

**LEGAL SHORTCOMINGS IN THE PROSECUTION OF WAR CRIMES:
THE CASE FOR CONTINUED USE OF AD HOC TRIBUNALS IN
UPHOLDING INTERNATIONAL LAW**

by

Madison Heeney
300222064

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Part 1: Glossary of Terms and Abbreviations Used

ICJ	International Court of Justice
ICC	International Criminal Court
IMT	International Military Tribunal
UN	United Nations
UNSC	United Nations Security Council
OTP	Office of the Prosecutor
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	The International Criminal Tribunal for Rwanda
ECHR	European Court of Human Rights
IMTFE	International Military Tribunal for the Far East
RSCSL	Residual Special Court for Sierra Leone
ECCC	Extraordinary Chambers in the Courts of Cambodia
STL	Special Tribunal for Lebanon
PACE	Parliamentary Assembly of the Council of Europe
NATO	North Atlantic Treaty Association
UNGA	United Nations General Assembly
IMTC	International Military Tribunal Charter
CoE	Council of Europe
EU	European Union
ILC	International Law Committee
IRMCT	International Residual Mechanism for Criminal Tribunals

Part 2: Introduction

The Geneva Convention was established through efforts to codify international law and establish formal rules intended to minimize violence and brutality against citizens in time of war. In 1998, the Rome Statute, the founding treaty of the International Criminal Court (ICC), came into effect for similar reasons; to attempt to reduce and deter atrocities and promote international peace, order, and justice. The purpose of creating the ICC was also to establish a permanent institution and so reduce reliance on temporary tribunals. Inter- and intra-state armed conflict is prevalent, and international law continues to face challenges of legitimacy and the absence of a higher authority. The institutions whose functions are to uphold the rule of law and ensure justice and accountability are also facing the disadvantage of political circumstances. There exist many processes and means of prosecuting individuals for crimes committed at the international level, yet both the evolving nature of war crimes and crimes against humanity and the jurisdictional and resource constraints of the international judicial system pose challenges to the delivery of justice and accountability for international criminal violations.

The structure of international law established following the Second World War stipulates a framework of peace by prohibiting war and violent conflict except in cases of self-defence or collective security. The Russian Federation's violation of international law, Israel's violent attacks in Gaza, and violence and unrest in Africa have brought more attention than ever towards international courts and judicial structures, including both permanent institutions such as the ICC and ad hoc tribunals created to deal with specific conflicts. It is these ad hoc tribunals that are the focus of this paper. They can take various forms. In the first instance, they can be incorporated

into the domestic court system.¹ In the second – so-called hybrid tribunals – they incorporate both domestic and international features. And in the third instance, a tribunal can be established by a treaty between a state and other states or through an intergovernmental organization. This paper will consider each of these different kinds of tribunals and discuss their efficacy and role in supporting international law as well as their possible use in the case of Ukraine. Existing international law may fail to respond effectively to pressing global needs, particularly those arising from humanitarian emergencies and global conflict.² This failure triggers the need for a corrective or alternative course of action.

This paper aims to identify the shortcomings of international law and its legal mechanisms to determine whether the jurisdiction of the International Court of Justice (ICJ) and the ICC should be broadened, or whether special tribunals should continue to be used as a support tool. The paper will examine whether these tribunals are a viable long-term legal solution for violations of international law, whether by a state or individual. These questions will be explored using the war in Ukraine as an exemplary case study, which has generated conversation about the need for an alternative solution for post-war legal retribution. Applying these questions to the war in Ukraine and the historical use of special tribunals will contribute to further exploring proposals that seek to address existing loopholes in the international legal framework and to determining whether the continued use of special tribunals in international law the best and most feasible solution.

¹ Nuridzhanian, Gaiane. *International Enough? A Council of Europe Special Tribunal for the Crime of Aggression*. Reiss Centre on Law and Security, New York University School of Law. 2024.

² Popovski, Vesselin and Turner, Nicholas, *Legality and Legitimacy in International Order* United Nations University, November 2008.

Part 3: Development of the International Legal Justice System

In an anarchic international system, the absence of a higher authority to regulate the enforcement of international law within the international system continues to pose concerns. The prosecution of a state as an entity fails to provide justice and accountability to individual perpetrators of a crime, given that states are unwilling to forgo their sovereignty and are aware that there are few ways of enforcing international law. The Nuremberg Tribunal, also called the International Military Tribunal (IMT), was as an attempt to resolve this problem and provide an institution that could hold a state government accountable for crimes committed under international law. The Tribunal was established to prosecute official leaders and members of the Third Reich who had a direct hand in executing orders or directly committing heinous crimes during the Second World War. The IMT intended not only to convict Nazi perpetrators, but also to serve as a lesson and exemplify the legitimacy of international law. The Tribunal also demonstrated that all of humanity would be guarded and protected under international law, and that not even government officials or heads of state could be protected; indeed, they could be held accountable.³ It has also been credited with establishing personal criminal responsibility in the international context,⁴ and it paved the way to the establishment of the permanent world courts: the ICJ and the ICC.

The ICJ, the principle judicial organ of the United Nations (UN), provides a judicial setting whereby legal disputes are submitted by one state against another for violations of international law. It also provides advisory opinions of legal questions referred to the Court by

³ Rosen, Tove, *The Influence of the Nuremberg Trial on International Criminal Law*, Robert H. Jackson Centre, January 2018.

⁴ *Courts and Tribunals*, United Nations International Law Documentation, UN Library. June 2024.

authorized UN organs and specialized agencies.⁵ The ICJ was established in 1945 by the Charter of the UN and contributes to global peace and security by providing a means for states to settle disputes without escalating to conflict.⁶ The ICJ serves as a mediating body for cases brought before it and does not have its own prosecuting body capable of trying a defending state. The ICJ's judges listen to trial statements from both parties, and offer a resolution, or impose provisional measures against an aggressor state. There is no enforcement or regulating body to ensure these measures are followed. Both Ukraine and Russia, as UN member states, have the authority to bring a case against each other, regardless of whether they have direct involvement in the dispute or not.⁷ Ukraine has brought two cases to the ICJ against Russia, one for its invasion of Crimea in 2014, and a second on 24 February 2022, two days after the most recent full-scale invasion.

The ICC is the first permanent, treaty-based international criminal court, and was established through the Rome Statute.⁸ It oversees trial procedures for the most serious war crimes and crimes against humanity committed by an individual, including genocide, crimes against humanity and war crimes. Its jurisdiction extends to any crime committed after 1 July 2002, as well as to the crime of aggression, as of 17 July 2018, under specific conditions and procedures as defined in the Rome Statute.⁹ The ICC can exercise jurisdiction over international crimes committed on the territory of a state party, or by one of its nationals, over any situation referred to the prosecutor by the United Nations Security Council (UNSC), and if a State makes

⁵ United Nations International Law Documentation, 2024.

⁶ *What is the International Court of Justice and why does it matter?* United Nations News. January 2024.

⁷ Ibid.

⁸ *The ICC at a glance*, International Criminal Court. July 2017.

⁹ Ibid.

a declaration accepting the jurisdiction of the Court.¹⁰ The execution of a full judicial process and the final verdict is decided by evidence collected and submitted for the trial process. The ICC does not in this case have jurisdiction to prosecute aggression in Ukraine, as Russia is not a signatory to the court's treaty.¹¹ The ICC's Office of the Prosecutor (OTP) is the organ responsible for examining situations under the jurisdiction of the Court where genocide, crimes against humanity, war crimes and aggression appear to have been committed, and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes.¹² The OTP can decide to open an investigation on its own initiative, Ukraine declared ad hoc acceptance of the ICC's jurisdiction in both 2014 and 2022, which grants the OTP jurisdiction to investigate crimes committed in Ukraine. The Court is also able to investigate alleged Rome Statute crimes committed by the nationals of States Parties anywhere in the world (even if not committed on the territory of a State Party)¹³.

In a monumental declaration, the ICC announced on March 17th, 2023 that it had issued an arrest warrant against President Vladimir Putin and Maria Alekseyeva Lvova-Belova (Commissioner for Children's Rights) for war crimes of unlawful confinement under Article 8(2)(a)(vii) of the International Criminal Court alleging, "*grave breaches of the Geneva Conventions against persons or property protected under the provisions of the relevant Geneva Convention; Unlawful deportation or transfer or unlawful confinement*" for the deportation and transfer of Ukrainian children from the occupied territory of Ukraine to Russia. Two more warrants of arrest were issued by the ICC Pre-Trial Chamber II on 5 March, 2024 against Sergei

¹⁰ Ibid.

¹¹ Brzozowski, Alexandra. *EU seeks special court to try Russia's war crimes in Ukraine*. Euractiv. November 2022.

¹² See International Criminal Court. *Office of the Prosecutor*

¹³ Ibid.

Ivanovich Kobylash, a Lieutenant General in the Russian Armed Forces who at the relevant time was the Commander of the Long-Range Aviation of the Aerospace Force, and Viktor Nikolayevich Sokolov, an Admiral in the Russian Navy.¹⁴ According to the ICC, if an individual has committed a Rome Statute crime on the territory of a State party or of a State that has logged an ad hoc declaration to the ICC, the Court is able to exercise jurisdiction.¹⁵

According to Jean-Marc Sorel, Professor and Director of the Research Institute in International and European Law at Sorbonne, the international criminal justice system emerged in layers. The first layer consists of the two ad hoc tribunals created to try crimes committed in the former Yugoslavia and Rwanda.¹⁶ A second layer—which stems in large part from the first—is the establishment of the permanent International Criminal Court, which, in conjunction with states, is competent to handle any proceedings that may arise in this area.¹⁷ A third layer is made up of a set of “internationalized,” “mixed,” or “hybrid” courts (Sierra Leone, Cambodia, East Timor, Kosovo, and Lebanon), so-called because they were created on the basis of an international agreement or act and borrow widely from the domestic law of the state in question, while being international in terms of their staff, operation, and the categories of crimes covered.¹⁸ Sorel notes that the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established under certain circumstances – before the end of conflict to try the main parties responsible, and through a binding UNSC resolution.¹⁹ The International Criminal Tribunal for

¹⁴ International Criminal Court ICC-01/22, Situation referred to the ICC by 43 States Parties for alleged crimes committed in the context of the situation in Ukraine since 21 November 2013. March 2022.

¹⁵ See ICC *Office of the Prosecutor*.

¹⁶ Sorel, Jean-Marc. *International Criminal Tribunals: The Light and Dark Side of a Recent Grand Ambition*. In *Revue Tiers Monde*, Volume 205, Issue 1, P. 29-46. 2011.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Rwanda (ICTR) was established under similar conditions, and were both deemed by Sorel to have reactivated the idea of the need for an permanent international court.²⁰

Stuart Ford, Professor of International Law at the University of Chicago, notes that international criminal justice is possible, but not easy, and that ad hoc tribunals are not a sustainable mechanism for ensuring legal justice.²¹ Ford notes that the ICC was created as a reaction to ad hoc tribunals, specifically that the ICC was established in order to eliminate the need for such tribunals entirely. Nevertheless, there are still flaws to the ICC's structure that prevent it from being able to fully investigate and prosecute all perpetrators of international law. Consequently, some argue that there is still a role for ad hoc tribunals in international law, and this idea has therefore been proposed as a potential option to address concerns of jurisdiction and legal responsibility for the war in Ukraine.

²⁰ Ibid.

²¹ Ford, Stuart, *The Impact of ad hoc Tribunals on the International Criminal Court*. Cambridge University Press, March 2019.

Part 4: The Rule of Law and State Involvement in War and Conflict

International law is created through the development of treaties and conventions that are signed and ratified by states parties and supported by international mechanisms like the ICC and ICJ, which uphold and prosecute states and individuals for violations of the law. In wars and conflict, their role is to aid in settling state disputes, provide judgement over cases, and deliver a judicial ruling against perpetrators of international law, both states and individuals. Enforcement of international law is difficult due to the lack of central authority,¹ able to judge violations of international treaties and conventions. International law therefore depends on the willingness of states and individuals to abide by the treaties and conventions which comprise the system of international law. Historically, states have not been obliged to cooperate with others in criminal matters unless they have agreed to do so. But over time, the view that criminal law, including its effects, is local in nature has given way to a rapidly growing need for international legal cooperation.²² Influential factors in this regard are increased cross-border activities, including the commission of crimes, international terrorism, and the development of human rights.²³ Commitment and contribution to organizations and international legal bodies like the UNSC, UNCHR, ICJ, ICC etc. are all indicators of increasing efforts at cross-border cooperation.

International law pertaining to war and conflict is codified in the Rome Statute through terms and definitions which fall under the category of “*Jurisdiction, Admissibility and Applicable Law.*” Each article is divided into sections that encompass crimes of war and conflict which include “Article 6: Genocide”; “Article 7: Crimes Against Humanity”; “Article 8: War

²² Cryer R, Friman H, Robinson D, Wilmschurst E. *State Cooperation with Respect to National Proceedings. In: An Introduction to International Criminal Law and Procedure.* Cambridge University Press, June 2012.

²³ Ibid.

Crimes”; and “Article 8bis: Crime of Aggression²⁴.” These Articles are considered the main four crimes of war, with the crime of aggression being a relatively new inclusion and receiving significant attention within the international community given its relevance to the war in Ukraine. The Charter of the UN defines the crime of aggression as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations²⁵.” In 2017, State parties to the Rome Statute made the historic decision to enable the ICC to prosecute the crime of aggression – marking the first time that humanity has had a permanent international court with the authority to hold individuals accountable for their decisions to commit the worst forms of the illegal use of force.²⁶ As the war in Ukraine is on-going, it should be a vital goal of state parties and organizations to come to an agree to a definition of aggression, as well as to begin negotiations to amend the Rome Statute to grant the ICC jurisdiction over the crime of aggression.

Prosecuting perpetrators and high-ranking members of state government for committing crimes in violation of international law has seen several monumental achievements throughout the ICC’s existence. When the ICC issued an arrest warrant in 2009 against Sudanese President Omar al-Bashir, the first against a sitting head of state, for charges of crimes against humanity and war crimes, it displayed a clear message by the ICC that, notwithstanding the principle of state immunity, even the most senior officials will be held accountable for the egregious crimes

²⁴International Criminal Court. “*Elements of Crimes*” <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf> December 2019.

²⁵ Ibid.

²⁶ *Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute and ICC*, Handbook, Permanent Mission of the Principality of Liechtenstein, Global Institute for the Prevention of Aggression. November 2017.

subject to its jurisdiction.²⁷ This case was the first instance that the Court has sought to exercise its jurisdiction over nationals of a non-State Party to the Rome Statute that has not consented to the Court's jurisdiction.²⁸ In consideration of options put forth regarding the war in Ukraine and potentially executing a trial in absentia, the ICC has declared they will not operate a legal trial in such manner, meaning that for any case brought against a sitting head of state such as President Putin or any other Russian perpetrator in this case to move forward, they must either surrender to the ICC, or be arrested by a cooperating government.²⁹

Focusing on the crime of aggression specifically in relation to the war in Ukraine, it deemed to be a crime committed by the highest political and military leadership.³⁰ The Rome Statute was expanded in 2018 to include the crime of aggression, but it was noted that the ICC should give priority to the prosecution of the other three crimes under its jurisdiction rather than to the prosecution of aggression.³¹ This marked the first time in 70 years – since the Nuremberg and Tokyo Tribunals – that an international tribunal would possess the possibility of prosecuting leaders for the ‘supreme international crime’, the crime against peace.³² Given the nature of the crime of aggression however, it is essentially impossible for this particular crime to be prosecuted in a national court, but it could be possible to prosecute the crime of aggression through a special international tribunal operating with the necessary jurisdiction. The Nuremberg Tribunal, for instance, based its jurisdiction over aggression by means of transfer of jurisdiction

²⁷ Kates, Ben. *Justice vs. Peace: Omar al-Bashir and the ICC*, University of Toronto Faculty of Law, 2009.

²⁸ Ibid.

²⁹ Ibid.

³⁰ European Union Agency for Criminal Justice Cooperation, *International Centre for the Prosecution of the Crime of Aggression Against Ukraine*, European Union Agency for Criminal Justice Cooperation February 2023.

³¹ See the statement by Norway at the Review Conference in Kampala (RC/11, D), and the Dutch endorsement of this position at the time of the implementation of the Kampala amendments, Parliamentary Papers, House of Representatives. October 2015

³² Akande, Dapo, Tzanakopoulos, Antonios, *The Crime of Aggression before the International Criminal Court: Introduction to the Symposium*, European Journal of International Law, Volume 29, Issue 3, August 2018.

by the Allied Powers that occupied Germany after the Second World War, thereby assuming the powers of the German aggressor state.³³ A similar ad hoc international tribunal might therefore still be the best option for trying the crime of aggression. International law, treaty and custom has not (yet) developed a special regime for State-to-State cooperation concerning the previously mentioned crimes.³⁴

Potential solutions to circumvent these challenges begin with meaningful international cooperation to contribute towards the development and execution of just for international criminals, regardless of their status or position in government. Cryer et al. point out the fact that international laws, treaties, and customs have not (yet) developed a special regime for State-to-State cooperation concerning such crimes. The Geneva Conventions and Additional Protocol I, for example, explicitly refer to cooperation in accordance with domestic legislation, and fail to provide protocols on handling international criminal matters. This causes a vagueness and uncertainty in the role and responsibility of states in instances where international cooperation regarding international criminal matter is most needed.

Regarding the legal procedure for prosecuting the crime of aggression, this research topic sets out to conclusively determine whether there is a solution for how a state in its entirety can be prosecuted, and if there is an option that will provide the highest chance of success, both in the case of Russia's aggression against Ukraine, and any other conflict that could arise. The ICC cannot prosecute the Russian leadership for the crime of aggression in the context of Russia's

³³ Professor Heller, Kevin Jon, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Leiden University, 2011.

³⁴ See Cryer R, Friman H, Robinson D, Wilmschurst E

war against Ukraine, therefore a new international tribunal will be needed to try Russia for the crime of aggression because the ICC is not able to oversee trial proceedings on any crime of aggression committed by Russia³⁵. National courts would also struggle in the face of obstacles such as the inability of a state to try another, as well as surpassing the immunity of the highest Russia authorities.³⁶

³⁵ See Akande, Dapo, Tzanakopoulos, Antonios, August 2018.

³⁶ Ibid.

Part 5: Literature Review: Insights and Perspectives on Potential Legal Proceedings in Ukraine

Opinions and research on ad hoc and special tribunals express a cautious optimism. While they recognize that there exist problems and concerns arising from previous examples of temporary courts, these problems are not deemed to be insurmountable. Ad hoc tribunals are seen as playing a supporting role to the ICC and ICJ, addressing any jurisdictional loopholes or circumstantial matters that may arise. With an increasing case load and more focus on international law, ad hoc tribunals can play a key function in ensuring international justice when a case or conflict falls outside the jurisdiction of the ICC. Weaknesses and areas of improvement from historical tribunals have been identified by researchers and subject experts, who additionally provide suggestions or proposals for how to resolve these concerns through modern innovation and development. The progression from no permanent international legal organ or institution to the establishment of the United Nations and the ICJ, ad hoc tribunals, and most recently the creation of the ICC shows a positive progression in the development of enforcement mechanisms and legal procedures.

The war in Ukraine has received significant attention from the international community and raised the important question as to how to proceed with legal proceedings against those accused of war crimes in that conflict. The idea of a special tribunal for Ukraine was proposed shortly after Russia's first invasion of Ukraine in 2014, which means that there have been plenty of articles and research into this idea and its potential applicability to the on-going war. The proposal of a special tribunal for the war in Ukraine implies that there is a gap in international law or jurisdiction that prevents the permanent courts from being able to oversee the trial

process, whether entirely or in part. The ICJ can only assist in the mediation process and attempt to impose provisional measures to reduce conflict and violence in the region while state parties attempt to settle their dispute through diplomatic means. Provisions of the ICC's Rome Statute stipulate that this court can only consider the crime of aggression if both parties (the aggressor and the victim) have ratified it, but neither Russia nor Ukraine has done so.³⁷ Until there is a clearer picture of the conflict outcome, discussions of what can be done to hold Russian perpetrators of war crimes and crimes of aggression accountable are hypothetical and preparatory in nature. Research into the topic of ad hoc tribunals can, however, help evaluate proposals that have been made regarding the on-going war and provide a potential framework for an eventual legal proceeding.

Jennifer Trahan supports a fluid approach to ad hoc tribunals, noting that there is no agreement on what international tribunals are supposed to achieve. Some authors who support this idea recognize that tribunals are a result of trial and error, rather than developing from any premeditated plan or model.³⁸ Trahan notes that the purposes of ad hoc tribunals include socially transformative, judicial, and prosecutorial goals. While this approach does allow for flexibility and adaptation to situational circumstances, there does need to be a set of regulations and procedures for the establishment of special courts as well as what their purpose and intended function is to be. It would help to alleviate any objections to such tribunals if there were to be a standard, agreed upon procedure for how they are established. By contrast, confusion about their objectives and purposes will create negative impressions about their legitimacy. Trahan's

³⁷ Jędrzyński, Marcin. *Putting Russia on Trial. Ukrainian efforts to establish a tribunal for crimes of aggression*. Centre for Eastern Studies, December 2023.

³⁸ See Sorel, J. M., 2011.

analysis focuses on the ICTY, which she describes as having a mixed record of success in terms of the goals listed above. According to surveys evaluating its contribution the ICTY was not overly successful in a socially transformative role. However, Trahan points out that it's not reasonable to expect a tribunal to play such a transformative role.

By contrast, the ICTY did seem to make a successful impact in terms of its contribution to peace, security and the restoration of rule of law. The ICTR was implemented with the first goal of creating reconciliation, which Trahan considers inappropriate.³⁹ Deterrence was another factor examined, with the evidence suggesting a small contribution in the later years of the tribunal's existence. Courts and tribunals are intended to serve legal justice to perpetrators for breaches of the law. The restoration of peace and security or the deterrence of future conflict are secondary goals. Supporting this idea in his analysis, Sorel uses France as an example. France boasts that it spurred the creation of the ICTY and the ICC, but it has also shown reluctance when its soldiers were called to testify, and it was responsible for the provision in the ICC statute which originally allowed the Court's jurisdiction for war crimes not to be recognized for seven years.⁴⁰

An alternative proposal to fully remove the need for special tribunals is to grant universal jurisdiction to the ICC so that it has jurisdiction over all crimes committed in violation of international law, regardless of where or by whom they were committed. The fact that the ICC was not granted universal jurisdiction at the time of its establishment has been heavily criticized by some, including Hans-Peter Kaul, German international lawyer and former diplomat, who

³⁹ Ibid.

⁴⁰ See Sorel, J.M.2007.

called the rejection of universal jurisdiction “a painful weakness of the ICC regime⁴¹.” The main point made in his argument is that given this missing provision, in inter-state wars, such as the Russo-Ukrainian war, the perpetrator(s) will go unbothered if they do not consent to an ad hoc tribunal, and if they are not party to the ICC.⁴² Another argument to support this claim is that some offences will inevitably be left beyond the power of the ICC to prosecute.⁴³ The preface of the Rome Statute stipulates that international crimes threaten the peace, security and well-being of the world, and that these most serious crimes of concern to the international community must not go unpunished.⁴⁴ Yet if the Court lacks universal jurisdiction, this will not happen.

The case against universal jurisdiction is based not on principle but instead on an estimation of what can be realistically achieved.⁴⁵ Suggestions that the Rome Statute should be amended to enable the United Nations General Assembly (UNGA) to activate the ICC’s jurisdiction to get around the veto of UNSC members are not practical.⁴⁶ Under Articles 10, 11, 12 and 14 of the UN Charter, the Assembly’s powers are limited to making recommendations, and therefore the Assembly lacks the ability to take coercive or enforcement action, which is the exclusive prerogative of the UNSC.⁴⁷ The United States was vocal in its opposition to any form of universal jurisdiction, promising to actively reject the Court should such provision be

⁴¹ Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, In “The Rome Statute of the International Criminal Court,” by Antonio Cassese, Paula Gaeta, and John R.W.D. Jones, July 2002.

⁴² Ibid.

⁴³ Bekou, Olympia and Cryer, Robert. *The International Criminal Court and Universal Jurisdiction: A Close Encounter?* January 2007.

⁴⁴ Ibid.

⁴⁵ Ryngaert, Cedric. *The International Criminal Court and Universal Jurisdiction*. Leuven Centre for Global Governance Studies. March 2010.

⁴⁶ Darcy, Shane, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, Just Security, March 2022.

⁴⁷ McDougall, Carrie. *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, Journal of Conflict and Security Law, Volume 28, March 2023.

granted.⁴⁸ It is hard to see how the goal of granting the ICC universal jurisdiction could be achieved, and therefore this is an unlikely solution to legal recourse for the war in Ukraine.

Under the given circumstances, analysts recognize the need for the establishment of a new tribunal to cover the war in Ukraine. Scholars and experts discussing the war in Ukraine give various options as to the establishment and execution of a special tribunal. Suggestions included granting Ukraine jurisdiction over international war crimes, and amending the Rome Statute to grant the ICC universal jurisdiction. Given that granting the ICC universal jurisdiction is an almost impossible scenario, Ukraine has turned to the establishment of a special international tribunal to prosecute Russia for its crime of aggression against Ukraine since the beginning of the Russian invasion.⁴⁹ Ukraine is working to make the case that a tribunal must be established at the UN, opposing the idea of a hybrid court. However, Western partners, including the United Kingdom, Germany, and the United States, have been urging Ukraine to embrace the model of an internationalised court.⁵⁰ Some scholars are doubtful that such a tribunal would have much success in prosecuting Russian perpetrators. Nevertheless, most of the written work on the subject emphasises the importance of an international response to the war in Ukraine. The following section therefore analyzes historical precedents of ad hoc tribunals to see what lessons can be learnt from them, and what model or framework would provide the highest chance of efficacy and success.

⁴⁸ Schabas, William A., *An Introduction to the International Criminal Court*, 5th Edition Cambridge University Press, February 2017.

⁴⁹ See Jędrysiak, Marcin, 2023.

⁵⁰ Ibid.

Part 6: Historical use of Ad Hoc and International Criminal Tribunals

According to the International Committee of the Red Cross, international tribunals have existed since the beginning of the modern international system.⁵¹ Special tribunals play a key role where there have been accusations of genocide, war crimes, or crimes against humanity. They are founded on the need to minimize or eliminate such crimes, and to bring justice to the victims and the community as part of a pathway towards peaceful co-existence.⁵² Historical examples include the Nuremberg and Tokyo Tribunals created after the Second World War, the ICTY, the ICTR, the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC). Special tribunals can be responsible for both international and domestic crimes, and their legal functions vary based on the circumstances of the conflict or the crimes which they are prosecuting.

The Nuremberg Tribunal is arguably the most famed established special tribunal and was held between 20 November 1945 and 1 October 1946 in Nuremberg, Germany. The Tribunal was tasked with trying 23 of the most important political and military leaders of the Third Reich.⁵³ A second set of trials of lesser war criminals was held from 1946 to 1949, which included the “Doctors Trial” and the “Judges’ Trial,” sometimes referred to as the “subsequent Nuremberg trials.”⁵⁴ These trials marked the first significant moment in modern history when individual accountability was upheld and violators of international law were held responsible and accountable for the atrocities they inflicted. At the London Conference, held between 26 June and 2 August 1945, representatives of France, the Soviet Union, the United Kingdom, and the

⁵¹ Ibid.

⁵² International Committee of the Red Cross, *Ad Hoc Tribunals*, October 2010.

⁵³ *The Nuremberg Trials*, Carnegie Foundation, The Peace Palace Library, November 2018.

⁵⁴ Ibid.

United States negotiated the form that the trial would take.⁵⁵ The Nuremberg Charter was established with the vision of indicting not only individuals but also the entire Nazi Germany structures and institutions.⁵⁶ The International Military Tribunal (IMT) Charter and subsequent trials were historic for their role of prosecuting government leaders and officials for crimes committed against their own citizens. Combined efforts between allied states led to the establishment of the Charter. The Soviet Union proposed the change from “crimes against civilians” to “crimes against humanity,” with Great Britain adding the final wording to conclusively define crimes against humanity as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population.”⁵⁷ The final version of the IMTC limited the jurisdiction of the court to Germany’s atrocities.⁵⁸

The Trial was held at the Palace of Justice in Nuremberg, and overseen by judges from four allied states; the United States, France, the Soviet Union, and Great Britain. It was the first trial of its kind to have four judges from four different countries presiding.⁵⁹ Each delegation was responsible for drafting the indictment according to the geographic region. The British worked on aggressive war; France covered war crimes committed and crimes against humanity on the Western Front; the Soviet Union covered crimes committed on the Eastern Front; and The United States delegation outlined Nazi conspiracy and the criminality of Nazi organizations.⁶⁰

⁵⁵ Sellars, Kirsten. *Crimes Against Peace' and International Law*. Cambridge University Press. March 2013.

⁵⁶ See Peace Palace Library, 2019.

⁵⁷ Bassiouni, M. Cherif, *Crimes Against Humanity: Historical Evolution and Contemporary Application*. Cambridge University Press. July 2011.

⁵⁸ See Hirsch, Francine, July 2020.

⁵⁹ *The Nuremberg Trials*, The National WWII Museum New Orleans
<<https://www.nationalww2museum.org/war/topics/nuremberg-trials>.>

⁶⁰ Ibid.

The Trials were deemed to be “the true beginning of international criminal law,”⁶¹ and since then several additional significant international courts and tribunals have been established with similar goals and objectives - to hold perpetrators of the most serious crimes accountable and grant some semblance of justice for their victims. Other notable tribunals include the Tokyo Trials, or the International Military Tribunal for the Far East (IMTFE), the Residual Special Court for Sierra Leone (RSCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). Each case provided the opportunity to develop international law to become more consistent, efficient and legitimate. The difficulty remains that these institutions are state-led, and there is no higher governing authority to enforce rulings and outcomes decided in court. For instance, following the recent hearing held at the ICJ on Ukraine v Russia, in which Russia was found to have failed to meet measures previously established for its invasion and annexation of Ukraine, Russia responded that intergovernmental institutions such as any United Nations principal organ, the ICC, Interpol etc. are Western-led and influenced and so by default have no legitimate authority to impose measures against Russia.

The Nuremberg Trials intended not only to convict defendants, but also to assemble irrefutable evidence of Nazi crimes, establish individual responsibility and justice, exemplify the crime of aggression in international law, and provide a history lesson to ensure that these actions were never again repeated. Today’s war in Ukraine takes place in a much different digitalized society. The extent of atrocities committed during the Second World War went almost entirely unknown until allied soldiers liberated cities and Nazi prisons and camps on the ground.

Evidence presented in a trial today would be much different and most likely exponentially more

⁶¹ Sayapin, Sergey, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T.M.C. Asser Press. January 2014.

incriminating compared to thousands of written documents presented during the Nuremberg Trials. Witness testimonies were disregarded during the Nuremberg Trials due to potential lack of credibility. Present day witness testimonies are certain to be included and are supported by an abundance of evidence through means of live video, social media, and reporters and journalists documenting in areas of on-going conflict.

Nearly 50 years later, the ICTY and ICTR were established in the 1990s by the UN Security Council for the purpose of prosecuting criminals for war crimes, genocide, and serious human rights violations committed during conflicts in the Former Yugoslavia and Rwanda. Their legal basis was a mix of national and international law, and they contained both domestic and foreign prosecutors and judges.⁶² Both tribunals included the Nuremberg concept of ‘crimes against humanity’ in their articles, representing a further extension and development of international humanitarian law in internal conflicts. There were hurdles to the establishment of the ICTY and ICTR and their jurisdiction. Owing to the dissolution of the former Yugoslavia, the conflict there was considered both internal and external. In Rwanda, the war with the Tutsi-led RPF and the genocide against the Tutsis took place within state boundaries but was complicated by the fact that the RPF forces were exiles invading from Uganda.⁶³ The international development and elaboration of human rights instruments can be seen as the extension and application of international law in response to political circumstances, ethical concerns, and legal need.

⁶² Ibid.

⁶³ Humphrey, Michael, *International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda*, Journal of Human Rights Volume 2 No. 4, June 2010.

Discussions of solutions to the limitations of international law are on-going and more frequently occurring with the increased case load at the ICJ. The proposal to create a tribunal, or hybrid tribunal, to try Russian perpetrators for crimes of aggression has received support from numerous states including Ukraine, as well as several international bodies including the Parliamentary Assembly of the Council of Europe (PACE), the European Commission, the NATO Parliamentary Assembly and the European Parliament. The proposed framework would be an ad hoc international criminal tribunal aimed at prosecuting the Russian Federation and senior Russian leaders for actions in Ukraine and would serve as a complementary organ to the ICC investigation in Ukraine. It remains unclear how Russian officials and leaders will eventually be brought forth to face the court, something which could occur with a Ukrainian victory, or if President Putin is in some way ousted from the Russian presidency. Until then, and as the war drags on, measures imposed against Russia through the courts can only hope to influence international perceptions of Russia and further isolate it from the rest of the international community.

Part 7: Issues and Concerns with Special Tribunals

The implementation of special criminal tribunals face numerous challenges, from the initial proposal, through the establishment process and legal proceedings, to the conclusion of trials, a process which could take years. Many studies see ad hoc tribunals as a short-term option rather than a long-term solution. There are also different types of ad hoc tribunals, the suitability of which must be determined on a case-to-case basis. Three separate proposals have been made in the case of Ukraine: a hybrid tribunal; a tribunal operating under Ukrainian national institutions; and lastly a tribunal defined under an external convention, such as the Council of Europe (CoE)'s Convention on the Transfer of Proceedings or potentially the UNSC, should that be feasible without Russia's veto power.

If the flaws of ad hoc tribunals can be identified and resolved, they could very realistically continue to be utilized as an effective support tool to the ICC in situations of severe violence and conflict. If these concerns are insurmountable, then international organizations and states parties need to agree on a model framework for a permanent international legal mechanism that has jurisdiction over all war crimes and crimes against humanity. Issues of state sovereignty and the lack of state participation and compliance will only continue to hinder the development of international law and legal mechanisms and procedures. The idea of universal jurisdiction being granted to the ICC was concluded to be almost certainly unattainable, and world powers like the United States and China will refuse to forgo even a small fraction of state sovereignty to allow for an international court to hold higher authority. Instances where ad hoc criminal tribunals were shown to be ineffective in apprehending high level targets, were seemingly deemed to be caused by international forces being unwilling or unable to enforce court

indictments.⁶⁴ Changing states' perceptions of law so that they are more willing to comply with the enforcement and compliance of international law will contribute to bettering international mechanisms and procedures in the future, and be essential to further empowering international law.

In his article on the failings of ad hoc tribunals, Ralph Zacklin, former Assistant Secretary-General for Legal Affairs in the United Nations Office of Legal Affairs, identifies historical issues with special tribunals and the failure to resolve these issues since. He questions why the Nuremberg and Tokyo trials did not fix or at least improve the international legal system and why there is still a need for temporarily established, and often costly, tribunals, when there exist two international courts already.⁶⁵ Zacklin was involved in the creation of the ICTY and believed that several lessons can be learned from the process. The first is that the establishment of ad hoc tribunals like the ICTY and the ICTR undermines confidence in already established tribunals, a fact that questions whether such tribunals can effectively promote respect for international justice and the rule of law.⁶⁶ Next are structural issues, namely the financial and administrative capacity these tribunals need. Zacklin points out that the drawn-out trial process can create donor fatigue and dissatisfaction among participating member states.⁶⁷ In the case of the Ukraine war, there is plenty of international support for a special tribunal for Russian crimes of aggression, and thus financial and resource support from states parties are likely to be readily available.

⁶⁴ Howse, R., Teitel, R., *Beyond Compliance, Rethinking Why International Law Really Matters*, Global Policy Volume 1, Issue 2, May 2010.

⁶⁵ Zacklin, R., *The Failings of Ad Hoc International Tribunals*, Journal of International Criminal Justice, Volume 2 Issue 2, June 2004.

⁶⁶ Ibid.

⁶⁷ Ibid.

Political Implications

Political pushback stems from concerns of sovereignty leading to state opposition to the implementation of special or ad hoc tribunals. It is also unrealistic to expect international courts and tribunals to address all international crimes, whether due to lack of resources, the unwillingness of states to cooperate, or unwillingness to try a case against a certain state. Many countries fear that setting up such a court could set a precedent for punishing their leaderships for the aggressions they have committed in the past.⁶⁸ If the international community were to rely on the creation of new tribunals by the Security Council, it is almost certain that the Permanent Members of the Security Council would utilize their veto powers to block the creation of tribunals that might threaten their interests.⁶⁹ One example is the United States, which is concerned that countries of the Global South could move to establish a similar body, for example with regard to its invasion of Iraq.⁷⁰

Another issue is that the establishment of an international tribunal could appear as selective justice, as states only support such tribunals when it is financially and politically beneficial to them.⁷¹ Ad hoc tribunals can be seen as another institutional mechanism created and used by the West, which chooses who to prosecute for war crimes, but not face the same accountability measures itself. In a research article on the legitimacy of the ICC's OTP and concerns of prosecution bias, Birju Kotecha, Professor at Northumbria Law School in Newcastle notes that perceptions of the ICC will always be contested, fluid, and subject to the influence of

⁶⁸ See Jedysiak, Marcin, December 2023.

⁶⁹ Kirsch, Philippe, *The International Criminal Court: Current Issues and Perspectives*, Duke University School of Law, 2001.

⁷⁰ Duclos, M. *A Special Tribunal for the Russian Crime of Aggression in Ukraine*, Institute Montaigne. January 2023.

⁷¹ Ibid.

various circumstances.⁷² The focus should be on aligning the Courts' selection procedure towards greater procedural justice, which can make a modest but meaningful contribution to improving perceptions of the Court.⁷³

Bias and Selective Justice

Critics of the Nuremberg and Tokyo Tribunals have claimed that they were aimed at revenge, not true legal justice.⁷⁴ Only Germans and Japanese were prosecuted, yet some documents showed worse treatment of German prisoners by French soldiers, and allied forces who were responsible for the bombings of Dresden, Hamburg and Hiroshima.⁷⁵ Similar complaints have been raised against the ICTY. Many Serbs believed that the ICTY unfairly singled out Serbs for prosecution, with 59% of Serbs polled believing that Serbia should not have cooperated with the Tribunal.⁷⁶ An international criminal tribunal should not encourage bias towards one group, but rather facilitate the investigation and conclusive resolution of all actions committed within a given conflict. The laws, rules of procedure and evidence submitted at the Nuremberg Trials were non-representative of the diversity of the world's legal systems, but rather were essentially devised by Americans and based on American law.⁷⁷

Another issue is that there is no set criteria for how or when an ad hoc tribunal must be designed, and therefore may be seen as a selective process used for some conflicts but not all,

⁷² Birju Kotecha, *The International Criminal Court's Selectivity and Procedural Justice*, *Journal of International Criminal Justice*, Volume 18, Issue 1, March 2020.

⁷³ *Ibid.*

⁷⁴ See Duclos, January 2023.

⁷⁵ Popovski, Vesselin. *Legality and Legitimacy of International Criminal Tribunals*. Oxford University Press. March 2017.

⁷⁶ *Ibid.*

⁷⁷ Wallach, Evan J. "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?" *Columbia Journal of Transnational Law*, Volume 37, January 2008.

depending on when, how and where they are used. This can be a good and a bad thing. On the one hand, the lack of a blueprint allows for modification and adaptation to suit the needs of a given conflict. On the other, it could contribute to a lack of legitimacy, given that it seems that ad hoc tribunals are “made up” each time. The STL, for example, is described as a failed case due to a lack of political will, a failure of external support, and a lack of funding. In order to support the legitimacy of ad hoc tribunals, there does need to be a designated framework, with room for adjustment to fit a given conflict.

Concerns Over Jurisdiction and Undermining National Court Systems

Jurisdictional issues can arise or even invoke concern that international tribunals may undermine the role and responsibility of a national court system. One argument is that countries that have just been through civil war should be concentrating on rebuilding their society and political system rather than spending millions on special tribunals to try those responsible for violating international law.⁷⁸ This idea is disputed, however, as the implementation of a legal mechanism to provide support and justice for victims in the area can contribute to the rehabilitation process. Some countries facing serious conflict and violence may also have experienced the complete destruction of any government or legal institutions capable of executing any sort of trial. Following a serious war or violent conflict, there are two main challenges: (1) mediating, securing, and implementing a peace agreement that will create new political and economic institutions and new social norms, and that will prevent the recurrence of conflict; and (2) legitimizing this new transitional political order by empowering citizens and increasing local ownership over the peace process.⁷⁹ The legal justice process an important tool

⁷⁸ Crockett, Sophie. *Are International Courts Effective?* Royal Holloway, University of London, November 2011.

⁷⁹ Kora, Andrieu. *Transnational Justice: A New Discipline in Human Rights*. SciencesPo. 18 January 2010.

for achieving these goals. By re-establishing the rule of law, it helps to support rebuild the political institutions at the state level; and by healing victims, promoting reconciliation, and revealing the truth, it contributes to the building of a healthier society post-conflict.⁸⁰

Financial and Administrative Capacity

The expense and resource requirement of ad hoc tribunals has been criticized for taking up a sizeable chunk of the UN's budget and has led to "tribunal fatigue."⁸¹ Due to a long trial process that can span over decades, tribunal fatigue is a commonly reoccurring theme when discussing ad hoc tribunals. The concept refers to the extremely time consuming and politically exhausting process of reaching a consensus on the tribunal's statute, election of judges, prosecutor selection and funding arrangements.⁸² The amount of logistics, resources, and time spent by the UN Security Council on ad hoc tribunals has been seen in the past as causing a heavy strain on the capacity of the organization.⁸³ The ICTY, which started with an annual budget of \$276,000, over time expanded to consist of 16 permanent judges and nine ad hoc judges, supported by a staff of more than 1,000 persons. The biennial budget to support this body was estimated at \$276,474,100 for the period 2006–2007.⁸⁴ The cost of ad hoc tribunals is a cause for concern regarding their sustainability.

⁸⁰ Ibid.

⁸¹ See Zacklin, R., 2004.

⁸² Scharf, Michael P., "The Politics of Establishing an International Criminal Court" (1997). Faculty Publications. 561. https://scholarlycommons.law.case.edu/faculty_publications/561

⁸³ Skinnider, Eileen. *Experiences and Lessons from "Hybrid" Tribunals: Sierra Leone, East Timor and Cambodia*. International Centre for Criminal Law Reform and Criminal Justice Policy, February 2007.

⁸⁴ Dunoff, J., Ratner, S., Wippman, D., *International Law: Norms, Actors, Process: A Problem-Oriented Approach*. Aspen Publishers, September 2006.

In 2020, the UN General Assembly concluded its debate on the report of the International Court of Justice with speakers describing the growing docket of the principle United Nations judicial organ as a sign of rising confidence among Member States in the authority and legitimacy of its judgements and advisory opinions.⁸⁵ Malaysia noted that the Court's advisory opinions carry great legal weight and opinion, even though they are not legally binding. Germany's delegate emphasized that the Court's functioning depends on consensus among state parties, even if decisions go against national interests, respect for international opinions are in the national interests of all.⁸⁶ This shows that countries from around the world are recognizing the importance not only of international legal organs, but also of the role of state parties. This increase in case load and trust in the Courts is a very positive sign for international law and the willingness of state compliance. If states have faith and are willing to support international legal efforts, through financial or other means, then proposals for ad hoc criminal tribunals for the purpose of fulfilling legal justice and accountability are more likely to receive greater support and recognition from the international community.

⁸⁵ See UN 75th Session, 20th Meeting Coverage on “*Growing Docket of International Court of Justice Signals Rising Confidence in Its Legitimacy, Say Delegates, as General Assembly Concludes Debate*,” November 2020.

⁸⁶ *Ibid.*

Part 8: Potential Frameworks for a Special Tribunal in Ukraine

The previous sections of this paper have discussed scholarly and field expert research into the topic of legal justice and accountability for international law, specifically the role and function of special or ad hoc tribunals. Using the war in Ukraine as a comparative case analysis, this section will discuss potential options of tribunals that have been proposed by the international community and international legal experts. Nearly all proposals focus on the establishment of a special tribunal specifically for the crime of aggression. Given that the ICC does not have jurisdiction over Russia, it may be more beneficial and efficient to implement a tribunal with jurisdiction over the most significant war crimes and crimes against humanity as deemed relevant to the on-going war. Under the assumption that the establishment of a special tribunal is the most feasible solution in the given circumstances, this section will combine the historical analysis of special tribunals with modern research on international law to determine what structure would be best suited for the war in Ukraine to try Russian perpetrators for war crimes and the crime of aggression, as well as to determine how to rectify issues from past experiences to propose a functional, legitimate and well-founded tribunal should the war in Ukraine come to this stage.

The UNSC and EU joined the conversation on the establishment of a special tribunal for the crime of aggression against Ukraine and have since received contributions on potential frameworks from other parties. Ukraine has been strongly advocating for the establishment of an institution modelled on the IMT in Nuremberg which dealt with the crimes of Nazi Germany. This demand is one of the components of the peace formula that President Volodymyr Zelensky

proposed in November 2022.⁸⁷ The idea has now generated discussion amongst international lawyers and subject experts about how this tribunal should work, where it should be located, who will oversee its functions, and the body of law it will serve. The most important consideration when deciding where these trials will be held is the matter of jurisdiction. Ukraine has twice exercised its prerogatives to accept the ICC's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to Article 12(3) of the Statute in 2014 following Russia's annexation of Crimea.⁸⁸ This Article grants the ICC the right to open an investigation into the situation in Ukraine encompassing any new alleged crimes falling within the jurisdiction of the Court.⁸⁹ However, the Article does not grant the Court jurisdiction to extradite perpetrators from Russia, thus requiring exploration and discussion of other options.

1. A Ukrainian court with international components and support

The first proposal is a fully functioning hybrid tribunal. Hybrid or mixed tribunals or internationalized courts are terms used for courts that include both domestic and international components, first used in East Timor, with subsequent variations in Cambodia, Sierra Leone and Kosovo.⁹⁰ A hybrid tribunal would involve Ukraine's national legal system being granted jurisdiction over the crime of aggression, as well as other international crimes, and would most likely involve both Ukrainian and international judges and prosecutors. A hybrid court established within a country's national jurisdiction will still be subject to head of state immunity, applying to sitting heads of state, heads of government, and foreign ministers.⁹¹ Functional

⁸⁷ See Jedysiak, Marcin. December 2023.

⁸⁸ See ICC Situation in Ukraine, 2022.

⁸⁹ Ibid.

⁹⁰ See Skinnider, Eileen, 2007.

⁹¹ Komarov, A and Hathaway, Oona A., *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, Just Security, April 2022.

immunity will also be a complex topic given the nature of certain crimes, such as the crime of aggression, which are by definition a state act. As explained below, functional immunity would still apply to heads of state and government officials in prosecutions before a hybrid court. University of Warsaw Associate Professor of International Relations Patrycja Grzebyk provides an analysis on the implication of customary law on the war in Ukraine. She points out that criminalization of the crime of aggression is an established norm of international law within Eastern European states' national law. States in contrast to many other states and regions, Eastern European states directly affected by the on-going war in Ukraine do have laws concerning the criminalization of aggression in their criminal codes- including Russia.⁹² While these laws are based more on the Nuremberg standards than on those adopted in Article 8bis of the Rome Statute, the question is whether customary law, which includes the rules of regional or local customs, could serve as a source of criminalization of international crimes?

Given the way that the crime of aggression is defined in the Rome Statute, it is widely accepted that the only potential defendants for an international aggression tribunal would be senior officials who are or were able to direct the Russian state's military or political activities.⁹³ Even if it was feasible for perpetrators of international law to be tried in a national court under Article 437 of the Code of 2001 of Ukraine's criminal code, which "outlaws planning, preparation or initiation of an aggressive war or an armed conflict, conspiring for any such purpose or waging of an aggressive war or aggressive hostilities," the Ukrainian Constitution restricts the Ukrainian government to two stipulations should it chose to pursue the option of a

⁹² Grzebyk, Patrycja, *Crime of Aggression against Ukraine: The Role of Regional Customary Law*, Journal of International Criminal Justice, Volume 21, Issue 3, July 2023

⁹³ International Crisis Group, "A New Court to Prosecute Russia's Illegal War?" March 2023.

special tribunal. The first is that the court must be “international,” not hybrid or an extraordinary chamber of a domestic court, and the second stipulates that it must not be designed or described as “complementary” to the judicial system of Ukraine. These conditions regulating the possible model of tribunal for the war in Ukraine relates to the Ukrainian Constitution. Article (125) of the Constitution states that “the establishment of extraordinary and special courts shall not be permitted,” and that “the Supreme Court of Ukraine shall be the highest judicial body in the system of courts of general jurisdiction.”⁹⁴ This stipulation effectively eliminates the possibility of establishing a hybrid tribunal for the purpose of prosecuting Russian offenders in any domestic court in Ukraine for war crimes or the crime of aggression.

2. Hosting a tribunal under Ukrainian law in a third state⁹⁵

Another proposal put forth by Dr. Patrick Butchard, International Law Researcher for the House of Commons Library in the UK Parliament, is the establishment of a tribunal outside of Ukrainian territory that would still function under Ukrainian law. This structure would include international judges, prosecutors and other staff, the application of international rules of procedure and evidence, and cooperation with other states and international organizations and tribunals etc.⁹⁶ In order for this proposal to work, the Ukrainian Constitution would need to be modified to accommodate additional features, which is not possible under the martial law currently in place in the country.⁹⁷ An example of such a modification occurred when Ukraine transferred jurisdiction to the Netherlands for the purpose of trying the perpetrators responsible for shooting down Malaysian flight MH17 over Ukraine. This transfer was required for the host

⁹⁴ See Constitution of Ukraine, Title VIII *Justice*, Article 125

⁹⁵ Butchard, Patrick Dr. *Conflict in Ukraine: A special Tribunal on the Crime of Aggression*. House of Commons Library, The United Kingdom of Great Britain. February 2024.

⁹⁶ See Non-Paper by Commission Services and the European External Action Service, European Parliament. December 2011.

⁹⁷ *Ibid.*

country to have jurisdictions over all victims of the crime of aggression, not only Dutch citizens.⁹⁸

3. An International Court established by a State Organization

The most commonly discussed, and the most feasible, option is the establishment of an international criminal tribunal for the crime of aggression against Ukraine. An international tribunal can be established in several ways, including through treaties or conventions with other States or state organizations. If an international court is established in lieu of a domestic court to try the crime of aggression, Article 125 of the Ukrainian Constitution is not a bar to establishing such a tribunal to address the crime of aggression. However, the support of an organization such as the UNSC, UNGA, NATO or the EU would provide such a tribunal with stronger legitimacy. Such a framework would incorporate the international component of the first proposal with a focus specifically on the crime of aggression, without any domestic involvement. A transfer of proceedings can also be requested, as defined under the CoE's "Convention on the Transfer of Proceedings."⁹⁹ When an individual is suspected of having committed an offence under the law of a contracting state, that state may then request another contracting state to take over proceedings under conditions as defined by the convention.¹⁰⁰ In order for transfer or extradition to occur, the alleged crime must be considered illegal in both the demanding and requesting countries.

⁹⁸ Ibid.

⁹⁹ See European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972.

¹⁰⁰ See Article 6 of the Council of Europe Convention.

Potential drawbacks of this model are primarily political, concerning perceptions of selective justice and Western bias, especially in discussions where the UN or other organizations, such as the NATO or the EU countries are the most likely candidate to establish and oversee the legal proceedings of the Tribunal. However, an international tribunal created through an agreement between Ukraine and the UN on the recommendation of the UNGA, UNSC, or another international organization would be on firmer international legal ground, something that would safeguard the court's legitimacy.¹⁰¹ Furthermore, a criminal tribunal utilizing international components to try Russian perpetrators for war crimes in Ukraine would have the highest chance of success through much greater authority under international law than domestic courts with regards to the ability to prosecute sitting Heads of State.¹⁰² In March 2005, following the UNSC's approval for an investigative process to begin in Darfur and the submission of a UN fact-finding report, the Security Council triggered the ICC's authority over crimes committed in Sudan, and the arrest and trial of President al-Bashir, by referral in the UN Resolution 1593.¹⁰³ The extent of the ICC's jurisdiction over crimes committed in Sudan required a concurrent reading of the applicable Rome Statute provisions found within the Security Council Resolution, which subsequently allotted jurisdiction to the ICC on the legal basis of Resolution 1539¹⁰⁴.

¹⁰¹ Dannenbaum, Tom, Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine, Just Security, March 2022.

¹⁰² Buzzard, Lucas, *Holding an Arsonist's Feet to the Fire? - The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashi*, American University International Law Review. Volume 24, Issue 5, 2009.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

Part 9: Ensuring the Legitimacy of an International Criminal Tribunal in Ukraine

Those opposing the establishment of an international criminal tribunal are concerned about the speed at which one can be created, noting how quickly the allied forces established the IMT in 1945. Another concern rests on the outcome of the war; many believe that Russia will prevail, which would mean indefinite Russian occupation in Ukraine, or a new Ukrainian government run and controlled by Moscow.¹⁰⁵ However, should Ukraine defeat Russia, the difficult question then becomes how the investigation process into the crime of aggression can and will be conducted, given that much of the evidence of crimes would be in Russia. Despite these concerns, there is strong international support for a special tribunal to send a strong message to potential aggressors that such actions will not go unpunished. Dedication to international solidarity will also reiterate the necessity of upholding international law. Russia's invasion of Ukraine is the largest military attack in Europe since the Second World War, which signifies the need for an unprecedented response. Based on the models and frameworks discussed above, an international criminal tribunal is the most logical choice for the given circumstances. From here, the concern rests in establishing a legitimate, functioning tribunal, which depends on the source of the tribunal's jurisdiction, how the tribunal would address the functional and personal immunities of members of Russia's leadership, and what resources would be available and could be contributed to the tribunal.¹⁰⁶

¹⁰⁵ Heller, Kevin John, "Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea, *Opinio Juris*, March 2022.

¹⁰⁶ Corten, O and Koutroulis, V. *Tribunal for the crime of aggression against Ukraine- a legal assessment*. Policy Department for External Relations, European Parliament. 2022.

Legal Basis and Jurisdiction

The desire to create an international tribunal for the crime of aggression in Ukraine stems from the need to fill a “jurisdictional loophole” and bring to justice perpetrators responsible for the crime of aggression against Ukraine.¹⁰⁷ Several models have been proposed for how to proceed with a special tribunal, based on precedents relating to similar international and internationalized or hybrid tribunals that have been used in the past.¹⁰⁸ If a tribunal was to be modeled after the IMT as President Zelensky hopes, it would mimic the same legal jurisdiction as follows: crime of aggression (the IMT equivalent of “crimes against peace”), war crimes, and crimes against humanity¹⁰⁹. The IMT and IMTFE are special cases in that they are the only tribunals whose jurisdiction has covered crimes against peace. This is why they may be the most suitable models for Ukraine.

A tribunal is granted jurisdiction through a statute, treaty, or transfer of power. The ICTY Statute, for example, was what provided the Tribunal its limited jurisdiction, the authority to prosecute persons for violations of laws or customs of war, genocide, and crimes against humanity.¹¹⁰ The ICTR was founded by the UNSC based on Resolution 955.¹¹¹ Suggestions for providing a special tribunal for Ukraine with a legal basis include a resolution by the UN (Section 3.1) or an agreement between Ukraine and another international organization or other states (Section 3.2). Russia sits as a member of the UNSC, which means that any attempt by the organization to establish a Tribunal of any kind will be blocked. An alternative solution to this

¹⁰⁷ See statement by the Ministry of Foreign Affairs of Estonia, Latvia and Lithuania, October 2022.

¹⁰⁸ See Corten, O and Koutroulis, V. 2022.

¹⁰⁹ Nadya Sadat, Leila, *The Conferred Jurisdiction of the International Criminal Court*, Notre Dame Law Review, Volume 99, Issue 2, December 2023.

¹¹⁰ *Ad Hoc International Criminal Tribunals*, University of North Carolina School of Law, October 2023.

¹¹¹ See UNSCR Resolution 955

may be an agreement of the creation of a tribunal through a formal agreement or treaty between Ukraine and the UNGA, the European Union (EU), other states, or the CoE.¹¹² The previously discussed example whereby the UNSC granted jurisdiction over Sudanese officials in Darfur through a Resolution seems most likely inapplicable in this situation. While it was the combination of the UNSC Resolution 1593 and the Rome Statute provide the foundation for the ICC to exercise jurisdiction over Sudanese nationals,¹¹³ Russia's permanent membership on the UNSC would likely also pose an issue to any final UNSC resolutions in this case.

Avoiding Immunity

The crime of aggression is labeled by the ICC as a 'leadership crime,' in other words a crime committed by 'persons in a position effectively to exercise control over or to direct the political or military action of a State.'¹¹⁴ This raises issues of immunity. At Nuremberg, Nazi officials tried in the IMT did not enjoy personal immunity because it was implicitly waived by the Allied Control Council.¹¹⁵ At the ICTY and ICTR, defendants also did not receive personal immunity because those Tribunals were established based on Chapter VII resolutions of the UNSC,¹¹⁶ which allows the UNSC to carry out actions and decisions for the maintenance of international peace and security. An internationalized tribunal that goes beyond domestic restrictions would prevent heads of state, heads of government or foreign ministers who are to be tried in an international tribunal from maintaining their rights to immunity and waive the right to use the argument that they committed an offence in their official role or on behalf of their

¹¹² See Corten, O and Koutroulis, V, 2022.

¹¹³ Ibid.

¹¹⁴ See *ICC at a Glance*, July 2017

¹¹⁵ See Heller, Kevin Jon, 2022.

¹¹⁶ Ibid.

state.¹¹⁷ The grounds for immunity under international law however are uncertain. States are equal according to public international law, meaning that the legal mechanisms and organs of a state cannot exercise jurisdiction over another state or a person representing another state¹¹⁸. State representatives or officials are under the understanding that they are free from any form of international prosecution.

It is crucial then that any established Court follows established laws and regulations to avoid an immunity trap. Support by the UNSC or UNGA, as seen in former tribunals, would provide a supporting authority independent of the Rome Statute, such as what was seen in the case of Sudan whereby jurisdiction was granted to the ICC on behalf of the Security Council Resolution 1593.¹¹⁹ A solution could be a tribunal backed by the EU. However, this would need to garner further support from other state parties to avoid accusations of selective justice. Due to the concept that no state is above another, a tribunal would have to be internationalized in order to be able to try Russia for the crime of aggression, as Ukraine as a state is unable to try another state.

Functionality and Establishment Procedure

The Executive Director of Ukraine's Centre for Civil Liberties Oleksandra Romantsova notes that for there to be a legitimately functioning court, there needs to be a statute or treaty which grants legal legitimacy to the tribunal. This establishment process, given the amount of information, victims, evidence collection etc., can and will take years to come to fruition. She

¹¹⁷ See Corten, O and Koutroulis, V, 2022.

¹¹⁸ See United Nations *Convention on Jurisdictional Immunities of State and Their Property*

¹¹⁹ See Buzzard, Lucas, 2009.

also notes that the Council of Europe is not an ideal option, but this institution is presently the most progressive¹²⁰. She offers an alternative solution to shorten the amount of time it could take to reach a trial process, which is for the tribunal to take place in absentia, without detention and the physical presence of the accused in the courtroom¹²¹. The ICC however has stated they will not conduct trials in absentia.

A special tribunal for the war in Ukraine could be enacted in a similar way to the ICTY under Chapter VII, noting the role and responsibility of the UNSC, or the UNGA if needed, to maintain or restore peace and security to the region. The ICTR was created through the UNSC Resolution 955 with a vote of 13 to 1, which formally established the court for the purpose of prosecuting individuals responsible for genocide and other serious violations of international law committed in the territory of Rwanda.¹²² The International Law Commission (ILC) has begun the process of drafting and progressively developing international law to determine crimes of genocide, war, apartheid, torture under Article 7 of the UN Charter. Following two readings of the draft, there is a clear majority in favour of such an amendment. Interestingly, a dozen states expressed the view that the exception of immunity should also extend to the crime of aggression given the ongoing war of aggression against Ukraine.¹²³ As of December 2023, the supporting 22 States included Australia, the Nordic countries, the Netherlands, Mexico, Sierra Leone, Switzerland, and Ukraine. France, Iran, Japan, Russia, the U.K., and the U.S. were amongst the 11 critical states. Germany was one of four Member States who maintained a neutral position.

¹²⁰ Golovina, Olga, *Can the Council of Europe Create a Tribunal for Putin?* Institute for Peace and War Reporting, July 2024.

¹²¹ Ibid.

¹²² See UNSC Resolution 955, November 1994.

¹²³ De Andrade Pacheco, Joana. *Where do States Stand on Official Immunity Under International Law?* Reiss Centre on Law and Security, New York University School of Law. April 2024.

For future use of international legal tribunals or other mechanisms, a pre-existing framework or procedural outline for how tribunals will be established, where they will be held and who will oversee the establishment and legal process can allow for a pre-meditated plan in cases where one may be needed. Given the difference in circumstances of war and conflict, there will need to be adjustments as mentioned previously, but a pre-written plan agreed upon and signed by a willing group of UN states for example could help to at least serve as a foundational proposal, and legitimize the process of implementing and granting power and jurisdiction to an ad hoc tribunal to execute its role and function in international law.

Internationalization of a Criminal Tribunal

For a tribunal to be deemed as ‘international,’ it (1) must not be incorporated into the domestic legal system of Ukraine or any other state; (2) must be acting on behalf of the international community and; (3) must be established by more than one state acting directly or through an intergovernmental organization.¹²⁴ By meeting these qualifications, the Tribunal would effectively overcome the previous issue of immunity applied to Russian officials and representatives, making this the optimal structure for a potential tribunal for Ukraine. As previously discussed in this paper, the importance of state support throughout the process is crucial to the tribunal’s success. Even more so, funding from state parties or intergovernmental organizations will be needed throughout the duration of trials to avoid the same fate as the STL. Resource-wise, this tribunal will need to pay judges, prosecutors, and other support workers for their role from the initial investigation all the way through the trial proceedings.

¹²⁴ See Nuridzhanian, Gaiane, June 2024.

One suggestion that offers a constructive solution to address concerns regarding potential biased judgement is that these people should be appointed from regional states not involved in the conflict with the same legal tradition and language of the affected state.¹²⁵ Such stipulation would indicate states such as Poland, Slovakia, Hungary, and Romania, though not limited to these states. Belarus has been noted by several sources as being a complicit party¹²⁶, and therefore could face a similar outcome as Russia should legal procedures for violations of war crimes become a reality. Language and cultural similarities vary greatly amongst each of these states, and there seems to be no meaningful connection or similarity that would require a regional state to oversee the legal and trial procedures in conjunction with or on behalf of Ukraine. This leaves the responsibility open to any state that is willing to do so and has the resources and capacity required. This concept of enacting a multilateral treaty among the victim state and additional supporting states was dubbed “the coalition of the willing states” during the Nuremberg Tribunal¹²⁷. It is important however to re-emphasize that the support and contribution of all states would bolster the legitimacy of a tribunal, and therefore responsibility and establishment of a special tribunal should not be limited to a specific group of states.

Ukraine is advocating for the establishment of a functioning, legitimate tribunal with the support of the international community to contribute to efforts of upholding international law and accountability. The most important role this tribunal fulfills is resolving the loophole of jurisdiction that the ICC is unable to address. While other options have been considered for this circumstance, the most likely resolution for this issue that is supported by legal experts,

¹²⁵ Hobbs, Harry. *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*. Journal of International Law, The University of Chicago School of Law. January 2016.

¹²⁶ Temnycky, Mark, *Belarus is Complicit in Russia's War Crimes, and Should be Punished Accordingly*. "Byline Times, August 2023.

¹²⁷ See International Crisis Group, March 2023.

government organizations and states themselves is to pursue the establishment of an international criminal tribunal in Ukraine. A successful international tribunal will also contribute to the argument that such institutions are in fact still a useful tool and should be considered in future circumstances. Should it fail, there may be a case to end the establishment of new tribunals of any kind and focus instead on amending the jurisdiction of the permanent courts.

Part 10: Practicality and Realistic Expectation of this Proposal

States and state organizations' responses play a significant role in the perception of justice and accountability for war crimes. As mentioned previously, state governments and organizations turning a blind eye to crimes being committed by Russia in Ukraine will contribute to the continuation of conflict and eliminates pressure to come to a purposeful solution. Ignorance and failure to enforce some form of accountability by the international community will contribute to a perception that States have free-will regardless of any international law in place. If other states recognize that no form of legal action will be taken for violating international law, what is to stop them from deciding to invade other smaller countries around them? China's looming threat over Taiwan is a frequently used example of the fact that a united international response to the war in Ukraine can send an important message that such actions will not be tolerated or left without repercussions. While there is no guarantee that a tribunal for Ukraine will materialize, the collective conversations about potential legal repercussions may send a message that states are unwilling to stand by idly without upholding their commitments to international law and human rights.

In 1997, two years after the end of the war in Bosnia and Herzegovina, the ICTY had only eight suspects in custody, most of them "little fish," while more than 50 remained at large in Bosnia, and the prospect of arresting high-level suspects seemed remote.¹²⁸ That changed because of the efforts of human rights groups and supportive governments, first through pressure to get the NATO peacekeepers in Bosnia to arrest suspects in that country, and later through political pressure

¹²⁸ Ward, B., Singh, P. *Yugoslavia's War Crimes Tribunal Showed the Promise- and Limits- of International Justice* " Human Rights Watch. Foreign Policy in Focus. January 2018.

on Croatia and Serbia by the EU and US to hand over suspects on their territory.¹²⁹ That meant that the big targets — including Croatian general Ante Gotovina, Bosnian Serb wartime president Radovan Karadzic, and Bosnian Serb general Ratko Mladic — were eventually arrested and sent to The Hague to face justice.¹³⁰ By amplifying the voices of victims, media scrutiny, and the support and fortitude of EU states, the EU held firm to its commitment to bring forth justice. Ward and Singh conclude with a reminder of the role and contribution of the ICTY to the idea that justice is possible. It helped develop international criminal law in relation to genocide, crimes against humanity, the responsibility of commanders for the crimes of their subordinates, and rape and sexual violence in conflict as war crimes and contributed to the momentum that led to the creation of the International Criminal Court.¹³¹

Arguments of Western bias pertaining to the war in Ukraine have certainly been raised, however the threat and consequences that Russia’s invasion imposes on Europe and the defined “Western States” arguably does warrant their increased attention given their proximity to the conflict. European countries surrounding Ukraine have expressed their fears of the unpredictability of Putin’s intentions. Poland and Lithuania have voiced their concerns over the militarization of borders by Russia and Belarus along the eastern parts of the country,¹³² The Republic of Moldova remains on high alert due to the potential advancement of Russian troops towards Odessa and potentially beyond,¹³³ and Romania recently invested €2.5 billion into what will now be the largest allied military base in the eastern part of the Alliance.¹³⁴ The United States, a vocal opposition to

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ See Ward and Singh, 2018.

¹³² Gera, Vanessa, *Poland and Lithuania say they fear provocations from Russia and Belarus at NATO’s eastern flank*, The Toronto Star, August 2023.

¹³³ Taranu, Anatol, *Romania and Moldova in case of expansion of Russian aggression*, Op-Ed, October 2024.

¹³⁴ Ibid.

the ICC and any form of higher power of authority, voiced their support for legal repercussions to prosecute the crime of aggression committed by Russia in Ukraine in March of 2023. US Ambassador-at-Large for Global Criminal Justice Beth Van Schaack proclaimed that there are indeed compelling arguments for why the crime of aggression must be prosecuted alongside crimes being investigated by the ICC, and that a new tribunal incorporating international elements in the form of substantive law, personnel, information sources and structure will maximize the chances of achieving meaningful accountability.¹³⁵ It is not without recognition that the United States is culpable for its own actions and crimes, and their unwillingness to be a signatory party to the Rome Statue is a deliberate choice. However, given these circumstances, and for the sake of the war in Ukraine, the United States support does provide a strong backing. Ultimately, the hope is that international law can one day achieve a standing whereby no state is ever above international law, and that the entire international system can agree to follow and comply with international law to avoid repercussions and legal accountability such as what is being pursued against Russia.

The implementation of a special tribunal, and the contribution of States should be seen as a progressive contribution to legitimizing international law and legal proceedings. On 2 April, 2024, a conference was held in the Netherlands on *Restoring Justice for Ukraine*, at which the Netherlands extended conditional offers to host both any special tribunal established and operate a compensation mechanism, called the Register of Damage for Ukraine.¹³⁶ Only a few weeks later on 30 April, 2024, an announcement came from the Committee of Ministers of the Council of Europe, stating that the CoE has begun the process of creating a special tribunal to try Russia for

¹³⁵ See Ambassador Van Scaack's *Remarks on the U.S proposal to prosecute Russian Crimes of Aggression*, United States Department of State, March 2023.

¹³⁶ Fenbert, Abbey. *Allies demand international tribunal to hold Russia accountable for crimes in Ukraine*. The Kyiv Independent. <https://kyivindependent.com/allies-demand-international-tribunal-to-hold-russia-accountable-for-crimes-in-ukraine/>. 2024.

the Crime of Aggression in Ukraine.¹³⁷ among the proposed documents are a draft agreement between the Council of Europe and Ukraine on the establishment of the Special Tribunal, a draft statute and an expanded partial agreement that will regulate financial and administrative issues of its activity.¹³⁸

International law functions on the consent of participating nations since no governing body exists to explicitly enforce international agreements.¹³⁹ It is increasingly evident that existing international law may fail to respond effectively to pressing global needs, particularly those arising from humanitarian emergencies.¹⁴⁰ This shortcoming signifies the need for corrective or alternative action to support the legitimacy and applicability of international law to conflict, war and humanitarian crisis around the world. The international legal system is far from perfect but has been and continues to be improved through progressive development of laws, treaties, and institutions.¹⁴¹ If states and state organizations believe that there is no hope for justice in Ukraine, or that there is no purpose in discussing such ideas and proposals, it would be hard to imagine states like The Netherlands putting forth such offers as they have. It seems that there is a belief by both states and international organizations that there could come a time when Russia could be held responsible for crimes it committed in Ukraine, and they are and will continue to put forth efforts.

¹³⁷ See 1497th Meeting of the Ministers Deputies, *0.2 Core Group on the establishment of a Special Tribunal for the Crime of Aggression of the Russian Federation against Ukraine*, April 2024.

¹³⁸ See Golovina, Olga, July 2024.

¹³⁹ *International Law*, Legal Information Institute (LII) Cornell Law school.

¹⁴⁰ “*Beyond Compliance: Rethinking Why International Law Really Matters to Global Policy.*” London School of Economics and Political Science, John Wiley and Sons LTD. 2010.

¹⁴¹ *Ibid.*

Part 11: Conclusion

The UN Charter set a goal “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,”¹⁴² which cannot be executed or upheld without the contribution of the international community’s compliance and support. The Charter of the United Nations is the document that expounds upon international law, but the United Nations cannot enforce those laws directly in the same way that a sovereign state can enforce its laws domestically.¹⁴³ International cooperation and contribution to upholding international criminal law will continue to be the key factor in making strides towards obtaining justice for the atrocities that were committed and are still being committed in Ukraine. States and state organizations are actively working on changing international legal policy decisions, reshaping democratic institutions, and reconstructing civil society following intense conflict,¹⁴⁴ proven in their responses and contribution towards Ukraine. The continued development and use of courts, tribunals, conventions, and multilateral treaties as supporting tools to the UN legal organs does in fact work to legitimize international law by clearly defining the legal responsibilities of states, their conduct, and their treatment of individuals within state boundaries.¹⁴⁵

Legal and field experts’ research into the historical use of ad hoc tribunals, their successes, concerns, and any other relevant information indicates that these tribunals do provide a support tool to the ICC by executing their function as special ad hoc courts in very complex

¹⁴² See United Nations. 2023.

¹⁴³ See *International Law*, Cornell Law School, July 2023.

¹⁴⁴ Howse, R., Teitel, R., *Beyond Compliance, Rethinking Why International Law Really Matters*, Global Policy Volume 1, Issue 2, May 2010.

¹⁴⁵ *Ibid.*

and unprecedented circumstances. Creating a special tribunal for the purpose that Russian government and military officials are held accountable for crimes committed in Ukraine does face considerable challenges. These include issues raised regarding other temporary tribunals, namely issues of cost and efficiency, selective justice, political influence, and their limited scope. Other concerns such as immunity, arrest, and detention all pose further challenges to the hope of seeing a fully executed criminal trial for those responsible for the crime of aggression and any additional war crimes in Ukraine.

These challenges and concerns are however by no means insurmountable. This research has conclusively shown that despite concerns, there is no given reason that discussions and proposals of a special tribunal to try Russia for crimes committed in Ukraine should be dismissed. States and State organizations have demonstrated their support and willingness to work cooperatively to come to a meaningful solution to ensure Putin and other high-ranking officials face justice. An internationalized tribunal is conclusively the most feasible solution and shows the highest chance of success if implemented. Several historical instances, such as the arrest and trial of President Radovan Karadzic, and Bosnian Serb general Ratko Mladic, as well as sitting President Omar al-Bashir, were considered major first or milestones in the legal justice process for perpetrators of war crimes. While there is a long and uncertain period ahead before this proposal can and will become a reality, continuing to pursue perpetrators of international law and justice for victims in Ukraine will continue to send a message that the international community will have no tolerance for those responsible for committing war crimes and crimes against humanity, regardless of a title or position.

This research highlights the fact that state willingness and compliance is the most essential prerequisite for the effective functioning of international law and for the success of any established criminal tribunals. States are showing greater commitment and attention to international law and their foreign partnerships, working cohesively to hold perpetrators accountable for serious war crimes and crimes against humanity through various mechanisms, while continuing to improve the legitimacy and extend the reach of international law. There is evidence of past successes that indicate that there is a hope of one day seeing justice for citizens and victims in Ukraine for the long-standing 10-year war at the hands of Putin and the Russian Federation. Achieving this goal will still take time, and will continue to rely on the support and contribution of States parties and international organizations. Seeing that there have been monumental cases successfully brought before special tribunals illicit optimism for the future of those affected by the war in Ukraine, and eventual legal repercussions for the Russian perpetrators responsible.

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