Cour Pénale Internationale

International Criminal Court

Internal memorandum
Memorandum interne

To | À	**Plenary of Judges**	**From | De**	**Judge Rosario Salvatore Aitala**
Date	24 December 2024	**Through | Via**	
Ref.		**Copies**	
Subject | Objet	**Observations of Judge Aitala on Mongolia's Request for Partial Reconsideration**		

1. In response to the 'Order concerning the Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx)',[1] I, Judge Rosario Salvatore Aitala, submit the following written observations, pursuant to article 41(2)(c) of the Rome Statute ('Statute') and rule 34(2) of the Rules of Procedure and Evidence (the 'Rules'), in connection with the request made by Mongolia for partial reconsideration (the 'Request for Partial Reconsideration')[2] of a decision taken by the plenary on 22 November 2024 concerning Mongolia's request for the disqualification of judges (the 'Plenary Decision').[3]

[1] Plenary of Judges of the ICC, *Situation in Ukraine*, Order concerning the Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx), 9 December 2024, ICC-01/22-115.
[2] Mongolia, *Situation in Ukraine*, Request for Partial Reconsideration of the Decision on the "Application for the Disqualification of Judges", or Alternatively, a Submission of a new Application for Disqualification, 2 December 2024, ICC-01/22-113-Anx, *annexed to* Registry, *Situation in Ukraine*, Registry Transmission of a "Request for Partial Reconsideration of the Decision on the 'Application for the Disqualification of Judges'" received from Mongolia, 2 December 2024, ICC-01/22-113.
[3] Plenary of Judges of the ICC, *Situation in Ukraine*, Reasons for the Decision on the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), 22 November 2024, ICC-01/22-107.

Preliminary matters

2. Consistently with my earlier observations,[4] the Plenary Decision unanimously found that Mongolia had standing to bring its original disqualification request in the context of proceedings related to cooperation under article 87(7) of the Statute, noting that the interests of Mongolia were engaged.[5] Mongolia's standing related to the distinctive nature of article 87(7) proceedings[6] and its request for disqualification was limited in scope to the 'specific case and proceedings concerning Mongolia'.[7]
3. The Request for Partial Reconsideration, at times, appears to extend beyond the scope of the standing of Mongolia to represent its own national interests in the context of article 87(7) proceedings.[8] The plenary should focus on those issues which Mongolia has standing to raise, noting that Mongolia cannot represent the interests of any individual subject to an arrest warrant before the Court. Put otherwise, Mongolia's assertion that head of state immunity is directly tied to Mongolia's legal proceedings has no connection with the Chamber's finding which concern Mongolia, not Mr. Putin. Mongolia has not raised any allegation of actual or apparent bias against Mongolia on my part.
4. It is further observed that the Request for Partial Reconsideration is practically moot because the legal proceedings concerning Mongolia before Pre-Trial

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[4] Judge Aitala and Judge Ugalde, *Situation in Ukraine*, Observations of Judge Aitala and Judge Ugalde concerning the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), 7 November 2024, ICC-01/22-97-AnxII, para. 2, *annexed to* Plenary of Judges of the ICC, *Situation in Ukraine*, Notification concerning the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), 8 November 2024, ICC-01/22-97.

[5] Plenary of Judges of the ICC, *Situation in Ukraine*, Reasons for the Decision on the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), 22 November 2024, ICC-01/22-107 (the 'Plenary Decision'), para. 23.

[6] Additional submission in support of the Application for disqualification of Judges, dated 11 November 2024 and notified on 13 November 2024, ICC-01/22-101-Anx (the 'Additional submission'), paras 3-7, *annexed to* Registry, *Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to an "Additional Submission in Support of the Application for Disqualification of Judges", 13 November 2024, ICC-01/22-101.

[7] Application for the disqualification of Judges, dated 29 October 2024 and notified on 31 October 2024, ICC-01/22-92-Anx (the 'Application for the disqualification of Judge of 29 October 2024'), *annexed to* Registry, *Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to Pre-Trial Chamber II's "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" of 24 October 2024, 31 October 2024, ICC-01/22-92, para. 1.

[8] *See* Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 40, 44.

Chamber II have been completed.[9] The original disqualification request was a request, *inter alia*, for the disqualification of two judges of Pre-Trial Chamber II in connection with the proceedings concerning Mongolia arising from article 87(7) of the Statute.[10] More specifically, seeking to disqualify those two judges from hearing a request for leave to appeal. The decision on the request for leave to appeal in question was rendered by Pre-Trial Chamber II on 29 November 2024[11], following the Decision of the Plenary on the Disqualification Request communicated on 15 November 2024 (and fully rendered on 22 November 2024).

Reconsideration

5. The Request for Partial Reconsideration fails to meet the legal standard for reconsideration of judicial decisions at the Court. Reconsideration is not addressed in the Court's legal framework and has been consistently considered as an exceptional remedy that can only be granted in very limited circumstances. This strict exceptionality is due to the compelling need to ensure the stability and legal certainty of the Court's decisions. A comprehensive representative statement of the approach consistently taken by the Court to reconsideration is the following:

> 'The Chamber notes that the Statute does not provide guidance on reconsideration of judicial decisions. However, the Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*, particularly in light of Articles 64(2) and 67 of the Statute. Trial chambers have determined that reconsideration is exceptional and should only take place if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment. A request for reconsideration cannot be used as an attempt to re-argue points which have already been made before the Chamber. However, if new facts are matters which the Chamber would have taken into account

[9] Although Mongolia has now made additional filings before Pre-Trial Chamber II asking for reconsideration of that Chamber's decision on leave to appeal, the proceedings before the Pre-Trial Chamber II cannot be considered to be ongoing based merely on the fact of Mongolia having made additional unsolicited filings, thus delaying the finality and conclusion of the proceedings.

[10] Application for the disqualification of Judge of 29 October 2024, ICC-01/22-92-Anx, para. 1.

[11] Pre-Trial Chamber II, *Situation in Ukraine*, Decision on Mongolia's requests for leave to appeal, temporary stay of the proceedings and related matters, 29 November 2024, ICC-01/22-111.

> when arriving at the impugned decision, then it is clearly in the interests of justice that the Chamber considers whether those facts would provide good and sufficient reason to alter that decision.'[12]

6. The Request for Partial Reconsideration fails to meet this standard. The Request for Partial Reconsideration presents four alleged grounds for reconsideration: (A) Error in legal reasoning; (B) Concerns regarding the speed of Pre-Trial Chamber II's decisions; (C) New evidence affecting impartiality; and (D) Procedural error. None of these grounds satisfy the requirements for reconsideration.
7. Commencing with Mongolia's ground A, the alleged error in legal reasoning is that the Plenary Decision failed to consider whether Judges Aitala and Ugalde, having already issued an arrest warrant for Mr Putin allegedly involving the consideration of the immunity of a Head of State, can be expected to impartially consider subsequent proceedings involving the same substantive legal issues and the same individual.[13] This issue cannot constitute an error of reasoning in the Plenary Decision because the same argument was already made by Mongolia in the original disqualification proceedings[14] and was fully considered by the plenary. The Plenary Decision clearly and correctly expressed the unanimous view that where the judges of a Pre-Trial Chamber exercise different decision-making functions assigned to them by the Rome Statute, each of which require the application of distinct legal standards and criteria, no issues of actual or apparent bias arise.[15] Noting that reconsideration cannot be used to re-argue matters already raised nor to express disagreement with the Plenary Decision, the fact that this issue was already fully raised and addressed precludes Mongolia's ground A from justifying reconsideration.
8. Mongolia's ground B for reconsideration is that Pre-Trial Chamber II is alleged to have acted too hastily in rendering its decision on the leave to appeal request. It is algo alleged that the motivations for the Chamber's decision "may not have been purely legal but political".[16] These allegations are unsubstantiated. Moreover, this argument is not capable of supporting a request for reconsideration. The original disqualification proceedings assessed whether Judges Aitala and Ugalde should be disqualified from rendering the decision

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[12] Trial Chamber I, The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman *('Ali Kushayb')*, Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", 29 March 2022, ICC-02/05-01/20-650-Red, para. 10.

[13] Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 25-30.

[14] For example, Mongolia stated that 'Mongolia's disqualification request is confined to specific circumstances where judges who issued an arrest warrant against a Head of State are now tasked with adjudicating a State Party's compliance with that warrant': Additional submission, ICC-01/22-101-Anx, para. 20.

[15] Plenary Decision, ICC-01/22-107, para. 25.

[16] Request for Partial Reconsideration, ICC-01/22-113-Anx, paras. 31 and following.

on Mongolia's request for leave to appeal the article 87(7) decision of Pre-Trial Chamber II. Once the plenary took its unanimous decision not to disqualify Judges Aitala and Ugalde (communicated publicly on 15 November 2024, while the full decision was rendered on 22 November 2024)[17], the Pre-Trial Chamber was duty bound to render its underlying leave to appeal decision as soon as practicable in the interests of justice, consistently with the Statute's framework. It eventually did so on 29 November 2024. The timing of the Pre-Trial Chamber's leave to appeal decision cannot demonstrate the existence of any legal error or injustice in the Plenary Decision, which had already been taken. Accordingly, ground B reveals no basis for reconsideration.

9. Mongolia's ground C for reconsideration is that there is 'new' evidence, citing two publications in Italian language written by myself. These publications date from 2021 and March 2022. These texts were fully available in the public domain at the time of the initial disqualification request of 29 October 2024 and therefore cannot constitute new facts or new evidence. Reconsideration is a highly exceptional remedy to be used and construed narrowly in order to preserve the stability and the certainty of the Court's decisions and cannot be used be used merely to supplement an earlier request, based on information which was readily publicly available at the time of that earlier request.
10. Mongolia's ground D for reconsideration is that the plenary of judges is alleged to have committed a procedural error in failing to allow Mongolia to respond to submissions made by the Prosecution.[18] This issue of a procedural nature could not have caused any injustice to Mongolia as the Prosecution's submissions were not used by the plenary.[19] Accordingly, nothing in this ground is capable of satisfying the legal standard for reconsideration, which requires that it be necessary to prevent an injustice.
11. In sum, it is observed that reconsideration is an exceptional legal remedy at the Court. It is not a mechanism which is available in response to mere disagreement with a rendered decision nor to further explain or supplement arguments which were already raised in the original proceedings. The exceptionality of reconsideration is necessary to safeguard the integrity of judicial proceedings by ensuring legal certainty and stability. It is equally necessary to ensure that legal proceedings are finite. In very limited circumstances, reconsideration may be appropriate but these circumstances must be closely guided by the need to demonstrate a clear error of legal reasoning or the necessity to prevent injustice. As elaborated above, none of the

[17] Plenary of Judges of the ICC, *Situation in Ukraine*, Notification of a decision of the plenary on the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), 15 November 2024, ICC-01/22-104.
[18] Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 51-55.
[19] Plenary Decision, ICC-01/22-107, para. 22.

alleged grounds of reconsideration presented by Mongolia satisfy this requisite legal standard.

New Disqualification Request

12. The Request for Partial Reconsideration states that it should, alternatively, be considered as a new application for the disqualification of Judges Aitala and Ugalde. Plainly, the only relevant ground presented by Mongolia concerns the alleged 'new' evidence (ground C).[20] It is observed that the need for finality, certainty and efficiency in legal proceedings renders it necessary that new requests for disqualification of judges whose disqualification has already been unanimously rejected be the plenary should be considered in an exceptional and very careful manner. The alleged 'new' facts/evidence, which were publicly available to Mongolia at the time of the original disqualification request, are insufficient in this regard. The requirement in rule 34(2) of the Rules for a disqualification request to be made as soon as there is knowledge of the grounds on which it is based, attests to the necessity of matters concerning disqualification to be addressed in a timely manner, to ensure legal certainty and stability. It is proposed that repeat disqualification requests against the same judges in the same proceedings should not be allowed where they would effectively allow a disqualification request to be placed before the plenary of judges in a piecemeal fashion. Finally, it is noted that a 'new' disqualification request is an improper legal mechanism in circumstances such as the present in which the decision on the Pre-Trial Chamber on leave to appeal has already been taken thus rendering the disqualification practically moot.

Alleged 'new' evidence

13. There is no legal basis for considering the alleged 'new' evidence, as it neither meets the legal standard for reconsideration nor should it be properly regarded as supporting a new disqualification request. Nonetheless, for the sake of transparency, I will address the substance of this alleged 'new' evidence raised by Mongolia. The Request for Partial Reconsideration raises statements made in two texts: a part of a textbook on international criminal law concerning the

[20] Ground A (error in reasoning) is not capable of supporting a new request for disqualification as it was already fully considered and dismissed by the plenary (see paragraph 7 above). Ground B (alleged expedited decision-making) is incapable of supporting a new request for disqualification, with the performance of assigned judicial functions in a timely manner following the plenary's decision to reject the disqualification request bearing no resemblance to any recognised ground for disqualification. Ground D (procedural issue concerning the Prosecution's Submissions) has no relevance to whether Judges Aitala and Ugalde have acted with any actual or appearance of bias.

concept of immunity (the 'Text Book')[21] and an article referring to start of the conflict in Ukraine (the 'Article').[22] Noting that Mongolia has claimed that this 'new' evidence is of relevance but has failed to provide it to the Court, nor even quoted any parts of them supposedly supporting its allegations, the relevant extracts of the Text Book and the Article are hereby provided in endnote in English language.

14. Article 10(2) of the Code of Judicial Ethics provides as follows:

> While judges are free to participate in public debate on matters pertaining to legal subjects, including academic publications, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court. In commenting on decisions or judgements of the Court, judges should show at all times judicial restraint and be mindful of the principles set out in this Code.

15. The Text Book was published in 2021 and the Article on 4 March 2022, but the latter was submitted about a week earlier in order to allow editorial work as the Italian Review of Geopolitics is published at the same time in paper and online. The situation in Ukraine was assigned to Pre-Trial Chamber II, which included myself, on 2 March 2022.[23]
16. Preliminarily it needs to be noted that all Judges of the Court, because of the experience and professionalism required to be nominated as candidates and elected as judges, have previously expressed views on matters of law or on events related to Situations before the Court. Previous plenaries of judges have noted this by describing that 'a Judge of the ICC does not come to the Court in a state of *tabula rasa*. Rather, she or he arrives at the Court with the highest level of experience in relevant fields, be that criminal law and procedure or international law, with it also being entirely possible that a judge may, in addition, come to the Court with extensive experience in a partially non-legal field, such as international relations or security'.[24] In that particular disqualification request, the plenary highlighted that comments by a judge which were general in nature, geopolitical, peripheral to the case and not connected to criminal proceedings against any individual did not give rise to

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[21] Request for Partial Reconsideration, ICC-01/22-113-Anx, para. 42.
[22] Request for Partial Reconsideration, ICC-01/22-113-Anx, para. 43.
[23] Presidency, *Situation in Ukraine*, Decision assigning the situation in Ukraine to Pre-Trial Chamber II, 2 March 2022, ICC-01/22-1.
[24] Plenary of Judges, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 42.

an actual or appearance of bias.[25] It is assumed that judges of the Court are professional judges who, by virtue of their experience and training, are capable of dealing with matters before them while relying solely and exclusively on the evidence adduced in the case, with an objectively reasonable appearance of bias arising only in situations where a judge has previously made determinations of fact based upon consideration of the same issues and evidence.[26] Plenaries have also previously highlighted that the expression of opinions tangentially connected to a case are insufficient to give rise to disqualification.[27] Accordingly, the assessment of any issues of impartiality must involve the assessment of whether any prior or externally expressed views are of any relevance to the legal issues in the proceedings giving rise to the disqualification request.

17. The Text Book was published well before any investigation or situation on Ukraine at the Court. It is a purely academic publication aimed at providing information on international criminal law to students. It is used as a textbook in Italian universities. The content of the Text Book is merely descriptive of an area of international criminal law. It recounts key case law in the field in a neutral manner. A factual and descriptive publication on an area of international criminal law falls clearly within the scope of the permitted participation of a judge on legal matters set out in article 10(2) of the Code of Judicial Ethics. While reiterating that the Plenary should not evaluate this text, for the sake of transparency I provide an English translation in endnote [i].
18. The Article is authored together with Fulvio Palombino, professor of international law. In this regard, I note that the part of the Article which I authored pertained only to the jurisdiction of the Court. The part relevant to the work of the Court provides a strictly academic and informative analysis of the jurisdiction of the Court. It does not make conclusions or assessments, it does not contain criticism or opinions nor touch upon issues of potential individual responsibility of anyone for crimes. The article is entirely irrelevant to the question of Mongolia's interests in the article 87(7) proceedings and falls outside the scope of any matter for which Mongolia has standing, which are limited to the Finding of non-cooperation. As asserted earlier, it cannot act on behalf of the suspects of the case. While reiterating that the Plenary should not

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[25] *Ibid*, paras 45-46.

[26] Presidency, The Prosecutor v. Omar Hassan Ahmad Al Bashir, 19 March 2010, Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v, Omar Hassan Ahmad Al Bashir*, pursuant to article 41 (1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, pp. 6-7.

[27] Plenary of Judges, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision of the plenary of judges on the 'Defence Request for Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 19.

evaluate this text, for the sake of transparency I provide a courtesy translation in endnote[ii].

Procedural Request

19. It is observed that the Request for Partial Reconsideration asks Judges Aitala, Ugalde and Ben Mahfoudh to provide any information they have published concerning matters such as immunity and the situation in Ukraine or Russia.[28] Mongolia thus requests such information from one judge of the Pre-Trial Chamber who has never been the subject of any disqualification request (Judge Ben Mahfoudh), as well as from Judge Ugalde who has not been alleged to have published any writing of any relevance to the topic. It is further noted that the procedural request pertains only to information which is in the public domain and thus could be readily accessed or obtained by Mongolia.
20. Such request is inconsistent with the presumption of judicial impartiality which attaches to the judges of the Court. Such presumption may only be rebutted with evidence, with the burden of proof resting on the party requesting disqualification.[29] This procedural request effectively turns the presumption of judicial impartiality on its head and places a burden on judges of the Court to prove their impartiality in every instance. Such requirement would have a chilling effect on the appearance of impartiality of the judiciary of the Court as a whole, as well as create a risk of such procedural requests becoming *pro forma* in all legal proceedings before the Court. This request is legally untenable and should be entirely rejected by the plenary.
21. Nonetheless, for the sake of full transparency, I note that I have not authored any further texts or otherwise made further statements concerning head of state immunity or the situation in Ukraine.

[i] "*Unlike official immunities, personal immunities prevent in principle that public officials belonging to certain categories can be prosecuted even for international crimes for the duration of their mandate (PUSTORINO 2020, p. 144). This is a broader form of immunity than the official one, recognised to diplomatic and consular agents, heads of state and government and foreign ministers also with respect to private acts, not committed in the exercise of their functions. It has the important function of preventing interference in the private life of foreign dignitaries that could compromise their official actions. Immunity from criminal proceedings*

[28] Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 63-66.
[29] *See e.g.* Plenary Decision, ICC-01/22-107, para. 20.

for ordinary crimes and international crimes is reaffirmed by domestic and international jurisprudence. It is a temporary immunity, valid only as long as the person holds the position. The International Court of Justice affirmed the existence of immunity in favour of the Foreign Minister in office of the Democratic Republic of the Congo for war crimes and crimes against humanity, specifying however that the minister could have been prosecuted in his own country; by foreign courts on the condition that the State of nationality removed his immunity; by international courts; by foreign courts upon cessation of functions for crimes committed in a personal capacity before, during or after having held office (ICJ, Arrest Warrant of 11 April 2000 - Democratic Republic of the Congo v. Belgium, 14 February 2002). The judgment fails to address the crucial issue relating to the prosecution of international crimes committed in an official capacity given that it is inconceivable that these crimes could be committed in a private capacity. It thus seems to create an inadmissible space of impunity (CASSESE 2020, p. 138).
The Statute of the International Criminal Court excludes the paralysing effect of personal immunities on the prosecution of heads of State and government responsible for international crimes. According to article 27(2) St., immunities or specific procedural rules associated with the official capacity of a person, under national or international law, do not prevent the Court from exercising its jurisdiction over that person.
The latter provision does not clarify whether States Parties have an obligation to execute arrest warrants against heads of State and senior officials of non-Party States by removing their personal immunity. The issue took on incendiary tones when some States Parties to the Court (South Africa, Jordan, Malawi, Chad, Democratic Republic of the Congo) refused to execute the arrest warrant issued against the then Sudanese President Omar al-Bashir in the Darfur-Sudan situation reported by the United Nations Security Council, while he was in their territories. Several Pre-Trial Chamber decisions affirmed the obligation of States Parties to execute the mandate under Article 27(2) of the Statute, also noting that the Security Council resolution requiring Sudan to cooperate fully creates all obligations under the Statute for all States, including those under Article 27 (ICC, PTC II, Al-Bashir, 9 April 2014; 6 July 2017; 11 December 2017). Some decisions (ICC, PTC I, Al-Bashir, 12 December 2011) reiterated the principle that personal immunities are not enforceable in international courts, enunciated by the Special Court for Sierra Leone in the case against the then President of Liberia Charles Taylor (SCSL, Taylor, 31 May 2004). The Appeals Chamber, ruling on Jordan's appeal, confirmed the decisions of the Chamber but also resumed the Taylor theory by stating that there is a rule of customary international law that prevents personal immunities from being invoked in international courts, raising numerous criticisms, also because the parties had not raised the issue and the Chamber could have resolved the issue without conducting useless exercises in style (ICC, AC, Al-Bashir, 6 May 2019).
It has recently been reiterated by certain scholars that no customary international rule has yet emerged that excludes personal immunities in the case of the commission of international crimes. According to the current rule, incumbent senior officials cannot be prosecuted either in international or national jurisdictions (TAN 2021, p. 376)".

[ii] *"The International Criminal Court, which has been invoked on several occasions with considerable inaccuracy in the political and diplomatic debate that followed the outbreak of hostilities, could adjudicate individual responsibility for international crimes committed in the context of the war and beforehand. The Court has jurisdiction over war crimes, which consist of serious violations of the rules of international law governing the legitimate means and*

methods of conducting armed hostilities and the treatment of civilians and military personnel hors de combat; on crimes against humanity, the category that the Allies created in view of the Nuremberg trials to punish the Nazis of the Third Reich for the atrocities committed against their own Jewish citizens and which includes crimes that are an expression of the abuse of government power, in the form of widespread or systematic attacks against civilian populations that are an expression of government or organizational policies: murder, torture, arbitrary detention, rape, persecution; on genocide, consisting of violent conduct supported by the intent to destroy an ethnic, national or religious group; and on the crime of aggression. According to the declaration adopted by the General Assembly of the United Nations in 1974, an "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other way contrary to the Charter of the United Nations. An act of aggression such as the one currently attributed by most States to Russia, under certain conditions may also give rise to a crime of aggression, as such susceptible to being subjected to the jurisdiction of the International Criminal Court. According to the Statute of the Court, as amended at the Kampala Conference in 2010, the crime of aggression consists in the planning, preparation, initiation or execution of an act of aggression which by its character, gravity and scope constitutes a manifest violation of the Charter of the United Nations. It is an elite crime that can be committed only by those very few people capable of effectively exercising control or directing the political or military action of a State, that is to say the highest political and military leaders who have the effective power to decide and control the use of military force. The Court could not, however, exercise jurisdiction in relation to the events in Ukraine by proceeding for aggression because a provision of the statute, the result of a disputable compromise in Kampala wanted by important States, prohibits the Court from exercising its jurisdiction for the crime of aggression if the criminal conduct is carried out by a citizen of a State not party to the statute. The Russian Federation is not a party to the Court; indeed, despite having signed the international treaty in Rome that created the international judicial body in 1998, at the time of Yeltsin, it passed a law that excludes the possibility of the statute being ratified. The Court would have no room for manoeuvre in this respect, but it could adjudicate war crimes and crimes against humanity possibly committed on Ukrainian soil by anyone, both against Ukrainian citizens and against Russian citizens. Ukraine is not a State Party to the Court but has accepted its jurisdiction on two occasions, first for crimes committed on its territory from 21 November 2013 to 22 February 2004 and then for any international crimes hypothetically committed from 20 February 2014 onwards, without time limit. On 28 February, the Court's prosecutor announced his intention to open an investigation as soon as possible and on the same day the Lithuanian government announced that it would notify the Court to investigate "war crimes and crimes against humanity in Ukraine". If an investigation were indeed conducted, the Court may have to assess whether international crimes were committed at any time after 21 November 2013, in the context of the Jevromajdan uprising, against Russian-speaking minorities, as denounced by Moscow, or in these days of conflict. Although the Court will not be able to adjudicate acts that may be related to the crime of aggression, it may have to preliminarily assess the existence of the so-called "contextual element", that is, the recurrence of an armed conflict in connection with which for example murder, torture, persecution and so on were committed. In doing so, it may have to assess the circumstances that led to the conflict, including the legitimacy of the use of force by the State that initiated the hostilities. The international criminal trial has the predominant function of ascertaining the truth and that would be enough to deliver to history an objective reconstruction

of the events in progress. However, it must be kept in mind that investigations in conflict contexts are particularly difficult and that the proceedings before the Court are, for procedural and practical reasons, long and complex. If the prosecution were to conduct the investigations successfully, it would then have to demonstrate to the judges the existence of evidence and precautionary requirements for issuing arrest warrants against those responsible and then obtain their surrender, because the Court can only try defendants who are present".