in its Draft Code of Crimes against the Peace and Security of Mankind, an essential condition for finding individual responsibility for the offence is the occurrence of an act of aggression attributable to the state, specifically a violation of art 2(4) of the *UN Charter*.¹⁸² As a prosecution would require the adjudication of the rights of the alleged aggressor state under the *jus ad bellum*, domestic jurisdictions cannot prosecute the crime of aggression. The ILC thus adopted a bifurcated jurisdictional regime for the core international crimes, subjecting aggression alone to the exclusive jurisdiction of a "future international criminal tribunal" alongside the jurisdiction of the defendant's state of nationality on the

¹⁷⁹ Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (справа про Римський Статут) [Opinion of the Constitutional Court of Ukraine in the Case on the Constitutional Submission of President of Ukraine on the Conformity of the Rome Statute of the International Criminal Court with the Constitution of Ukraine (the Rome Statute Case)], Case No 1-35/2001, No 3-v/2001, 11 July 2001, [2], discussed in Komarov and Hathaway (n 45).

¹⁸⁰ Про внесення змін до Конституції України (щодо правосуддя) [Amendments to the Constitution of Ukraine (Regarding Justice)] (Ukraine) 2 June 2016, Law No 1401-VIII, art 1(1).

¹⁸¹ *VCLT* (n 93) art 27; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 272 [9]–[10] (Judge Gros).

¹⁸² International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Eighth Session*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 (1996) 30 [14] ('*ILC Report 48th Session*'). Although the ILC made this comment in the context of its draft definition of the crime of aggression, the commentary is equally applicable to the crime's definition under the *Rome Statute* as both require the violation of art 2(4) of the *UN Charter*: *Rome Statute* (n 15) art 8bis(1); *ILC Report 48th Session*, UN Doc A/51/10 (n 182) 42–3.

basis that that state is competent to assess the international legality of its own acts.¹⁸³ In the context of the ICC's aggression jurisdiction, Akande suggests that this dynamic precludes the delegation of a domestic aggression jurisdiction to an international criminal tribunal.¹⁸⁴ The obstacle has also been noted by the Dutch Government's Advisory Committee on Public International Law, with reference to Akande, in the specific context of the prosecution of the crime of aggression in Ukraine.¹⁸⁵

Nonetheless, commentators have suggested means through which the *par in parem* obstacle may be overcome. One possibility, raised by Akande, is the recognition of the right of a victim state to prosecute an aggressor state as a form of 'self-help', albeit a form which cannot be delegated to an international tribunal.¹⁸⁶ As *lex lata*, the existence of such a doctrine is questionable; Akande relies on the *dictum* of the US Supreme Court in a single case as judicial authority for his proposition.¹⁸⁷ Furthermore, it may be argued that recourse is not needed to a novel solution as the orthodox principles of international jurisdiction provide a satisfactory resolution to the problem. This argument proceeds on the basis that the crime of aggression is not fundamentally different from other international crimes which are prosecuted domestically. The contrast that the ILC and Akande endorse is that while the prosecution of other core international crimes may involve the adjudication of state acts on which individual criminal responsibility may be pinned, these differ from the adjudication of the corporate state's rights and interests which occurs when a court determines whether the state has violated art 2(4) of the *UN Charter*. This distinction may be a false dichotomy. The determination that an individual is responsible for an international crime may implicitly engage the corporate state's responsibility; individual international criminal responsibility and state responsibility are two sides of the same coin as states can only act through their officials. Take, for example, State A's exercise of jurisdiction over State B's official to prosecute them for genocide. State A's courts will effectively determine whether State B has violated customary international law, specifically the *jus cogens* prohibition on genocide,¹⁸⁸ as the official's conduct is attributable to the state under art 4 of the *ARSIWA*. State A's courts' decision will also effectively determine whether State B has violated its obligations under the *Genocide Convention*,¹⁸⁹ such as art IV, assuming that State A's courts are prosecuting the individual in lieu of State B's courts. Such

¹⁸³ ILC Report 48th Session, UN Doc A/51/10 (n 182) 27–30.

¹⁸⁴ Akande, 'Prosecuting Aggression' (n 106) 32–5.

¹⁸⁵ Advisory Committee on Public International Law, *Challenges in Prosecuting the Crime of Aggression: Jurisdiction and Immunities* (Advisory Report No 40, 12 September 2022) 7–8 <<https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/09/12/challenges-in-prosecuting-the-crime-of-aggression-jurisdiction-and-immunities>>, archived at <<https://perma.cc/4SC7-KVHC>>.

¹⁸⁶ Akande, 'Prosecuting Aggression' (n 106) 33.

¹⁸⁷ Ibid. Specifically, Akande relies on Harlan J's dictum in *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964), a case concerning the act of state doctrine following the expropriation of a shipment of sugar. Per Harlan J, 'the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders': at 423.

¹⁸⁸ Recognised by the International Law Commission: *Report of the International Law Commission: Seventy-First Session*, UN GAOR, 74th sess, Agenda Item 79, Supp No 10, UN Doc A/74/10 (2019) 146–7.

¹⁸⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

prosecutions are not generally challenged under *par in parem non habet imperium*. This is because the conclusion that the corporate state has violated its international obligations or duties is an indirect consequence of the prosecution. In other words, whereas State A's court will directly confront the question of the violation of art 2(4) of the *UN Charter* when prosecuting aggression, a prosecution for genocide will only lead to the inference (albeit one which may be practically inescapable) that State B has or has not violated a *jus cogens* prohibition and certain treaty commitments. To distinguish between these two scenarios may seem jesuitical but it reflects the *Monetary Gold* principle as explained by the ICJ in *Certain Phosphate Lands in Nauru*.¹⁹⁰ The Court distinguished between the relevant facts and *Monetary Gold*, the crux being that the determination of a non-consenting state's rights was a *sine qua non* to the claim in *Monetary Gold*, but was not in *Certain Phosphates*, even if the non-consenting states' responsibility was implicated by the judgment.¹⁹¹ However, it is axiomatic under the *Monetary Gold* principle that a state can consent to other states, acting through an international organisation such as the ICJ, adjudicating their international legal rights. There is no reason why that consent must be directly expressed in a *sui generis* form by treaty; it could be manifested through consent to general conditions outlined in customary norms under which specific factual nexus permit a state to exercise a jurisdiction. It is suggested that, for the crime of aggression, *par in parem non habet imperium* may not be engaged as Russia has consented to the customary principle of objective territorial jurisdiction when an offence is consummated in the prosecuting state's territory, a nexus which is particularly clear for aggression as it is almost always consummated within another state's borders.

This approach accommodates *par in parem non habet imperium* better than the ILC's preference for domestic prosecutions limited to the state of the defendant's nationality. What would occur in a prosecution in the defendant's state if the defendant alleged that their state used force in self-defence in order to deny the existence of their alleged act of aggression?¹⁹² This would require a determination of the *victim* state's rights under the *jus ad bellum* as a *sine qua non* of the prosecution as the court determines whether the victim state had *first* breached art 2(4) of the *UN Charter* by launching an 'armed attack'.¹⁹³ This involves a (presumably) non-consenting state's international legal rights being determined by a peer. However, whereas it is foreseeable for the aggressor state that its conduct could be impugned in a foreign court under customary jurisdictional principles to which the aggressor state consents, victim states are unlikely to have an expectation that their conduct will be similarly queried in the courts of the purported aggressor. Although the ILC was seemingly content for *par in parem*

¹⁹⁰ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 261–2 [55].

¹⁹¹ *Ibid.* On the basis that Nauru's complaint related to the actions of Australia through Nauru's Administering Authority which was composed of Australia, New Zealand and the UK: Anthony Anghie, 'Certain Phosphate Lands in Nauru' (1993) 87(2) *American Journal of International Law* 282.

¹⁹² Such a claim would rely on the existence of an armed attack having occurred within the meaning of art 51 of the *UN Charter*, an event which necessarily breaches art 2(4) of the *Charter: Nicaragua* (n 53) 101 [190]–[191], 103–4 [195].

¹⁹³ *Ibid* 103–4 [195].

non habet imperium to be disappplied in the aggressor state's courts, the normative case is stronger for its disapplication in the victim state's courts.

A residual challenge made by the ILC to domestic aggression prosecutions is that such prosecutions have 'serious implications for international relations and international peace and security'.¹⁹⁴ Although it is obvious that aggression prosecutions may cause substantial international friction, other international crimes which are also domestically prosecuted place enormous pressure on international relations too.¹⁹⁵ The classic example is the Belgian assertion of universal jurisdiction¹⁹⁶ over various US officials, including President George Bush, for war crimes which resulted in significant American pushback.¹⁹⁷ Of course, we do not generally determine the *legality* of domestic prosecutions for international crimes with reference to their political implications. A justified argument for holding the crime of aggression to a different standard is lacking. A more reasonable challenge along similar lines is proposed by Yoram Dinstein: national courts prosecuting the crime of aggression are likely to be biased compared with international criminal tribunals prosecuting the same crime.¹⁹⁸ However, this assumes that international criminal tribunals are immune from politicking, a proposition already exposed as fallacious.

Lastly, it is worth dealing with Akande's claim that Ukrainian objective territorial jurisdiction over aggression, if found, cannot be delegated to an international criminal tribunal for want of precedent.¹⁹⁹ Ukraine has already consented to a foreign state exercising jurisdiction over a crime which falls within Ukraine's objective territorial jurisdiction — the Netherlands — in *MHI* 7. There is no principled basis on which to distinguish between consent given to one state as such and an international criminal tribunal which is, in essence, several states cooperating in a treaty framework.

B Customary Extraterritorial Jurisdiction

Alternatively, the Tribunal could exercise a customary extraterritorial jurisdiction of a state (or states) other than Ukraine. The nationality principle is patently inapplicable. The passive personality and protective principles *could* be engaged, but this would only be by certain states whose nationals have been killed in Ukraine, or who can allege that their essential national security interests have

¹⁹⁴ *ILC Report 48th Session*, UN Doc A/51/10 (n 182) 30.

¹⁹⁵ Scharf (n 136) 381–2.

¹⁹⁶ A jurisdiction inherently contentious due to its attenuated connection with asserting states: George P Fletcher, 'Against Universal Jurisdiction' (2003) 1(3) *Journal of International Criminal Justice* 580.

¹⁹⁷ Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003) 25(1) *Cardozo Law Review* 247, 251–2.

¹⁹⁸ Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Intersentia, 2nd ed, 2016) 194, quoting Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 4th ed, 2005) 145.

¹⁹⁹ Akande, 'Prosecuting Aggression' (n 106) 35.

been threatened by the war.²⁰⁰ In any case, those jurisdictional bases are weak due to continued debate surrounding their exact boundaries.²⁰¹ The preferable candidate of the customary extraterritorial options is universal jurisdiction. Rather than arising through happenstance, universal jurisdiction goes to the heart of the matter: an offence so egregious that the entire world is interested in its prosecution. Doubtless, this jurisdictional assertion would be controversial, but such political concerns do not themselves affect its legality.²⁰²

A more pressing challenge is the question of whether universal jurisdiction exists over aggression. It is well-known that the precise contours of universal jurisdiction are contested, such as whether it may be exercised in absentia.²⁰³ However, the legality problem in relation to aggression is acute. Universal jurisdiction is unique:²⁰⁴ rather than being established by the offence's nexus to the state, the jurisdiction must be positively established over specific offences. The difficulty for aggression is a dearth of state practice and *opinio juris*²⁰⁵ and academic commentary supporting the positive existence of universal jurisdiction over it. Regarding the former, although the crime of aggression is generally accepted to *exist* in customary international law,²⁰⁶ relatively few states include it in their criminal codes. In 2017, at least thirty-nine states had aggression-related criminal legislation.²⁰⁷ Of those states, seventeen asserted some form of universal

²⁰⁰ The jurisdiction is invocable for offences which affect the internal or external security, or other key interests of the state: Crawford (n 32) 446. On an expansive view, it is imaginable that every country in Europe could assert a protective jurisdiction due to the impact — literally, in the case of Poland and Moldova due to stray missiles — that the invasion has had within their territory. However, such an interpretation appears proximate to the ‘effects’ doctrine under which objective territorial jurisdiction is asserted due to an *effect* arising from the offence which is not a constituent element of the offence: Akehurst, ‘Jurisdiction in International Law’ (n 49) 152–4, suggesting that the doctrine is a ‘slippery slope’ to universal jurisdiction: at 54. The legality of such a jurisdictional claim would undoubtedly be challenged, as exemplified by the challenges to the US assertion of the effects doctrine in anti-trust law: see Joseph P Griffin, ‘Possible Resolutions of International Disputes over Enforcement of US Antitrust Laws’ (1982) 18(2) *Stanford Journal of International Law* 279, 284–5.

²⁰¹ For the passive personality principle and questions, both old and new, regarding the exact conditions for its assertion, see ‘Draft Convention on Jurisdiction with Respect to Crime’ (n 60) 578–9; Ryngaert, *Jurisdiction in International Law* (n 59) 110–11. For the protective principle, see Akehurst, ‘Jurisdiction in International Law’ (n 49) 157–8; Crawford (n 32) 447.

²⁰² *Arrest Warrant* (n 70) 172 (Judge Van den Wyngaert).

²⁰³ See, eg, the clash in *Arrest Warrant* between President Guillaume and Judges Higgins, Buerghenthal and Kooijmans, which the majority appears to have resolved in the latter’s favour: Orakhelashvili (n 68) 42–3.

²⁰⁴ Here, referring strictly to an assertion of customary universal jurisdiction rather than a so-called universal jurisdiction dependent on a treaty. Cf Yee (n 82) 81–2, where the two are equated.

²⁰⁵ Ryngaert notes the view of Kreß, drawing on Simma and Paulus, that in areas where there is a lack of state practice and *opinio juris*, such as universal jurisdiction, it may be proper to rely on ‘a more human rights-informed, “modern positivist” approach to determining the existence of customary norms: Ryngaert, *Jurisdiction in International Law* (n 59) 132. This view bypasses the simpler, if inconvenient, conclusion that, where there is an absence of state practice and *opinio juris*, no customary rule exists.

²⁰⁶ Kemp (n 198) 209; Wrange (n 165) 708; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th ed, 2017) 142 (‘*War, Aggression and Self-Defence* (6th ed)’).

²⁰⁷ Astrid Reisinger Coracini, ‘(Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law’ in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2016) 1038, 1038.

jurisdiction.²⁰⁸ Other than in the context of the Russo-Ukrainian War, there have been no known domestic prosecutions for aggression.²⁰⁹ However, the handful of prosecutions under Ukrainian law for the aggression offence under art 437 of the *Ukrainian Criminal Code* offer little in support of a universal jurisdiction for aggression. First, it is uncertain whether these cases constitute state practice concerning the crime of aggression due to the Ukrainian courts' interpretation of the offence as one which can be committed by persons other than those in a position effectively to exercise control over or to direct the political or military action of a state. For example, in *Alexandrov and Yerofeyev*, the Golosyyvsky District Court convicted the two defendants of crimes including aggression as defined in the *Ukrainian Criminal Code* due to their participation in hostilities in eastern Ukraine following their enlistment in the armed forces of the Luhansk People's Republic.²¹⁰ In another case, the Dzerzhinskyy City Court of the Donetsk region convicted a soldier acting as a scout for the armed forces of the Donetsk People's Republic of the same offence.²¹¹ Second, even if these cases constituted state practice concerning the internationally-defined crime of aggression, it is limited in volume: between 2015 and 2023, just 20 verdicts were handed down in Ukrainian aggression trials, with six being mere summary trials following the entry of guilty pleas by the defendants.²¹² Third, in any event, the Ukrainian aggression trials cannot constitute state practice for universal jurisdiction over the crime of aggression because Ukraine has objective territorial jurisdiction over the crime of aggression, as explained in the preceding section. Furthermore, leading commentaries and judicial views expressing general support for the existence of universal jurisdiction tend to exclude, either implicitly or explicitly, aggression from the list of crimes subject to it. These include the views of Judges Higgins,

²⁰⁸ Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2nd ed, 2021) 382. McDougall has since asserted that at least seventy-four states criminalise aggression, with eighteen providing for universal jurisdiction: McDougall, 'Special Tribunal for Aggression Against Ukraine is the Best Available Option' (n 42).

²⁰⁹ Kemp (n 198) 194; Dinstein, *War, Aggression and Self-Defence* (6th ed) (n 206) 137.

²¹⁰ Sergey Sayapin, 'A Curious Aggression Trial in Ukraine: Some Reflections on the *Alexandrov and Yerofeyev* Case' (2018) 16(5) *Journal of International Criminal Justice* 1093, 1094.

²¹¹ Anton Korynevych, Oksana Senatorova and Mykhaylo Shepitko, 'Prosecution of the Crime of Aggression in International and Ukrainian Jurisdiction: Challenges and Prospects' (2023) 43 *Polish Yearbook of International Law* 367, 377.

²¹² *Ibid.*

Kooijmans and Buergenthal in *Arrest Warrant*,²¹³ the ILC,²¹⁴ the Institut de Droit International,²¹⁵ Crawford,²¹⁶ and Alexander Orakhelashvili.²¹⁷

Two notable exceptions to the academic trend are worth raising. The first is the *Princeton Principles on Universal Jurisdiction*, which include aggression in their list of offences to which universal jurisdiction applies.²¹⁸ However, the Principles are characterised by the Princeton Project on Universal Jurisdiction (‘Project’) itself as *lex ferenda*,²¹⁹ with the Project further accepting that the inclusion of aggression within the proposal was controversial, at least as compared with other identified crimes which appear to have been adopted without significant objection.²²⁰ Moreover, there is no indication, considering the absence of state practice, that international law has developed in tune with the Principles.

The second is a stronger argument proposed by Michael Scharf. In his view, universal jurisdiction over aggression was established by the IMT on the basis that the Tribunal exercised universal jurisdiction. This is evidenced by the Tribunal’s characterisation by Egon Schwelb, Prosecutors Robert Jackson and Sir Hartley Shawcross, the UN Secretary-General and the tribunals established by the Allied Control Council’s *Law No 10*.²²¹ This characterisation was allegedly confirmed by the UNGA in Resolution 95(I)²²² and is, in any event, supported by the presumption of legality for the exercise of extraterritorial jurisdiction in *Lotus*.²²³

Scharf’s argument is unsustainable. First, the sources supporting Scharf’s favoured characterisation of the IMT are either weak or equivocal. In his citation of Schwelb, Scharf identifies several factors which evidence the international character of the IMT, including the Tribunal’s designation as the *International Military Tribunal* and the fact that other states could accede to the *IMT Charter*.²²⁴ These factors are largely meaningless from a jurisdictional perspective: that a tribunal is called “international” or that it has been constituted via treaty to which accession is possible does not mean that it exercises a universal jurisdiction. Nevertheless, one identified factor — art 6 of the *IMT Charter*’s jurisdictional

²¹³ In which torture, piracy, war crimes, crimes against humanity and genocide were identified as subject to universal jurisdiction, albeit some under treaty arrangements: *Arrest Warrant* (n 70) 70–4 [26]–[41], 81 [60]–[61] (Judges Higgins, Kooijmans and Buergenthal).

²¹⁴ By excluding aggression from the scope of universal jurisdiction in the Draft Code of Crimes against the Peace and Security of Mankind: *ILC Report 48th Session*, UN Doc A/51/10 (n 182) 27–32.

²¹⁵ By the exclusion of aggression from the list of crimes identified as amenable to that jurisdiction: Institut de Droit International, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes* (Resolution, 26 August 2005) <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf>, archived at <<https://perma.cc/9ZBS-ELQZ>>.

²¹⁶ Crawford (n 32) 451–2.

²¹⁷ Through the lack of its identification as a crime generally subject to universal jurisdiction: Orakhelashvili (n 68) 39.

²¹⁸ Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs, 2001) 29.

²¹⁹ ‘The participants in the Princeton Project on Universal Jurisdiction propose the following principles for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems’: *ibid* 28 (emphasis added).

²²⁰ *Ibid* 45–7.

²²¹ Scharf (n 136) 374–8.

²²² *Ibid* 371–2.

²²³ *Ibid* 379–80.

²²⁴ *Ibid* 375.

claim over the major war criminals of the “European Axis” — at least suggests that the IMT’s jurisdiction was not exclusive to German territory or nationals. However, the importance of this fact should not be overstated. Schwelb accepted that this aspect of art 6 was academic, noting that the *Charter* conferred this jurisdiction ‘in theory’.²²⁵ Moreover, the fact that the IMT could have asserted a jurisdiction over non-Germans for acts committed outside of the Reich and the fact that the Tribunal would have considered such a jurisdictional assertion lawful pursuant to the *Charter does not mean* that such a jurisdictional assertion would have been lawful under general international law. Put simply, the fact that a treaty *claims* that a customary universal jurisdiction can be exercised does not mean that it *can*. The IMT’s jurisdiction is preferably characterised, according to the consent-based framework outlined in this contribution, as a territorial–nationality jurisdiction. The *IMT Charter* could not transform that jurisdiction into one which did not exist in custom or which was not based on state consent expressed *sui generis*, irrespective of the drafters’ intentions. As regards Jackson and Shawcross, Scharf notes that the Prosecutors referred to universal jurisdiction over piracy in their opening arguments, ‘[drawing] an analogy’ between that jurisdiction and the IMT’s.²²⁶ However, not only would it be impossible for Jackson and Shawcross to determine the IMT’s jurisdiction by their advocacy, but the statements Scharf cites pertain to the principle of *individual responsibility* rather than jurisdiction.²²⁷ As for Secretary-General Lie’s report, its implications have already been addressed; it is, at most, an equivocal authority for Scharf. As for the Control Council Tribunals (‘CCTs’), Scharf claims that the IMT did not adequately address its own jurisdiction, but the CCTs unambiguously identified the IMT’s jurisdiction as universal. The accuracy of this proposition is doubtful. First, the IMT appeared to identify its own jurisdiction as one grounded in the assumption of German sovereignty by the Allies.²²⁸ Second, the chief jurisprudential authority cited by Scharf, the *Hostage Case*,²²⁹ did not concern aggression.²³⁰ Furthermore, regarding the supposed UNGA affirmation, the Assembly did not *specifically* state that the IMT exercised universal jurisdiction. Resolution 95(I) was decidedly

²²⁵ Egon Schwelb, ‘Crimes against Humanity’ (1946) 23 *British Yearbook of International Law* 178, 208–9.

²²⁶ Scharf (n 136) 375–6.

²²⁷ *Ibid* 375, quoting Jackson in ‘Second Day, Wednesday, 21 November 1945’ in Lawrence Deems Egbert (ed), *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945–1 October 1946* (International Military Tribunal Record, 1947) vol 2, 149: ‘The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established. That is what illegal warfare is’, and Shawcross in ‘Twelfth Day, Tuesday, 4 December 1945’ in *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945–1 October 1946* (International Military Tribunal Record, 1947) vol 3, 106: ‘Nor is the principle of individual international responsibility for offenses against the law of nations altogether new. It has been applied not only to pirates. The entire law relating to war crimes, as distinct from the crime of war, is based upon the principle of responsibility’.

²²⁸ *IMT Judgment* (n 105) 218.

²²⁹ *United States v List (Judgment)* (United States Military Tribunal, Nuremberg, Case No 7, 19 February 1948), cited in Scharf (n 136) 377.

²³⁰ Rather, the CCT was prosecuting war crimes and crimes against humanity: *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10*, (United States Government Printing Office, 1950) vol 11, 759.

vague,²³¹ and the Nuremberg principles codified by the ILC on the Resolution's request do not mention universal jurisdiction at all.²³² Finally, Scharf's suggestion that, ultimately, the express identification of the IMT's jurisdiction is immaterial due to the *Lotus* principle must be rejected as *Lotus* is not reflective of the modern law of jurisdiction.

Lastly, this article has suggested that *par in parem non habet imperium* may not obstruct domestic aggression prosecutions. As some commentators view that principle as material in their determination that universal jurisdiction does not exist over aggression, it could be thought that universal jurisdiction can be exercised if the *par in parem non habet imperium* obstacle is discarded.²³³ However, to draw such a conclusion is fallacious: the absence of an obstacle to the assertion of an *existing* form of jurisdiction, such as objective territorial jurisdiction, does not imply the existence of a jurisdiction which must be *positively* identified for a specific offence. Such positive evidence for the existence of universal jurisdiction over aggression is, seemingly, lacking.

IV CONCLUSION

Shortly after Russian troops commenced the "Special Military Operation", a photo emerged from Ukraine of a road sign. The previous directions had been erased, each arrow now pointing the Russian soldier to one location: ГААГА — The Hague. A variation of the slogan — 'Putin, The Hague is waiting for you' — has hanged from the city administration building of Vilnius, the capital of Ukraine's stalwart ally, Lithuania, since March 2022.²³⁴ These slogans speak to the desire which lies at the heart of international criminal law: the ending of impunity. This desire burns no doubt stronger due to the crime with which Putin and his associates are accused — aggression, the 'supreme international crime' from which all others may flow.²³⁵ However, The Hague, we know, cannot quench this desire for accountability due to the restrictive conditions on the ICC's aggression jurisdiction. But this has not ceased calls for accountability, rather it has diverted them in support of a Russian Aggression Tribunal. The path to see Russian leaders convicted of aggression before the Tribunal is one beset by challenges both legal and political, including difficulties of enforcement, the

²³¹ The Resolution's operative part states that the UNGA '[a]ffirms the principles of international law recognized by the *Charter of the Nürnberg Tribunal* and the judgment of the Tribunal': *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, GA Res 95(I), UN GAOR, 1st sess, 55th plen mtg, UN Doc A/RES(I) (11 December 1946).

²³² 'Documents of the Second Session Including the Report of the General Assembly' [1950] II *Yearbook of the International Law Commission* 1, 195.

²³³ See Akande and Shah (n 108) 836; Beth Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10(1) *Journal of International Criminal Justice* 133, 148–9.

²³⁴ Although the poster featuring the slogan was temporarily taken down in April 2025 to allow for maintenance on the building: Austėja Paulauskaitė, 'Nuo Vilniaus miesto savivaldybės pastato laikinai nukeliamas Putiną smerkiantis plakatas' [A Poster Condemning Putin is Temporarily Removed from the Vilnius City Municipality Building] *LRT* (online, 7 April 2025) <<https://www.lrt.lt/naujienos/lietuvoje/2/2530735/nuo-vilniaus-miesto-savivaldybes-pastato-laikiniai-nukeliamas-putina-smerkiantis-plakatas?srsId=AfmBOop8fc6G2BuKhyguYFxdlNHzf12LY1zrK9pgmLdzk1R8gBodb4EM>>, archived at <<https://perma.cc/P5CU-55WD>>.

²³⁵ *IMT Judgment* (n 105) 186.

allegations of hypocrisy on account of the absence of aggression trials for Western-led conflicts, and the reaction which may be spurred in Russia to the Tribunal's activities which may, as with the ICTY, only entrench ethno-political grievances. However, these problems will remain purely hypothetical until the first existential matter of the Russian Aggression Tribunal is settled: its jurisdictional basis. As outlined, the Tribunal's supporters have not clearly articulated the available jurisdictional options. Returning to basics by establishing the criminal jurisdictional limits of states and discounting the alchemical effect of ICT, the Tribunal has two potential jurisdictional bases. Both have their difficulties. The objective territorial jurisdictional option can be challenged on the basis of *par in parem non habet imperium*, although the principle's chilling effect is not as unambiguous as some suggest. The universal jurisdictional option suffers from an essential fragility due to the uncertainty surrounding its applicability to the crime of aggression. The route to international justice for the crime of aggression in Ukraine is not impassable, but, whether it leads to Strasbourg, Kyiv or wherever else may host the Tribunal, those heading along it will have to pay keen attention to the potholes along the way.