Rule of Law Considerations for a CoE Special Tribunal for Ukraine: Lessons from the ECtHR

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Abstract

This contribution examines the efforts to establish a Special Tribunal for the Crime of Aggression against Ukraine through a treaty concluded between Ukraine and the Council of Europe (CoE) from the perspective of rule of law (RoL) requirements. It draws on the case law of the European Court of Human Rights (ECtHR) to consider how RoL guarantees may influence the establishment and operation of this tribunal. This includes the institutional fair trial guarantee (Article 6 ECHR) that tribunals have to be "established by law". In that context, the contribution argues that the treaty-making powers granted to the CoE Committee of Ministers allow for the conclusion of bilateral treaty with Ukraine on the establishment of an international criminal justice body. The contribution then shows the flexible application of the principle of legality (Article 7 ECHR) by the ECtHR when it comes to international (core) crimes. The conclusions are dedicated to how these different RoL requirements relate to a Special Tribunal for Aggression against Ukraine more specifically.

Keywords: Council of Europe, International Criminal Justice, Rule of Law, Crime of Aggression, Fair Trial, Treaty-Making Powers, Principle of Legality, European Court of Human Rights

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A. Introduction

The full-scale invasion of Ukraine by the Russian Federation raises questions of criminal accountability of the individuals responsible. The International Criminal Court (ICC) has opened investigations into the "Situation of Ukraine" early on and has already issued several arrest warrants.[1] However, its lack of jurisdiction over the crime of aggression,[2] sparked efforts to find alternative international criminal justice mechanisms. These have by now coalesced around the establishment of a Special Tribunal for the Crime of Aggression against Ukraine, through a treaty concluded between Ukraine and the Council of Europe (CoE).[3]

In large parts, the decision to pursue these efforts through the CoE is motivated by legal and political necessity: a sufficiently "international" tribunal is necessary to overcome immunities *ratione personae* of those presumably to be prosecuted,[4] while the path through the United Nations (UN) is unavailable due to the Russia's veto power in the UN Security Council and the lack of support in the UN General Assembly. Beyond the issue of immunities, this project raises a wealth of legal questions.

The present contribution examines these efforts from the perspective of rule of law (RoL) requirements. It reflects on such requirements enshrined in the European Convention on Human Rights (ECHR) – and developed by the jurisprudence of the European Court of Human Rights (ECtHR) – to assess how they may impact the establishment and operation of a Special Tribunal for Aggression against Ukraine. That stems from the consideration that any international criminal justice institution created through the CoE will (for political, if not for legal reasons) have to conform to the greatest possible degree with standards developed by the ECtHR.

The contribution first engages in some general reflections on the (international) RoL and international criminal law. It then turns to the institutional fair trial guarantees as a core part of RoL standards, as enshrined in Article 6(1) ECHR. As a third substantive part it examines how the principle of legality under Article 7 ECHR has been interpreted in the context of international (core) crimes. The conclusions are dedicated to how these different requirements relate to a Special Tribunal for Aggression against Ukraine.

1 See *ICC*, Situation of Ukraine, available at: www.icc-cpi.int/situations/ukraine> (28/10/2024).

2 As a result of the specific jurisdictional regime of the crime of aggression, see Art. 15*bis* Rome Statute.

3 See *CoE CoM*, Core Group on the establishment of a Special Tribunal for the Crime of Aggression of the Russian Federation against Ukraine (30 April 2024) Doc CM/Del/Dec (2024)1497/10.2 (authorizing the Secretary General to prepare the necessary documents).

4 ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 11 April 2002, ICJ Reports 2002, 3 (51–55); see also *Reisinger Coracini* and *Trahan*, The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities (*Just Security*, 8 November 2022), available at: www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/ (28/10/2024).

B. The International Rule of Law and International Criminal Law

The RoL notion stems from domestic legal traditions[5] and, broadly speaking, addresses the relationship between the sovereign and legal subjects. By requiring that the manner by which (sovereign) power is exercised conforms to certain criteria, individuals should be protected from governmental overreach or arbitrariness.[6] While some theorists have considered the RoL to be inherent in the concept of law itself,[7] these issues have also found reflection in positive domestic law.[8] In particular, the RoL should ensure that legal subjects enjoy a degree of liberty, in the sense that they may foresee legal consequences of their actions and are protected from arbitrary, *i.e.* unpredictable, interference.[9]

On the international level, international organizations have promoted an international standard of the RoL, which states should implement in their domestic legal systems.[10] Those efforts exist in parallel with international legal instruments that govern the conduct of a state *vis-á-vis* its legal subjects, such as within human rights law[11] or international investment law[12]. While those instruments do not explicitly provide for "RoL"-standards, they have the potential to contribute to a domestic RoL. As a result, efforts to formulate relevant international standards exist in a symbiotic relationship with other common interests of the international community, such as the furtherance of human rights, economic development or peace and security.[13]

5 See the notions of "*Rechtsstaat*", "*État de droit*", "*stato di diritto*" or "*estado de derecho*", *Chesterman*, AJCL 2008/2, pp. 336–338; *Council of Europe*, European Commission for Democracy through Law (Venice Commission) Report on the Rule of Law (4 April 2011) Study No. 512/2009, CDL-AD(2011)003rev, paras. 7–16.

6 *Raz*, pp. 201 ff.

7 See in particular *Fuller* (proposing eight principles of legality that identify the rule of law or, in his words, the "internal morality of law").

8 See, *e.g.*, Art. 18(1) Austrian Federal Constitutional Law ("The entire public administration shall be based on law."). More generally see *Council of Europe*, European Commission for Democracy through Law (Venice Commission) Report on the Rule of Law (4 April 2011) Study No. 512/2009, CDL-AD(2011)003rev, paras. 30–33.

9 *Simmonds*, pp. 99–104; *Raz*, pp. 214–223; see also *Kaufmann-Kohler*, AI 2007/3, pp. 373–375.

10 See also *UNGA*, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1, 30 November 2012.

11 See also *UNGA*, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993; *CoE*, European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist (18 March 2016) Study No. 711/2013, CDL-AD(2016)007 (additionally highlighting its connection to pluralist democracies).

12 See *Reinisch*, ZEuS 2024/4, pp. 463 ff.

13 *Chesterman*, AJCL 2008/2, pp. 343–350. See *UNSG*, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, para. 6 ("The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as

In contrast, the international rule of law proper constitutes a RoL applicable to the international legal system.[14] Given that no such comprehensive concept is enshrined in positive international law, it rather constitutes a political, aspirational ideal.[15] Moreover, its content must necessarily be different from domestic notions of the RoL due to the structural differences between these legal systems. In particular, the decentralized international legal order is generally not concerned with hierarchical relationships (between a sovereign *vis-á-vis* its legal subjects) but has to address the relationship of numerous sovereign actors.[16]

The most notable exception to this is international criminal justice, which involves the direct exercise of sovereign authority over individuals by international institutions.[17] Thus, it raises RoL questions similar to domestic criminal justice. However, again, the field exists in the context of an international legal system, with all its particularities.[18] The discussions below will highlight how that might impact the transposition of RoL elements from the domestic to the international level.

For one, the international criminal justice system may serve to contribute to an international RoL. Effective judicial review of political decisions is a core aspect of RoL concepts.[19] That likewise applies to an international RoL, with individual criminal responsibility as an additional tool to respond to violations of a particularly grave nature. As the International Military Tribunal in Nuremberg famously held:

> "Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."[20]

well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."); see also the reference to a rule of law in *UNGA*, 2005 World Summit Outcome, UN Doc. A/RES/60/1, 24 October 2005, paras. 11, 25 (with development), 119, 134 (with human rights).

14 See also *Chesterman*, AJCL 2008/2, pp. 355–356.

15 That being said, the concept may well be undergirded with more specific principles and rules that serve rule of law functions. See also *Chesterman*, AJCL 2008/2, pp. 360–361.

16 Similarly, *Hurd*, EIA 2014/1, pp. 40–41.

17 In addition, capacity-building efforts as an aspect of positive complementarity at the ICC may contribute to strengthening the domestic rule of law of a given state party, see *Takemura*, in: Ruiz Fabri (ed.), paras. 32 ff.

18 Such as the significant differences in law-creation, or the constraints on the role and powers of (judicial) institutions.

19 See, e.g., *CoE*, European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist (18 March 2016) Study No. 711/2013, CDL-AD (2016)007.

20 *International Military Tribunal*, Judgment of 30 September and 1 October 1946, available at: https://avalon.law.yale.edu/imt/judlawch.asp (28/10/2024).

Thus, individual criminal responsibility also serves the purpose of making the broader international legal order more effective – which has been emphasized in the context of the Russian aggression against Ukraine.[21]

The challenge in this context is to ensure that the inherent selectivity of international criminal justice does not result in clear double-standards – or, at least, perceptions and accusations of it.[22] The establishment of the Special Tribunal in the context of the CoE as a regional organization – and thus as a European response to a European problem – might somewhat lessen those perceptions.[23] Nevertheless, to fully pre-empt accusations of double-standards would require a clear commitment, by all members of the CoE, to prosecute acts of aggression also when committed by their own leaders.[24]

The following sections will reflect on the specific RoL requirements – stemming from the ECHR – that will likely affect the establishment and operation of the Special Tribunal. While the RoL is only briefly mentioned in the preamble of the ECHR, it comprises one of its "constitutional principle[s]"[25]. In particular, the ECtHR considers the RoL "a concept inherent in all the Articles of the Convention"[26] or to be "inherent in the system of protection established by the Convention"[27]. This contribution will focus on two sets of guarantees of particular relevance for the present context, namely the institutional fair trail guarantees (Article 6(1) ECHR)[28] and, relating to substantive law, the principle of legality (Article 7 ECHR)[29]. The following sections will address them in turn.

21 See, e.g., the statement and declaration signed by a number of politicians and lawyers, see Declaration on a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, available at: https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf (28/10/2024) at 3 ("international solidarity is necessary to uphold the rule of law and the principles of the United Nations Charter, including the prohibition on the use of force, and to protect Ukraine and the fundamental rights of its people, end the violence, and bring the perpetrators to justice").

22 With regard to the debate that the ICC had been improperly focused on Africa, see *Mude*, OJPS 2017/1, p. 178. For discussions of this issue in the context of a Special Tribunal for Ukraine, see *Heller*, J. Genocide Res. 2024/1, p. 13; *McDougall*, JCSL 2023/2, p. 228.

23 Notwithstanding the fact that this path was rather chosen out of political necessity, in light of the lack of support among the UN General Assembly.

24 Most notably France and the UK have not yet ratified the aggression amendment to the Rome Statute, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (28/10/2024).

25 *Spano*, European Law Journal 2021/27, p. 211.

26 ECtHR, No. 42750 /09, *Del Río Prada v. Spain*, judgment of 21 October 2013, para. 125; see also (GC), ECtHR, No. 21906/04, *Kafkaris v. Cyprus*, judgment of 12 February 2008, para. 116.

27 ECtHR, No. 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, para. 211.

28 *Ibid.*, para. 233 (noting that these institutional requirements "serve specific purposes as distinct fair-trial guarantees", but that "they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers").

29 ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015, para. 153 ("the guarantee enshrined in Article 7 (…) is an essential element of the rule of law").

C. Institutional Fair Trial Guarantees and International Criminal Justice

Article 6(1) ECHR provides for three stand-alone, but interdependent guarantees, by requiring that criminal charges are to be decided "by an *independent* and *impartial* tribunal *established by law*".[30] The latter aspect requires the existence of a legal basis on the establishment of the respective court, its organizational structure, its (subject-matter and territorial) jurisdiction and its composition.[31] Thus, "if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not 'established by law'".[32] This serves the separation of powers, more specifically "that the judicial organisation in a democratic society does not depend on the discretion of the executive"[33], but also prohibits that the "organisation of the judicial system [is entirely] left to the discretion of the judicial authorities"[34].

However, this does not generally prohibit *ad hoc* tribunals.[35] During the drafting of the International Covenant on Civil and Political Rights (ICCPR) an amendment that would have required tribunals to be "pre-established" by law was rejected[36] – also due to concerns that "it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes".[37] In the same vein, the ECtHR found no violations of Article 6(1) ECHR in cases where legal bodies were established after the commission of the crime in question[38] or when their competences were altered during ongoing proceedings.[39]

30 Emphasis added. See ECtHR, No. 26374/18, *Guðmundur Andri Ástráðsson v. Iceland,* judgment of 1 December 2020, para. 231.
31 See, generally, *ibid.*, paras. 223–230.
32 ECtHR, No. 74613/01, *Jorgic v. Germany*, judgment of 12 July 2007, para. 64.
33 ECtHR, No 26374/18, *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, para. 214.
34 ECtHR, Nos. 32492/96 32547/96, 32548/96, 33209/96 and 33210/96, *Coëme and Others v. Belgium*, judgment of 22 June 2000, para. 98.
35 With regard to a Special Tribunal for Ukraine, see also *Corten* and *Koutroulis*, Tribunal for the Crime of Aggression against Ukraine – A Legal Assessment, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf (28/10/2024). See, contra, *Grabenwarter*, p. 115.
36 *UNCHR*, Fifth Session: Summary Record of the 110th Meeting, UN Doc E/CN.4/SR 110, 9 June 1949, 4.
37 According to the representative of the Philippines, see *UNCHR*, Fifth Session: Summary Record of the 109th Meeting, UN Doc E/CN.4/SR 109, 8 June 1949, 6; see also *Harris*, ICLQ 1967/16, p. 356.
38 In *Fruni v. Slovakia*, the Court found no violation of Article 6(1) ECHR in circumstances where the applicant was convicted for crimes he committed between 1995 and 2002 by a Special Court that was established in 2003. See ECtHR, No. 8014/07, *Fruni v. Slovakia*, judgment of 21 June 2011, paras. 135–140.
39 Resulting in the transfer of the case to another court. The ECtHR highlighted that the tribunal "was not an 'extraordinary tribunal' established *ad hoc* or *ad personam* to deal specifically with the applicant's case", which would have contravened domestic constitutional prohibitions, see, ECtHR, No. 30836/07, *Bahaettin Uzan v. Turkey*, judgment of 24 November 2020, paras. 48–56.

This is notwithstanding constitutional principles of the "lawful judge", which partly require that competences are pre-determined *at the time of the initiation of proceedings*. For instance, the German Federal Constitutional Court considers that the relevant domestic law "must specify in advance as precisely as possible which court, which panel and which judges are authorized to decide the individual case".[40] These guarantees under domestic law are likewise relevant under Article 6(1) ECHR, as lack of compliance may result in a violation.[41] In general, in particular in absence of such more stringent domestic requirements, questions of the allocation of cases to specific panels are examined by the ECtHR against the standards of independence and impartiality, which "implies that (…) [they] should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria".[42]

However, the question arises how the requirement of tribunals to be "established by law" – developed for legal systems with a separation of powers and compulsory jurisdiction – should operate on the international level. That question was addressed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, where the accused argued that the creation of the ICTY violated the "general principle of law" and that (also) international criminal tribunals must be "established by law".[43] In particular, he claimed that the Tribunal – established on the basis of a United Nations Security Council (UNSC) resolution[44] – was

> "the product of a 'mere executive order' and not of a 'decision making process under democratic control, necessary to create a judicial organisation in a democratic society'."[45]

The Appeals Chamber considered that the requirement to be "established by law" could be interpreted in three ways: First, it could require establishment through legislature, as foreseen in the case law under the ECHR and as argued by the accused.

40 See, *e.g.*, BVerfGE, Beschluss der 1. Kammer des Zweiten Senats vom 20. Februar 2018, 2 BvR 2675/17, ECLI:DE:BVerfG:2018:rk20180220.2bvr267517, MN 17 (discussing possible limitations to ensure proceedings within a reasonable time in MN 18–19; translation by the authors). See Art. 101(1) second sentence Basic Law. See also the reference to the "constitutional principle of 'natural judge'" in, ECtHR, No. 30836/07, *Bahaettin Uzan v. Turkey*, judgment of 24 November 2020, paras. 51, 53.

41 See also *Kress/Hobe/Nußberger*, The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System, available at: justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/ (28/10/2024) ("It cannot be doubted that a Special Tribunal falls behind the most stringent rule of law standards and that many national constitutions rule out the establishment of a tribunal *ex post facto*.").

42 *CoE Venice Commission*, Report on the Independence of the Judicial System, Part I: The Independence of Judges (16 March 2010) Study No 494/2008, CDL-AD(2010)004, para. 77.

43 ICTY, *Prosecutor v. Duško Tadić*, IT-94–1-A, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 41–42.

44 UNSC Res 827 (25 May 1993) UN Doc. S/RES/827.

45 ICTY, *Prosecutor v. Duško Tadić*, IT-94–1-A, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 43.

This was rejected outright by the Appeals Chamber, as "the (…) division of powers (…) does not apply to the international setting" and therefore "the separation of powers element (…) finds no application".[46]

Second, it could require establishment by an international body authorized to take binding decisions. While the UN Charter does not expressly award the Security Council the power to set up international criminal tribunals, the Appeals Chamber found that it nevertheless reacted to a "threat to peace" within its authority under Article 41 UN Charter. In addition, it noted that the establishment of the ICTY "has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly".[47]

The third possible interpretation – which the Appeals Chamber considered "the most sensible and most likely meaning of the term in the context of international law" – required establishment "in accordance with the rule of law". Thus, it "must provide all the guarantees of fairness, justice and even-handedness", according to international human rights law.[48] In conclusion, the Appeals Chamber dismissed that ground of appeal, as "the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial".[49]

The latter two interpretations will also have relevance for the present context. According to current plans, the Committee of Ministers (CoM) seeks to take two separate legal steps. The first constitutes a treaty to be concluded between the CoE and Ukraine on the Establishment of a Special Tribunal (which would include the Tribunal's Statute). The second would be an "enlarged partial agreement governing the modalities of support to such a Tribunal, its financing and other administrative matters".[50] While being called an "agreement", the latter does not constitute a treaty under international law, but a specific form of cooperative activity within the framework of the CoE (authorized by the CoM), which does not have to be joined by all member states ("partial"), while being open to non-members ("enlarged").[51]

Although the CoE has no explicit competence to establish international criminal tribunals, the CoM has certain treaty-making powers that are of relevance here. It may "consider the action required to further the aim of the Council of Europe,

46 *Ibid.*, para. 43.
47 *Ibid.*, paras. 28–40, 44.
48 *Ibid.*, para. 45.
49 *Ibid.*, paras. 47–48.
50 See *CoE CoM*, Core Group on the establishment of a Special Tribunal for the Crime of Aggression of the Russian Federation against Ukraine (30 April 2024) Doc CM/Del/Dec(2024)1497/10.2 (authorizing the Secretary General to prepare the necessary documents). That was subsequently endorsed by PACE, see CoE PACE, Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine (26 June 2024) Resolution 2556 (2024) para. 11.
51 Statutory Resolution No. (93)28 on partial and enlarged agreements adopted by the Committee of Ministers on 14 May 1993 at its 92nd Session (noting in the preambular paragraphs that "in some cases the problems dealt with in the Council of Europe outstrip the geographical framework of the territory of its members"). See *Wittinger*, pp. 60–64.

including the conclusion of conventions or agreements" (Article 15(a) CoE Statute). The aim of the CoE is explicitly defined in Article 1(a) of its Statute:

> "to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."

This aim should be pursued *inter alia* through

> "agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms" (Article 1(b)).

In contrast, "[m]atters relating to national defence" are explicitly excluded from "the scope of the Council of Europe" (Article 1(d)). These provisions (Articles 1(b) and (d)) therefore determine the subject-matters that treaties within the CoE might address.[52]

Whether the conclusion of a relevant treaty with Ukraine falls within the competences of the CoM is subject to debate. Numerous scholars address whether the CoE had the *implied power* to conclude a treaty with Ukraine to establish a Special Tribunal (which is a notably different legal question of whether it had the implied power to establish it through a binding decision[53]).[54]

In contrast, this contribution argues that the conclusion of such treaty falls within the treaty-making powers explicitly granted to the CoM. For that purpose, it will address two specific concerns: firstly, relating to the parties of such a treaty (*i.e.* the CoE and a specific member state) and, secondly, the subject matter (*i.e.* the establishment of an international criminal justice tribunal).

With regard to the first issue, the CoM has generally been concerned with "intergovernmental co-operative activities"[55], in line with the aim "to achieve greater unity between its members". Thus, treaties have been negotiated and concluded by Member States "under the auspices of the CoE".[56] That being said, the powers granted to the CoM through Article 15(a) CoE Statute generally relate to "conven-

52 See *Polakiewicz*, pp. 13 f.

53 For an argument that the UNGA has the implied power to establish *ad hoc* criminal tribunals, see *Barber*, The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document (Asia-Pacific Center for the Responsibility to Protect, April 2021), available at: https://r2pasiapacific.org/files/7091/2021_UNGA_GuidanceDocument4.pdf (28/10/2024) at 29–30.

54 See *Owiso*, An Aggression Chamber for Ukraine Supported by the Council of Europe (*OpinioJuris*, 30 March 2022), available at: http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/ (28/10/2024) (discussing the question in the context of an internationalized or hybrid tribunal); *Peters*, Implied Powers under the Council of Europe Statute (10 April 2024), available at: www.coe.int/en/web/cahdi/seminar-on-the-special-tribunal-for-the-crime-of-aggression-against-ukraine (28/10/2024) (contending that there was "nothing in the statute that says anything about treaty-making power of the Council of Europe"); see also *Hárs*, População e Sociedade 2023, p. 8.

55 *Benoît-Rohmer/Klebes*, p. 51.

56 *Breuer*, in: Schmahl/Breuer (eds.), paras. 28.12–28.13.

tions or agreements", and not just inter-state treaties.[57] That is further supported by the fact that the Committee of Ministers "acts on behalf of the Council of Europe" (Article 13 CoE Statute) when exercising its competences. Similarly, the CoM resolution establishing the Register of Damages for Ukraine (as an enlarged partial agreement) authorized the CoE to conclude a Host State Agreement with the Netherlands.[58] Therefore, the CoM has the power to conclude (or authorize the Secretary General to conclude) a treaty on behalf of the CoE.[59] That treaty would notably not create obligations for any given (member) state, in lack of ratification by that state.[60] Those matters in which support and assistance by states is necessary for the Special Tribunal to properly function should apparently be addressed through an "Enlarged Partial Agreement".

The second aspect concerns whether a treaty to create the Special Tribunal falls within the subject-matter competence of the treaty-making powers of the CoM. As noted above, its competence is limited to treaties that "further the aim" of "achiev[ing] a greater unity between its members", *inter alia* through the "maintenance and further realisation of human rights and fundamental freedoms".[61] The link between human rights protection and criminal law is well-established: states are required to create functioning domestic criminal justice systems to comply with their obligation to protect *inter alia* the right to life,[62] the right to security of persons,[63] or the prohibition of torture[64]. In comparison, the deterrent effect of international criminal justice – and thus its capacity as an effective means to protect human rights – is not undisputed.[65] Regardless, wars of aggression enable massive human rights violations. Thus, the establishment of a Special Tribunal, supported by

57 *Cf* on potential external competences of the CoM *Wittinger*, p. 57.

58 Art. 3.3 CoE Committee of Ministers, Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (12 May 2023); see Host State Agreement between the Kingdom of the Netherlands and the Council of Europe regarding the Seat of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine 2023, Nr. 81, available at: https://rd4u.coe.int/documents/358068/372244/Host+State+Agreement.pdf/e6e12d32-69fe-5767-9147-11bbfef8f5f0?t=1708702341162 (28/10/2024).

59 *Polakiewicz* notes that "the treaties are not legal instruments of the Organisation as such, but owe their existence to the consent of those member states that sign and ratify them". However, this may be read as a descriptive explanation of practice, rather than implying the impossibility of such treaties. See *Polakiewicz*, p. 10.

60 See Resolution (51) 30 B (3rd May 1951) "Powers of the Committee of Ministers – Article 15 of the Statute" (providing that an "agreement shall be binding only on such Members as have ratified it").

61 Art. 1(a), (b) and Article 15(a) CoE Statute.

62 ECtHR, No. 24014/05, *Mustafa Tunç and Fecire Tunç v. Turkey*, judgment of 14 April 2015, para. 171; see also *HRC*, General Comment No 36: Article 6: Right to Life (3 September 2019) UN Doc. CCPR/C/GC/36, para. 20.

63 *HRC*, General Comment No 35: Article 9 (Liberty and Security of Person) (16 December 2014) UN Doc. CCPR/C/GC/35, para. 9.

64 ECtHR, No. 22457/16, *X and Others v. Bulgaria*, judgment of 2 February 2021, para. 179; see also *CAT Committee*, General Comment No 2: Implementation of Article 2 by States Parties (24 January 2008) UN Doc. CAT/C/GC/2, para. 8.

65 *Schmid/Drif*, in: Binder/Nowak/Hofbauer/Janig (eds.), paras. 20–22.

other member states, may reasonably be understood as a common response within the framework of the CoE to an existing threat to human rights and, therefore, fall within the treaty-making powers of the CoM.[66]

That treaty will also have to provide for "all the necessary safeguards of a fair trial" at the Special Tribunal, including its independence and impartiality.[67] In lack of more specific proposals, these matters are difficult to assess at the current stage. However, PACE[68] and, most recently, a large majority of Ministers of Justice of CoE countries[69] have called for adherence to those standards. In addition to those institutional and procedural guarantees, the principle of legality provides for substantive law requirements.

66 *Owiso*, An Aggression Chamber for Ukraine Supported by the Council of Europe, available at: http://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/ (28/10/2024). ("If Russia's aggression against Ukraine is understood to be a threat to human rights and fundamental freedoms in Ukraine in particular and in the CoE region in general, then the CoE is competent to conclude a treaty with Ukraine whose purpose is to ensure common action to respond to this threat."); *Corten/Koutroulis*, Tribunal for the Crime of Aggression against Ukraine – A Legal Assessment, available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf (28/10/2024) ("the establishment of a tribunal with jurisdiction to judge those responsible for a crime of aggression does not seem to lie outside the Council of Europe's scope of powers"); see also *CoE PACE*, The Russian Federation's Aggression against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes, Report of the Rapporteur Aleksander Pociej (26 April 2022) Doc 15510, para. 29 ("The competence (…) could be justified by the fact that the ongoing aggression amounts to a serious breach of the Statute of the Council of Europe and that in response to large-scale human rights violations committed on the territory of one of its members, member States have a collective responsibility to further the aims of the Organisation and safeguard its common ideals and principles").

67 For a suggestion on the composition of the Special Tribunal to ensure impartiality, see *Reisinger Coracini*, The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part II): Jurisdiction and Composition, available at: www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/ (28/10/2024).

68 *CoE PACE*, Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine (26 June 2024) Resolution 2556 (2024) para. 13.9.6; *CoE PACE*, Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine (26 January 2023) Resolution 2482 (2023) paras. 7.4 and 7.7; see also *CoE PACE*, Legal and Human Rights Aspects of the Russian Federation's Aggression against Ukraine Report of the Rapporteur Damien Cottier (24 January 2023) Doc 15689, para. 29.

69 Declaration of the Ministers of Justice of the Council of Europe (5 September 2024) paras. 6–7, available at: <https://search.coe.int/cm?i=0900001680b17523 (28/10/2024) (The Declaration was not supported by Armenia, Azerbaijan, Bosnia and Herzegovina, Hungary, Serbia, Slovakia and Turkey).

D. The Principle of Legality and International (Core) Crimes before the ECtHR

I. Overview

The principle of legality under Article 7 ECHR constitutes "an essential element of the rule of law" and should "provide effective safeguards against arbitrary prosecution, conviction and punishment".[70] The early debates on the relevance of the principle within international criminal justice – now undisputed[71] – notably focused on prosecutions for the crime of aggression.[72] The International Military Tribunal (IMT) in Nuremberg famously held:

> "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished."[73]

Thus, rather than considering the principle of legality a legal norm, the IMT framed it as a "principle of justice" that may be outweighed by other considerations of justice. The uneasy relationship between the Nuremberg trials and the principle of legality was not lost on the drafters of the ECHR. The so-called "Nuremberg clause" in Article 7(2) ECHR[74] serves the sole purpose of clarifying that the criminal prosecutions following the Second World War were not in contravention to the principle of legality.[75] This has been emphasized, in reliance on the *travaux préparatoires*, by the European Commission[76] and confirmed by the Grand Chamber of the ECtHR in *Maktouf and Damjanović v. Bosnia and Herzegovina*, which considered Article 7(2) ECHR

> "a contextual clarification (…) to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during

70 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 185; ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015, para. 153; see also *Grabenwarter*, p. 172 ("provides for fundamental principles of the rule of law in the field of criminal law").

71 See in particular Arts. 22–24 Rome Statute.

72 See in particular the Dissenting Opinion of Justice Pal to the Judgment of the International Military Tribunal for the Far East.

73 *International Military Tribunal*, Judgment of 30 September and 1 October 1946, available at: https://avalon.law.yale.edu/imt/judlawch.asp (28/10/2024).

74 "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.".

75 See, for a critical review, *Schabas*, pp. 351–355.

76 ECommHR, No. 29420/95, *Touvier v. France*, Decision of 13 January 1997, para. 161 ("the purpose of paragraph 2 of Article 7 is to specify that this Article does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, and collaboration with the enemy").

> that war (…). It is thus clear that the drafters of the Convention did not intend to allow for any general exception to the rule of non-retroactivity."[77]

The ECtHR – unsurprisingly, given its jurisdictional limitations – was never concerned with the permissibility of prosecutions by international criminal justice bodies.[78] However, it assessed the lawfulness of domestic prosecutions under domestic and international law for international (core) crimes. These involved charges of war crimes,[79] crimes against humanity,[80] and genocide,[81] while the crime of aggression has so far never reached the Court.[82] The following discussions will examine how the ECtHR has applied the different aspects of the principle of legality in such cases.[83]

77 ECtHR, No. 2312/08 and 34179/08, *Maktouf and Damjanović v. Bosnia and Herzegovina*, judgment of 18 July 2013, para. 72 (concerning the retroactive application of a different sentencing framework); see already, ECtHR, No. 36376/07, *Kononov v. Latvia*, judgment of 17 May 2010, para. 186.

78 The only case in which the ECtHR was invited to consider the permissibility of prosecutions by the ICTY from the viewpoint of Article 7 ECHR was *Naletilić v. Croatia*. The application concerned the lawfulness of the applicant's extradition to the ICTY, based on the contention that he could receive a heavier penalty by the tribunal as compared to prosecutions before Croatian domestic courts. However, the ECtHR dismissed the application as manifestly ill-founded. It considered that "even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2" and that therefore "the second sentence of Article 7 § 1 of the Convention invoked by the applicant could not apply." Quite notably, *Naletilić* is the only recent decision in which the Court attached any practical significance to Art. 7(2) ECHR. See, ECtHR, No. 51891/99, *Naletilić v. Croatia*, Decision of 4 May 2000, para. 2.

79 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010; ECtHR, Nos. 2312/08 and 34179/08, *Maktouf and Damjanović v. Bosnia and Herzegovina*, judgment of 18 July 2013; ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022.

80 ECtHR, Nos. 23052/04 and 24018/04, *Kolk and Kislyiy v. Estonia*, Decision of 17 January 2006; ECtHR, No. 14685/04, *Penart v. Estonia*, Decision of 24 January 2006; ECtHR, No. 9174/02, *Korbely v. Hungary*, judgment of 19 September 2008; ECtHR, No. 51552/10, *Šimšić v. Bosnia and Herzegovina*, Decision of 10 April 2012.

81 ECtHR, No. 74613/01, *Jorgic v. Germany*, judgment of 12 July 2007; ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015; ECtHR, No. 28859/16, *Drėlingas v. Lithuania*, judgment of 12 March 2019.

82 This is unsurprising given that the crime of aggression is virtually never prosecuted (see further on this in the concluding remarks).

83 See also *Eurojust*, Application of the Principle of Legality, Right to a Fair Trial and Other Protected Rights in Core International Crimes Cases: Selected Case-Law of the European Court of Human Rights, available at: www.eurojust.europa.eu/sites/default/files/assets/eurojust-gns-selected-case-law-echr-core-international-crimes-en.pdf (28/10/2024).

II. The Elements of the Principle of Legality in the Context of International (Core) Crimes

The principle of legality as interpreted by the ECtHR entails several distinct, yet interrelated elements.[84] The principle primarily requires the existence of a legal basis "under national or international law at the time when [the crime] was committed".[85] This applies to the offense as such (*nullum crimen sine lege*), as well as the penalty (*nulla poena sine lege*). Most importantly, Article 7 ECHR prohibits the retroactive application of criminal law.[86] That legal basis does not have to exist in written law (there is thus no *lex scripta* requirement),[87] and the ECtHR has considered convictions based on customary international law to be permissible.[88] In addition, where international law provides for a criminal offense, without "provid[ing] for a sanction (…) with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law".[89]

Moreover, that legal basis had to be "sufficiently clear" at the time in question,[90] and describe the prohibited conduct and the penalty in a sufficiently precise manner. Thus, courts may not construe criminal law extensively to the detriment of the accused, in particular through analogy.[91] According to the ECtHR in *Konovo v. Latvia* (GC):

> "This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable."[92]

More specifically, the ECtHR developed the concepts of *accessibility* and *foreseeability* as qualitive requirements for the legal basis of a conviction.[93] The notion of accessibility requires a certain publicity of the legal basis on which a conviction

84 The standards under Article 7 ECHR notably fall short of partly stricter standards under constitutional law of certain domestic systems, see ECtHR, Nos. 10211/12 and 27505/14, *Ilnseher v. Germany*, Dissenting Opinion of Judge Pinto de Alburquerque joined by Judge Dedov of 4 December 2018, para. 90 ("The Court's case-law a common-law understanding of the legality principle protected only in a minimal fashion").

85 Art. 7(1) ECHR.

86 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 185.

87 *Grabenwarter*, p. 174; ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 185 ("When speaking of 'law', Article 7 alludes to (…) a concept which comprises written and unwritten law").

88 See, e.g. ECtHR, No. 9174/02, *Korbely v. Hungary*, judgment of 19 September 2008, paras. 78–85.

89 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 212.

90 ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015, para. 162; ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 187.

91 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 185.

92 *Ibid.*; see also ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015, para. 153.

93 See, e.g., ECtHR, No. 42750/09, *Del Río Prada v. Spain*, judgment of 21 October 2013, para. 91.

is based, which is typically ensured through the promulgation of domestic laws.[94] The notion of foreseeability relates to the subjective perspective of the accused, namely that they "must be able to appreciate that his conduct is criminal in the sense generally understood, without reference to any specific provision".[95]

When it comes to convictions based on international law, the ECtHR has considered the concepts of accessibility and foreseeability together in a context-specific test. Its application

> "depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. Persons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails (…)."[96]

The ECtHR thus applies different standards when it comes to crimes enshrined in international law, as compared to domestic law. In the context of accessibility, the Court found it sufficient that the Geneva Conventions were published by the Ministry of Foreign Affairs in an "official publication of a brochure", given that their domestic proclamation itself did not contain their text.[97]

These differences in the standards applied are most notable when it comes to customary international law. For instance, in *Kolk and Kislyiy v. Estonia*, the applicants argued that their conviction for crimes against humanity for acts committed in 1949 violated Article 7 ECHR, *inter alia* because those acts had not been unlawful under international law at that time. The Court dismissed the applications as manifestly ill-founded and noted

> "that the universal validity of the principles concerning crimes against humanity [enshrined in the Charter of the Nuremberg Tribunal of 1945] was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission."

It further found it

> "noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities. The Court thus considers groundless the applicants' allegations that

94 ECtHR, Guide on Article 7 of the European Convention on Human Rights (29 February 2024) para. 27.
95 ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, para. 63.
96 ECtHR, No. 36376/04, *Konovo v. Latvia*, judgment of 17 May 2010, para. 235; ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, para. 62.
97 ECtHR, No. 9174/02, *Korbely v. Hungary*, judgment of 19 September 2008, paras. 74–75.

> their acts had not constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that."[98]

The Court has had a similarly liberal approach to the ascertainment of customary norms in other cases, attaching great relevance to the Nuremberg Charter and the Nuremberg Principles.[99] In terms of accessibility, the ECtHR merely refers to the public availability of those materials that provide evidence of state practice and *opinio juris*.[100]

Moreover, the Court explicitly allows judicial bodies to progressively clarify and develop criminal law through their interpretation. That is (only) limited by the requirements that any given interpretation must be "consistent with essence of the offence and could reasonably be foreseen", which likewise applies to crimes based on international law.[101] Thus, the ECtHR is not necessarily concerned with whether a particular interpretation of an international (core) crime by domestic courts is *correct*, but whether it is *reasonable*.

The case law on convictions for the crime of genocide is particularly instructive on this. In *Jorgic v. Germany*, the German domestic courts convicted a Bosnian Serb for acts of genocide, as he participated in an ethnic cleansing campaign in 1992. The judgment, handed down in 1997, relied on a particular wide understanding of the "intent to destroy", by finding that it "meant destruction of the group as a social unit in its distinctiveness and particularity and its feeling of belonging together", while "a biological-physical destruction was not necessary".[102] That interpretation of the Genocide Convention was subsequently explicitly rejected by the ICTY, in reference to the principle of legality.[103] However, the ECtHR found no violation of Article 7 ECHR. The conviction was consistent with the "essence of the offence", as the finding was "covered by the wording, read in its context (…) and does not

98 ECtHR, Nos. 23052/04 and 24018/04, *Kolk and Kislyiy v. Estonia*, Decision of 17 January 2006, paras. 8–9.

99 ECtHR, No. 14685/04, *Penart v. Estonia*, Decision of 24 January 2006, paras. 9–10 (concerning convictions for acts committed in 1953/54); ECommHR, No. 29420/95, *Touvier v. France*, Decision of 13 January 1997, para. 161 (concerning convictions for acts committed in 1943/44, with the Commission merely noting "that the offence of a crime against humanity (…) [was] laid down by the Charter of the Nuremberg International Tribunal").

100 *ECtHR*, "Guide on Article 7 of the European Convention on Human Rights" (29 February 2024) para. 27. See also, ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, para. 63 ("accessibility does not exclude reliance being placed on a law which is based on custom").

101 ECtHR, No. 36376/07, *Kononov v. Latvia*, judgment of 17 May 2010, para. 185; see also ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015, para. 162; ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, paras. 59–60; *Grabenwarter*, pp. 174–175 (noting that the line between judicial interpretation and (impermissible) law-making is difficult to draw in the abstract).

102 ECtHR, No. 74613/01, *Jorgic v. Germany*, judgment of 12 July 2007, para. 18.

103 *Prosecutor v. Krstić*, Trial Chamber, IT-98–33-T, Judgment of 2 August 2001, paras. 577–580. This was confirmed in *Prosecutor v. Krstić*, Appeals Chamber, IT-98–33-A, Judgment of 19 April 2004, paras. 25, 33.

appear unreasonable".[104] Moreover, the domestic court was able to rely on scholarly opinion (even though the interpretation was disputed) and a UNGA resolution. In addition, the Court considered that any interpretation "consistent with the essence of that offence must, as a rule, be considered as foreseeable" if, as in this case, it was the first under new domestic legislation (which incorporated the international (core) crimes).[105] The applicant was not able to rely on narrower interpretations by other authorities, such as the ICTY, as these occurred subsequent to the offence.[106]

The ECtHR applied a comparable standard of review to genocide convictions by Lithuanian courts. In 1988, Lithuania passed new domestic legislation that incorporated the crime of genocide, but added "political" and "social" groups to the list of protected groups stemming from the Genocide Convention (*i.e.* national, ethnical, racial and religious groups).[107] Lithuania subsequently began to prosecute several individuals on genocide charges for their involvement in the Soviet repression of the partisan movement in the 1940s and 1950s. In *Vasiliauskas v. Lithuania*, the Grand Chamber (by narrow majority) found that a conviction in such a case violated the principle of legality.[108] While the crime of genocide constituted customary international law at the relevant time in 1953,[109] it did not protect political groups.[110] Moreover, the Court found that the requirement of an intent to destroy the group "in part" constituted a "requirement as to substantiality" at the time.[111] It then turned to the finding of the appellate courts that the partisans were "representatives of the Lithuanian nation" and, thus, "the national group".[112] However, the ECtHR was unsatisfied with both the legal reasoning and the factual basis for that assertion, holding that

> "there is no firm finding in the establishment of the facts by the domestic criminal courts to enable the Court to assess on which basis the domestic courts concluded that in 1953 the Lithuanian partisans constituted a significant part of the national group".[113]

Moreover, it considered that it is questionable whether "the ordinary meaning of the terms 'national' or 'ethnic' (…) can be extended to cover partisans".[114] For all of

104 In particular, the domestic court relied on those *actus rei* (defined in Art. II(d) and (e) of the Genocide Convention), which did not necessitate the physical destruction of the group.
105 ECtHR, No. 74613/01, *Jorgic v. Germany*, judgment of 12 July 2007, para. 109.
106 ECtHR, No. 74613/01, *Jorgic v. Germany*, judgment of 12 July 2007, paras. 103–116.
107 See in more detail *Zilinskas*, Jurisprudencjia 2009, pp. 336–337.
108 ECtHR, No. 35343/05, *Vasiliauskas v. Lithuania*, judgment of 20 October 2015.
109 *Ibid.*, para. 168.
110 *Ibid.*, para. 175.
111 *Ibid.*, paras. 176–178 (noting subsequent – expansive – developments in case law that focused on whether a "distinct" part of the group was targeted, also taking account of the "prominence" within that group).
112 *Ibid.*, para. 179.
113 *Ibid.*, para. 181.
114 *Ibid.*, para. 183.

these reasons, the Court found that the "applicant's conviction for genocide could not have been foreseen at the time of the killing of the partisans".[115]

However, in the subsequent case of *Drėlingas v. Lithuania*, concerning a comparable conviction, a Chamber of the ECtHR came to a different conclusion.[116] The sole distinguishing factor between these two cases is the reasoning adopted by the Lithuanian Supreme Court.[117] It considered that the

> "Lithuanian partisans (…) had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation."[118]

In turn, the ECtHR found that the clarifications undertaken by the Supreme Court in its legal interpretation made the convictions "foreseeable" at the time of committing the offense, and therefore not in violation of Article 7 ECHR.[119]

The *Drėlingas v. Lithuania* judgment may be criticized from the perspective of international criminal law: to what extent it is permissible to construct a given political group as a sub-group of the "national group" is highly disputed.[120] However, more important for the present purposes is the standard of review adopted by the ECtHR: it shows a notable deference to the interpretation of domestic *as well as* international law by domestic courts. Despite its character as an international court, it does not understand itself as an "appellate" body when it comes to crimes based on international law – and thus concerned with developing its own legal reasoning –, but rather limits itself to establish the perimeters of "reasonable" interpretations.[121]

Another factor that the ECtHR considers in the context of foreseeability is whether the accused held a particular position of authority within a given government structure or had specific training. It *inter alia* highlighted that the accused occupied "very senior positions (…) in the State apparatus"[122], had been a commanding army officer[123], a police commander who was a military-academy-educated officer[124] or a police officer.[125] The ECtHR also at times suggests that the criminality of the type of conduct that constitutes international (core) crimes could

115 *Ibid.*, para. 186.
116 ECtHR, No. 28859/16, *Drėlingas v. Lithuania*, judgment of 12 March 2019.
117 See the reproduced excerpts of the Supreme Court's judgment in *ibid.*, paras. 50–52.
118 *Ibid.*, para. 103.
119 *Ibid.*, paras. 108–111.
120 See, *e.g.*, *Stahn*, pp. 35–36 (specifically referring to the Katyn massacres, killing the Polish intelligentsia); *Nersessian*, pp. 83–84, see also at 54–55 (discussing similar issues in the context of "auto-genocide").
121 See also the reference to the "principle of subsidiarity" in ECtHR, No. 28859/16, *Drėlingas v. Lithuania*, judgment of 12 March 2019, para. 105.
122 ECtHR, Nos. 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany*, judgment of 22 March 2001, para. 78.
123 ECtHR, No. 36376/07, *Kononov v. Latvia*, judgment of 17 May 2010, paras. 235–239.
124 ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, para. 65.
125 ECtHR, No. 51552/10, *Šimšić v. Bosnia and Herzegovina*, Decision of 10 April 2012, para. 24.

hardly be unforeseeable. It repeatedly highlighted the "flagrantly unlawful nature" of the acts in question, which should be apparent after "even the most cursory reflection by the applicant".[126]

E. Concluding Remarks: Rule of Law Considerations in Prosecuting the Crime of Aggression before a Special Tribunal

The Special Tribunal for the Crime of Aggression against Ukraine raises several questions from the perspective of the rule of law. This contribution has specifically focused on the tribunal having to be "established by law" as an institutional guarantee and the principle of legality as a substantive guarantee.

The first aspect relates to the competence of the CoE to establish an international criminal tribunal, as well as the procedural guarantees accorded in its framework. In contrast to the UN Security Council (and as seen with the ICTY and the ICTR), the CoE and its organs do not have the authority to establish an international criminal tribunal through its own accord. Nevertheless, this contribution argues that the CoM has the competence to conclude a treaty on behalf of the CoE with Ukraine for that purpose. In addition, there are at least statements at the policy level that the Special Tribunal should accord all necessary fair trial guarantees to the accused.

The second element, the principle of legality, relates to the existence of the crime of aggression under international law. Within scholarly opinion – and despite individual voices to the contrary[127] – there is a broad consensus of its customary status.[128] However, it should not be overlooked that this is less clear-cut than with regard to the other international (core) crimes. The coalescence of political will, practical capabilities and legal means to prosecute crimes of aggression rarely occurs, leading to a comparative lack of state practice. Since Nuremberg and Tokyo, no international criminal justice body was given jurisdiction over the crime of ag-

126 ECtHR, No. 51552/10, *Šimšić v. Bosnia and Herzegovina*, Decision of 10 April 2012, para. 24 ("which included murders and torture of Bosniacs within the context of a widespread and systematic attack against the Bosniac civilian population"); ECtHR, No. 36376/07, *Kononov v. Latvia,* judgment of 17 May 2010, para. 238; ECtHR, No. 33351/20, *Milanković v. Croatia*, judgment of 20 January 2022, para. 64.

127 *Knoops*, International Studies Journal 2023/2, p. 11 ("It is debatable whether the crime of aggression, at this moment, is part and parcel of customary international law."); *Hárs*, População e Sociedade 2023, p. 9 ("As an international crime, it lacks state practice and discernible *opinio juris*.").

128 *Grover*, in: Kreß/Barringa (eds), p. 387 ("The majority opinion among scholars today is that aggression is a crime under customary international law"). For an argument on specific regional customary norms, see *Grzebyk*, JICJ 2023/3, p. 435.

gression.[129] Domestic prosecutions are likewise extremely uncommon,[130] although relevant practice may be found in domestic legislation outlawing the crime of aggression.[131]

However, the definition of the elements of the crime "are well established" and the understanding of aggression "has remained virtually unchanged".[132] Insofar as the Special Tribunal operates with that established definition, it is safe to assume that it will comply with the standards set by the ECtHR. As already noted above, the Court found it sufficient that crimes were enshrined in the Nuremberg Charter and reaffirmed in the Nuremberg principles – which includes "crimes against peace". Moreover, as a leadership crime, the crime of aggression would only concern a limited group of individuals, who are presumably acutely aware of the unlawfulness of their conduct and thus could hardly claim that a criminal prosecution was not "foreseeable" as understood by the ECtHR.

In conclusion, international human rights law – as enshrined in the ECHR and interpreted by the ECtHR – provides for important RoL requirements for a Special Tribunal. While those set certain conditions regarding the establishment, composition and applicable law of a tribunal, they may well be complied with.

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129 See also US Military Tribunal Nuremberg, *United States v. Wilhelm von Leeb et al* ("High Command Case") (Judgment of 27 October 1948). Early efforts to codify international (core) crimes in the 1950s notably failed due to a lack of consensus on the definition of the crime of aggression, see *Bassiouni*, Israel Law Review 1993/1–2, pp. 253, 257–259.

130 For a recent conviction concerning the conflict in Ukraine pre-2022, see *Masol*, Are You a Leader? Ukraine's Supreme Court Clarifies the Definition of the Crime of Aggression, available at: www.ejiltalk.org/are-you-a-leader-ukraines-supreme-court-clarifies-the-definition-of-the-crime-of-aggression/> (28/10/2024).

131 *Reisinger Coracini*, in: Stahn/Sluiter (eds), p. 725; *Eurojust*, The Crime of Aggression in the National Laws of EU Member States, Genocide Network Observer States and Ukraine, available at: www.eurojust.europa.eu/publication/crime-aggression-national-laws-eu-member-states-genocide-network-observer-states-ukraine (28/10/2024). See also, confirming the customary status, *R v. Jones et al* [2006] UKHL 16, paras. 12–19 (Lord Bingham of Cornhill), para. 59 (Lord Hoffmann), para. 99 (Lord Mance).

132 See *Reisinger Coracini*, The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part II): Jurisdiction and Composition, available at: www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/ (28/10/2024).

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