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Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis

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“Human rights, democracy and peace are a single entity. When one disintegrates, they all disintegrate. Leaders in all social spheres must engrave this in their minds. In a society where respect for human rights is lacking, reputation and position hold no value. [...]

We must make the 21st century the century of human rights. We need to build a society with larger goals than short-term profit.”

Daisaku Ikeda

Table of Contents:

Abstract	5
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Preface	6
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CHAPTER I- INTRODUCTION AND CONFLICT OVERVIEW

1. Introduction and Conflict Overview	8
2. Methodology	17
3. Contribute to the literature	18
4. Navigating the Complexities: Overview of the Thesis	19
5. Conclusion	21

CHAPTER II - THE INTERNATIONAL CRIMINAL COURT AND THE INTERNATIONAL CRIMES COMMITTED IN UKRAINE

1. Introduction	23
2. General aspects of the International Criminal Court: The Statute of Rome of the International Criminal Court	24
3. The Court's Jurisdiction: a focus on the <i>ratione materiae</i>	31
4. Atrocity Crimes occurring in Ukraine: a substantial law analysis ..	37
5. War Crimes and the violation of International Humanitarian Law	45
6. Crimes Against Humanity	52
7. Crime of Genocide	56
8. Crime of Aggression	59
9. Conclusion	60

CHAPTER III - The Ukrainian Situation at the ICC: Putin's Arrest Warrant

1. Introduction.....	62
2. Focusing the Lens: a Shift to Putin's Individual Criminal Responsibility.....	65
3. The path from the Ukrainian Situation to the ICC's Arrest Warrant: Can President Putin and others be held responsible for the atrocities committed in Ukraine?	67
4. Main issues related to children trafficking and minor's transfer during the Russian invasion of Ukraine.....	75
5. Putin's Arrest Warrant: the individual criminal responsibility and the issues related to Immunity	90
6. The Challenge of Arresting High-Ranking Officials: Lessons from Al Bashir and Putin	93
7. Conclusion	100

CHAPTER IV - TOWARDS ACCOUNTABILITY: EXPLORING THE POTENTIAL OF AN *AD HOC* AND HYBRID TRIBUNAL OR AMENDMENTS TO THE ICC STATUTE IN ADDRESSING ATROCITY CRIMES IN UKRAINE

1. Introduction.....	102
2. Bridging the Accountability Gap: From Individual Criminal Responsibility to Possible Institutional Solutions.....	105
3. The Problematic Issue of the Crime of Aggression.....	106
4. The Controversial Hypothesis of the Institution of an <i>Ad Hoc</i> or Hybrid Tribunal	116
5. The Possibility of Reforming the Statute of Rome.....	129
6. Conclusion	141

CHAPTER V - FINAL REMARKS AND CONCLUSIONS

1. Conclusions.....	145
---------------------	-----

Bibliography.....	152
-------------------	-----

Abstract

As the conflict in Ukraine continues, the principles of International Criminal Law are being tested and reshaped, sparking crucial inquiries. Can we hold individuals, including leaders like Putin, accountable for the atrocities committed in the region? How can we effectively determine individual criminal responsibility in the midst of ongoing turmoil? In this dissertation, titled “Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis” a comprehensive investigation is conducted to unravel the complex layers surrounding individual criminal responsibility. Focusing specifically on the ICC's issuance of an arrest warrant for President Putin, this research seeks to shed much-needed light on these pressing questions. The purpose of the thesis is to analyze goals, key discoveries, and ramifications of this warrant, making a valuable contribution to both academic dialogue and policy decision-making. The study delves into the legal and practical obstacles, providing a comprehensive overview of the benefits and difficulties involved in implementing International Criminal Law for high-ranking officials. Drawing from established international legal frameworks such as the Rome Statute of the International Criminal Court and relevant decisions, this analysis navigates through several issued and challenges related to the crime of aggression. The findings underscore the need for a more effective approach, particularly in cases involving heads of state, thereby contributing to ongoing debates on the effectiveness in holding leaders accountable for their actions. The dissertation advocates for a deeper understanding of the intricacies related to the conflict in Ukraine, emphasizing the significance of considering alternative mechanisms, such as *ad hoc* or hybrid tribunals or amendments, to address challenges associated with international criminal responsibility and executing arrest warrants. In conclusion, this study provides an exploration of this vast topic, using Putin's case as a focal point, taking into consideration potential institutional reforms.

Preface

The exploration into "Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis" embarks on a research journey, immersing itself in a thorough examination of various literature sources. My research trajectory was significantly shaped during a three-month permanence in Washington D.C., where I carefully conducted research at the Library of Congress and the U.S. Congress for my dissertation thesis. This period also saw my frequent participation in congressional hearings in both the U.S. House and Senate, including those of the House Foreign Affairs Committee, the Senate Foreign Relations Committee, and the Helsinki Committee. An exceptional moment was being present at the hearing on "Accountability for Russian Atrocities in Ukraine," where I had the privilege of witnessing the insights of Hon. Beth Van Shaak, U.S. Ambassador-at-Large for Global Criminal Justice, from the Department of State.

I owe a debt of gratitude to Counselor Giuditta Giorgio, Francesca Nespoli and Fabio van Loon at the Congress Affairs Office of the Italian Embassy for their invaluable guidance during my stay in Washington D.C. This internship offered me insights into diplomatic engagements, seminars, and meetings pertinent to the theme of my thesis. I also had the honor of meeting and gaining insights from the Italian Foreign Affairs Minister, Defense Minister, the Prime Minister of Italy and Ambassador Zappia during my time in Washington D.C.

Special appreciation goes to my supervisor, Prof. Christopher Michaelson, whose excellent support was instrumental throughout the dissertation thesis process. I extend my gratitude to Professor Rosario Salvatore Aitala for his invaluable course, "International Criminal Law," which served as a wellspring of inspiration for choosing this topic. His lessons not only ignited my interest but also clarified my future professional trajectory.

In essence, this work represents a convergence of diverse sources, rigorous research, and firsthand experiences garnered during my Washington D.C. thesis'

research abroad experience, complemented by a year of dedicated observation and in-depth study of International Criminal Law and International Law.

As the thesis navigates the complexities of individual criminal responsibility, this study aspires to make a meaningful contribution to the ongoing discourse surrounding accountability for international crimes

CHAPTER I- INTRODUCTION AND CONFLICT OVERVIEW

1. Introduction and Conflict Overview

The conflict in Ukraine, marked by a series of harrowing events and widespread human rights violations, stands as a contentious chapter in contemporary geo-political history. The complex web of socio-political, historical, and ethnic factors fueling the conflict has not only disrupted the lives of millions but has also posed a significant challenge to the international community in addressing the resulting humanitarian crises and holding those responsible, accountable for their actions.

As the conflict unfolded, it became evident that the magnitude of atrocities committed demanded a strong legal response. The international legal framework, particularly the statutes of the International Criminal Court, emerged as a key instrument in addressing war crimes, crimes against humanity, and other egregious offenses occurring within the Ukrainian theater. However, the intricacies of applying international criminal law to the actors involved, especially high-ranking officials, introduced a layer of complexity that required careful examination.

This dissertation thesis, titled "Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis," undertakes a comprehensive exploration of the legal issues surrounding the conflict. The chosen focal point, President Vladimir Putin's arrest warrant, serves as a lens through which to analyze the challenges and hurdles inherent in applying international criminal law to this issue.

The origins of the conflict can be traced back to long standing historical, political, and cultural factors. Ukraine's complex history through centuries,

characterized by periods of independence, foreign domination, and shifting alliances, laid the groundwork for deep-seated divisions within the country.

Nowadays, the conflict in eastern Ukraine erupted in early 2014 as a consequence of Russia's annexation of Crimea. The decision by former President Viktor Yanukovich to abandon an association agreement with the European Union in favor of closer ties with Russia triggered widespread protests, known as the Euromaidan movement, in late 2013. The subsequent ousting of Yanukovich in February 2014 set the stage for a series of dramatic developments. In the wake of Yanukovich's departure, Russia seized the opportunity to annex Crimea, a region with a significant Russian-speaking population. This move was met with international condemnation, causing inevitable sanctions against Russia. The annexation reshaped the geopolitical landscape and heightened tensions between Russia and Ukraine.¹

Simultaneously, pro-Russian sentiments flared in eastern Ukrainian regions, particularly Donetsk and Luhansk, leading to pro-Russian separatists holding independence referendums. Armed separatist movements emerged, and clashes between Ukrainian forces and these groups escalated into a protracted conflict. The intricacies of local grievances, combined with alleged Russian involvement, added layers of complexity to the situation. In an attempt to ease hostilities, two ceasefire agreements, known as the Minsk Agreements, were brokered in September 2014 and February 2015. These agreements aimed to halt fighting, withdraw heavy weaponry, and pave the way for a peaceful resolution. Despite these efforts, challenges in implementation persisted, and the conflict endured.

In response, NATO sent battalions to Eastern Europe in April 2016 as a deterrent against potential Russian aggression. Furthermore, the United States imposed sanctions in 2018 and approved the sale of anti-tank weapons to Ukraine. However, despite these actions, the situation remained volatile. In October 2021,

¹Scott Neuman and Carol Ritchie, "Ukrainian President Voted Out; Opposition Leader Freed," NPR.org, February 22, 2014, Accessed January 2024, <https://www.npr.org/sections/thetwo-way/2014/02/22/281083380/ukrainian-protesters-uneasy-president-reportedly-leaves-kiev>.

intelligence reports indicated an increased likelihood of a large-scale Russian invasion, which ultimately materialized on February 24, 2022.

Actually, in February 2022 the ongoing conflict in Ukraine witnessed a disturbing escalation marked by unprovoked aggression, thrusting the region into renewed turmoil. Russian forces, under President Putin's directive, invaded Ukraine, alleging the need to demilitarize and “denazify” the country, qualifying such acts as a “special military operation”.² On February 24, 2022, as the UN Security Council made a final attempt to dissuade Russia from initiating military action against Ukraine, President Putin announced the commencement of a comprehensive invasion involving land, sea, and air operations. In response, U.S. President Joe Biden characterized the attack as "unprovoked and unjustified" and imposed stringent sanctions on key Kremlin figures, including Putin and Russian Foreign Minister Sergey Lavrov, as well as on four major Russian banks and the country's oil and gas industry. Subsequently, on March 2, a majority of 141 out of 193 UN member states voted to condemn Russia's invasion during an emergency session of the UN General Assembly, emphasizing the immediate withdrawal of Russian forces from Ukraine.

As the initial phase of the Russian invasion decelerated, extensive long-range missile strikes inflicted substantial damage on Ukrainian military assets, urban residential areas, and vital infrastructure for communication and transportation. Hospitals and residential complexes became targets of shelling and bombing attacks. In late March 2022, Russia declared its intention to "reduce military activity" near Kyiv and Chernihiv. By April 6, all Russian troops had withdrawn from the capital region of Ukraine. However, following the Russian withdrawal from Kyiv's vicinity, Ukrainian civilians recounted instances of apparent war crimes committed by Russian forces, including reports of summary executions, torture, and rape. On April 18, Russia initiated a new major offensive in eastern Ukraine after its unsuccessful attempt to capture the capital.

² Andrew Osborn and Polina Nikolskaya, “Russia’s Putin Authorises ‘Special Military Operation’ against Ukraine,” Reuters, February 24, 2022, <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/>.

By May, Russian forces gained control of Mariupol,³ a crucial southeastern port city under siege since late February. Drone footage released by Ukraine's far-right Azov Battalion highlighted the severity of the Russian offensive, resulting in the city's devastation and a significant humanitarian crisis. Indiscriminate and targeted attacks on civilians, including an airstrike on a theater and the bombing of a maternity hospital, led to heightened allegations against Russian forces for violating international humanitarian law.

Since summer of 2022, conflict zones have primarily been concentrated in Ukraine's east and south, where Russian cruise missiles, bombs, cluster munitions, and thermobaric weapons have caused extensive damage to port cities along the Black Sea and the Sea of Azov. The Russian seizure of Ukrainian ports and the subsequent blockade of Ukrainian food exports exacerbated the global food crisis, intensified by climate change, inflation, and supply chain disruptions. In mid-August, the southward shift of the war's frontline raised concerns about a potential nuclear disaster at the Zaporizhzhia nuclear plant along the Dnipro River, Europe's largest nuclear facility, seized by Russian forces early in the conflict.

Escalating tensions between the plant's Ukrainian staff and Russian occupiers heightened uncertainty about its continued safe operation. Fighting in the surrounding territory further raised the risk of critical damage to the plant. In early September, the International Atomic Energy Agency (IAEA), led by Director General R.M. Grossi, visited the plant and recommended the establishment of a "nuclear safety and security protection zone" around the facility. The IAEA also called for an immediate cessation of all military activity in the adjacent territory.

In September 2022, Ukrainian forces achieved significant progress in the northeast and initiated a robust southern counteroffensive. Notably, they reclaimed substantial territory in the Kharkiv region, catching Russian forces off guard and

³ Becky Sullivan and Laurel Wamsley, "Mariupol Has Fallen to Russia. Here's What That Means for Ukraine," NPR, May 19, 2022, Accessed January 2024, <https://www.npr.org/2022/05/18/1099885151/mariupol-falls-ukraine-russia-what-it-means>.

disrupting vital supply lines at Lyman. Although their advance eventually halted, Ukrainian forces established a new front line. Concurrently, in southern Ukraine, Russia swiftly withdrew across the Dnipro River, allowing Ukrainian forces to recapture the city of Kherson and all territories west of the river. By the end of 2022, Ukraine had attained a major victory, successfully liberating half of their previously Russian-occupied territory. A mere 14 percent of the country remained under Russian control, marking a significant turning point in the conflict. After the loss of Kherson, Russia redirected its forces eastward to Donetsk, supplementing them with tens of thousands of reinforcements in preparation for a February 2023 offensive.⁴

After a tense winter standoff, Russian President Vladimir Putin initiated an offensive in February 2023 with the aim of gaining control over all of Donbas by March. However, progress was sluggish, leading to the prolonged siege of the strategically inconsequential town of Bakhmut. Yevgeny Prigozhin, the leader of the Wagner Group, echoed these assessments, revealing that a significant portion of the casualties comprised Russian convicts compelled into battle. Despite Russia's assertion of capturing Bakhmut by late May, President Zelenskyy maintained that Ukrainian forces continued to resist, signaling a shift to offensive tactics. In June 2023, Ukraine launched a counteroffensive, seeking to breach Russian defenses in Donetsk and Zaporizhzhia provinces. Despite encountering formidable resistance, air superiority, and minefields, Ukraine achieved modest territorial gains and escalated attacks on bridges bound for Crimea, Russian ships, and structures in Moscow.

On June 23, Putin confronted a significant internal crisis when Yevgeniy Prigozhin released a video accusing the Russian Ministry of Defense (MoD) of attacking Wagner forces. In response, Prigozhin declared a "march of justice" with the aim of ousting top military leaders. This uprising unfolded after months of strained relations between Prigozhin and the MoD, marked by public criticisms,

⁴“War in Ukraine”. Global Conflict Tracker, Council on Foreign Relations, Center For Preventive Action, March 16, 2023. Accessed December 15, 2023, <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.

accusations of neglecting munition supply and attempts by the MoD to exert control over Wagner fighters. Acting swiftly, Wagner forces took control of Rostov-on-Don and the southern military headquarters, advancing toward Moscow. Putin denounced the march as "treason" and offered amnesty to soldiers who halted their advance. On June 24, Belarusian President Alexander Lukashenko intervened, facilitating the return of Wagner troops to their bases and Prigozhin's relocation to Belarus. Although Prigozhin's true motives remain unclear, the incident weakened both the Wagner Group and Putin.

In the nearly two-year period since Russia initiated a full-scale invasion,⁵ Ukraine has successfully regained control over 54 percent of its previously occupied territory,⁶ while Russia continues to hold sway over 18 percent of the country.⁷ Although Ukraine's 2023 offensive has resulted in modest territorial gains, the frontlines have stabilized for almost a year. Both conflicting parties have entrenched their positions, rendering significant breakthroughs increasingly challenging. The toll on military casualties has escalated, with an estimated half a million individuals affected. Simultaneously, Russia persists in bombarding Ukrainian cities and imposing blockades on its ports, prompting Ukraine to escalate drone attacks on Russian ships and infrastructure. Since January 2022, Ukraine has received substantial aid amounting to nearly \$350 billion, with \$77 billion contributed by the United States,⁸ though concerns about donor fatigue persist. The protracted conflict, marked by fighting and air strikes, has resulted in nearly 22,000 civilian casualties, with 5.1 million people displaced within the country and 6.2 million seeking refuge outside Ukraine. A staggering 17.6 million individuals are in urgent need of humanitarian assistance.

Given this conflict's overview, the dissertation thesis follows a structured approach, comprising three core chapters. Chapter II serves as the foundation,

⁵ See also the image at the end of the chapter for the evolution of Ukraine's military control.

⁶ "War in Ukraine". Global Conflict Tracker, Council on Foreign Relations, Center For Preventive Action, March 16, 2023. Accessed December 15, 2023, <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.

⁷ *Ibid.*

⁸ *Ibid.*

delving into the principles of the International Criminal Court. From the general aspects outlined in the Statute of Rome to a focused examination of the Court's jurisdiction, the chapter sets the groundwork for understanding the legal frameworks governing international crimes. Subsequent sections analyze specific crimes committed in Ukraine, including war crimes, violations of international humanitarian law, crimes against humanity, genocide, and the crime of aggression.

Chapter III shifts the lens towards Putin's arrest warrant, marking a strategic pivot towards individual criminal responsibility. As the dissertation narrows its focus, this chapter explores the path from the Ukrainian situation to the ICC's issuance of an arrest warrant for President Putin. It scrutinizes issues such as child trafficking during the Russian invasion and the complexities of Putin's individual criminal responsibility and immunity. Drawing lessons from historical cases, including Al Bashir, the chapter concludes with insights into the main challenges of arresting high-ranking officials.

In response to the limitations highlighted in Chapter III, Chapter IV broadens the discourse, contemplating potential institutional solutions. From the contentious crime of aggression to the exploration of *ad hoc* or Hybrid Tribunals and the prospect of reforming the Statute of Rome, this chapter addresses the accountability gap. Each subsection contributes to the overarching goal of refining International Criminal Law to better address atrocity crimes in Ukraine.

To conclude the introduction and offer an overview of the conflict in Ukraine, it is crucial to underscore the profound impact of the crisis on regional and global stability. The conflict, stemming from historical, political, and cultural complexities, has become a focal point in contemporary geopolitics. Its consequences extend far beyond the borders of Ukraine, challenging the foundations of international law and demanding a robust legal response to atrocities committed on both sides. In this scholarly journey, the dissertation aims to provide a comprehensive understanding of the legal intricacies surrounding individual criminal responsibility. The subsequent chapters unfold as a roadmap, guiding the

reader through the complexities of the ICC framework, Putin's arrest warrant, and the quest for accountability in the face of heinous acts during the Ukrainian crisis. The last chapter's aim is to highlight and consider possible solutions to make International Criminal Law more effective in persecuting personalities such as Putin.

There is no simple solution for these complex issues but keeping implementing present legal tools could be the key for what we are looking for. This thesis wants to analyze some relevant aspects of the case and open for a future debate. Discussing possible solutions is a sign of hope, it is a cause for creating conditions for future peace.

How military control of Ukraine has changed

Feb 2022: Before the invasion

Mar 2022: Russia's rapid advance



Nov 2022: Ukraine regains ground

Dec 2023: Stalemate on front line



- Russian military control
- Limited Russian military control
- Russian-backed separatist-held areas
- Held or regained by Ukraine
- Russia annexed Crimea in 2014

Note: Areas held or regained by Ukraine were reset by the Institute for the Study of War (ISW) on 12 May 2023

Source: Institute for the Study of War



2. Methodology

The methodology employed in crafting the dissertation thesis, "Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis", involves a qualitative research approach. The study aims to unravel the intricate facets of individual criminal responsibility in the context of the ICC's issuance of an arrest warrant against President Putin. Here is a narrative description of the methodology: the research journey began with a thorough examination of pertinent literature, including scholarly articles, books, legal documents, reports, and case studies. This comprehensive review provided a foundational understanding of international criminal law, the Rome Statute, and relevant jurisprudence. The analysis then delved into international legal frameworks, particularly the Rome Statute of the International Criminal Court, to comprehend the legal principles, definitions, and precedents related to individual criminal responsibility, especially in cases of aggression.

Case studies, including the Ukrainian Situation and the arrest warrant for President Putin, were scrutinized to discern legal precedents, challenges, and implications associated with individual criminal responsibility.

The qualitative research approach extended to an exploration of primary sources during a three-month research abroad. This involved immersive studies at libraries and attending Congressional hearings to gain firsthand insights into the topic on individual criminal responsibility. Qualitative analysis was applied to interpret and synthesize information obtained from various sources, integrating diverse perspectives, legal principles, and empirical data to construct a coherent narrative.

The writing process followed a structured approach, organizing the thesis into thematic sections aligned with research questions and objectives. The goal was to ensure clarity, coherence, and a logical progression of ideas. I undertook multiple

rounds of revision, cross-referencing information, validating findings, and ensuring the accuracy and reliability of the content presented in the thesis. This qualitative methodology not only facilitated a comprehensive exploration of the subject matter but also aimed to contribute meaningfully to the discourse surrounding individual criminal responsibility in the context of the ICC's actions against President Putin.

3. Contribute to the literature

The existing body of academic literature on the overlapping topics specifically in relation to the Ukrainian Crisis, is rather limited. This partial void in comprehensive scholarly exploration provides a unique opportunity for this thesis, titled "Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis" to make a contribution to the existing discourse.

The motivation behind selecting this relatively underexplored topic arises from the urgency and complexity surrounding recent geopolitical developments. The notable scarcity of in-depth analyses on the intricacies of individual criminal responsibility for heads of state and the application of international criminal law to such figures in the context of the Ukrainian Crisis prompted the undertaking of this research. As recent events, including President Putin's arrest warrant, mark unprecedented forays into uncharted legal territories, it became imperative to dissect and critically evaluate these occurrences within the framework of existing legal norms.

Moreover, not many scholars have proposed theories or explorations of potential solutions for the present stagnation. While a few noteworthy academics have delved into related areas, the emerging developments and evolving legal scenarios demand an up-to-date exploration.

I've taken into consideration three main opinions into consideration: The Hybrid Tribunal formulated by Heller, the *Ad Hoc* Tribunal by McDougall and potential Amendments to ICC Statute proposed by Ocampo. This lack of solutions,

doctrine (and hope) is the reason why I decided to deepen the analysis of these three possibilities, trying to make an objective evaluation of strengths and odds of each.

This thesis aims to bridge this gap by providing a comprehensive analysis that not only aligns with recent doctrinal developments but also extrapolates and contributes to the ongoing academic conversation.

The goal is to offer fresh perspectives, grounded in the current legal landscape, that can inform future discussions on international criminal law, individual responsibility, and the accountability of high-ranking officials in the wake of complex geopolitical crises. In doing so, this thesis aspires to lay the groundwork for further scholarly endeavors and contribute substantially to a field that is continually grappling with new challenges and legal frontiers.

4. Navigating the Complexities: Overview of the Thesis

In the shadow of the Ukrainian Crisis, a profound examination into the intricacies of individual criminal responsibility unfolds in this thesis, titled "Assessing Individual Criminal Responsibility: Putin's Arrest Warrant in the Context of the Ukrainian Crisis." The tumultuous events surrounding the conflict have not only disrupted the lives of millions but have also posed an actual challenge to the international community in addressing the consequential humanitarian crises and holding those responsible accountable for their actions.

In this section I will provide an overview of the thesis. The introduction and conflict overview serve as a gateway, immersing the reader in the multifaceted layers of the Ukrainian Crisis. Here, the geopolitical, historical, and ethnic factors mix, setting the stage for a nuanced exploration. The methodology section unveils the research tools and qualitative approach used to dissect the legal intricacies surrounding individual criminal responsibility. It is a compass guiding the reader through the myriad sources, legal frameworks, and case studies employed to inform the ensuing analysis.

Then follows the thesis's contribution to the existing academic landscape. As the literature on the subject is limited, the void creates space for fresh insights. This scholarly endeavor is motivated by a recognition of the urgency to comprehend and address the challenges posed by the ongoing conflict. The unique perspective brought forth is grounded in a commitment to refining and enhancing mechanisms that uphold the principles of justice and accountability.

As we step into Chapter II, the terrain shifts towards the ICC, its foundational elements, jurisdictional issues, and its role in addressing atrocity crimes. War crimes, crimes against humanity, genocide, and the elusive crime of aggression become the focal points of my work. The narrative weaves through legal frameworks and jurisprudence, constructing a scaffold upon which the subsequent chapters rest.

The spotlight then narrows into Putin's arrest warrant in Chapter III, a critical knot that brings individual criminal responsibility to the forefront. The work considers the path from the Ukrainian situation to the ICC's issuance of this warrant, navigating the intricacies of child trafficking, immunity challenges, and the echoes of historical cases like that of Al Bashir. This chapter encapsulates the real-world complexities of enforcing accountability for high-ranking officials.

Chapter IV widens the lens, contemplating institutional solutions to bridge the accountability gap. *Ad hoc* or Hybrid Tribunals, and the potential reform of the Rome Statute emerge as beacons of hope in the quest for justice. The narrative breathes life into hypothetical yet pragmatic avenues, offering a thoughtful reflection on the future of international criminal law in addressing atrocity crimes in Ukraine.

In the final *crescendo*, Chapter V, titled "Conclusions," synthesizes the symphony of insights gleaned from the preceding chapters and offers a quick overview of the main findings of each part. It's not merely an academic research or

dissertation but a call to action, a call for collective efforts in refining and mechanisms that uphold the principles of justice and accountability. The thesis closes its narrative loop, but the echoes of its exploration resonate beyond the pages, inviting readers to engage in the ongoing discourse, contributing to the evolution of international criminal law in the face of ever-evolving challenges.

The concluding chapter encapsulates the critical insights gleaned from this exploration. It emphasizes the urgency to bridge the accountability gap and highlights the proactive measures required to adapt legal frameworks continually.

As the conflict in Ukraine persists, in the face of evolving challenges, this research not only analyzes critical aspects of the case but also tries to open the door for future debates, fostering hope and conditions for lasting peace in the small context in which it operates.

5. Conclusion

In wrapping up this initial chapter, we've taken a broad look at the Ukrainian conflict through the lens of international criminal law. I've detailed the approach I've taken in this thesis, emphasizing the thorough and systematic investigation it involves.

Additionally, it has underscored the meaning of this attempt of contribution to the existing academic landscape. Given the shortage of literature on the specific topic of Putin's arrest warrant in the context of the Ukrainian crisis and possible solutions, this work strives to place in this gap by offering insights and perspectives. While acknowledging the limited scholarly discourse, this thesis (with the small contribution it can provide) aims to pave the way for future research endeavors in this critical intersection of international law and geopolitical conflicts.

Additionally, the "Navigating the Complexities" section has acted as a guide, offering readers a preview of the intricate terrain we'll be exploring in the

upcoming chapters. It delineates the path of the thesis, starting from the foundational comprehension of the International Criminal Court and the crimes in Ukraine to the scrutiny of Putin's arrest warrant and the potential routes to accountability.

The forthcoming chapters will delve deeper into the intricate realm of individual criminal responsibility, focusing specifically on President Putin's case. The methodological insights and scholarly contributions laid out in this chapter will form the basis for the detailed analyses and proposals to come

In summary, the Ukrainian conflict, laden with its legal intricacies, warrants a thorough examination, and this thesis aims to unravel these complexities while making a meaningful contribution to the academic discourse.

CHAPTER II - THE INTERNATIONAL CRIMINAL COURT AND THE INTERNATIONAL CRIMES COMMITTED IN UKRAINE

1. Introduction

The Statute of Rome⁹ represents the foundation and the basis of the International Criminal Court (ICC) and provides the legal framework for its establishment, jurisdiction, and way of function. This chapter delves into the historical background of the Statute, highlighting the international community's need for a permanent international court to address the most serious international crimes (so-called “grave breaches”). It explores the objectives of the ICC, including the promotion of peace, justice, and accountability, and the deterrence of future atrocities.

The chapter then examines the key provisions of the Statute, such as the Court's composition, structure. It analyzes the various organs of the ICC, namely the Presidency, the Chambers, the Office of the Prosecutor, and the Registry. Additionally, it explores the role of the Assembly of States Parties, which consists of the countries that have ratified or acceded to the Statute, in decision-making processes and the governance of the Court. It focuses also on the jurisdiction issues (in particular the *ratione materiae*) and the triggering mechanisms to initiate a proceeding before the Court.

Furthermore, this section analyzes the principles and values enshrined in the Statute, which guide the ICC's mission. It takes in consideration the principle of complementarity, which establishes the primacy of national jurisdictions in prosecuting international crimes and emphasizes the Court's role as a court of last resort. Then it deepens all the so-called “core crimes”, the articles and the fundamental issues connected to triggering mechanisms and jurisdictions.

⁹The United Nations Rome Statute of the International Criminal Court. International Organizations, 2001. Web Archive. <https://www.loc.gov/item/lcwaN0018822/>.

Lastly, it considers the Russia and Ukraine war as a case study to reflect on the atrocity crimes and the problems of establishing a jurisdiction in this particular conflict.

2. General aspects of the International Criminal Court: The Statute of Rome of the International Criminal Court

The establishment of the International Criminal Court was a major milestone in the advancement of human rights.¹⁰ The ICC is responsible for prosecuting cases of genocide, crimes against humanity, war crimes and the crime of aggression when national legal systems are “unable or unwilling” to deal with them. In the 1990s, following the massacres in the former Yugoslavia and Rwanda, the global public opinion increasingly demanded the establishment of an international criminal justice system. The idea of a permanent criminal jurisdiction was undoubtedly strengthened by the creation of the two Tribunals for the former Yugoslavia¹¹ and Rwanda.¹² In 1995, the United Nations General Assembly established an *ad hoc* committee tasked with analyzing the issues related to the creation of a permanent court. After one year, the committee urged the General Assembly to establish a Preparatory Committee.¹³

In 1994, the United Nations General Assembly began the process of establishing an International Criminal Court based on a draft statute¹⁴ prepared by

¹⁰Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 94-105.

¹¹ The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 to prosecute the war crimes that had been committed during the Yugoslav Wars. The tribunal was an *ad hoc* Court located in The Hague, Netherlands and it was dissolved in 2017.

¹² The International Criminal Tribunal for Rwanda (ICTR) was an international court established in November 1994 by the United Nations Security Council with Resolution 955. Its aim consisted of judging people who took part to the Rwandan genocide and who committed serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994.

¹³ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2017), *passim*.

¹⁴ Relevant is the Draft Statute for an International Criminal Court with commentaries of 1994, where it is stated «Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 91). The report, which also contains

the International Law Commission. To facilitate this process, an *Ad Hoc* Committee was convened and held two sessions in 1995. Discussions within the *Ad Hoc* Committee revealed significant differences among States regarding the nature of the future Court. While some delegations initially expressed doubts about the feasibility of the project, their opposition gradually diminished as the negotiations progressed. The draft Statute, redacted by the Preparatory Committee, served as the foundation for the discussions at the Rome Conference. It is divided into thirteen sections and consists of 116 articles.¹⁵

In accordance with resolutions passed by the General Assembly in 1996¹⁶ and 1997¹⁷ The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was convened on 15 June 1998 in Rome, specifically at the headquarters of the Food and Agriculture Organization (FAO). The Conference attracted representatives from over 160 States, along with various intergovernmental entities and a multitude of non-governmental organizations.

Italy played a crucial and influential role in the negotiations, both technically and politically. It was the first country to sign the treaty and the fourth to deposit the ratification instrument, as stipulated by Law 232/1999.¹⁸ However, the process of incorporating the Statute's provisions into domestic law has been slow and remains unfinished for many countries.¹⁹

The negotiations in Rome lasted five weeks. The project drafted by the International Law Commission was significantly more conservative and sensitive

commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II, Part Two».

¹⁵ *Ibid.*

¹⁶ The *Ad Hoc* Committee was established by General Assembly Resolution 51/210 of 17 December 1996

¹⁷ UN General Assembly, Resolution A/RES/52/165, 52nd session (1997), *passim*.

¹⁸ Law n.232 of July 12, 1999, known as the "Ratification of the Statute of the International Criminal Court," is an Italian law that confirmed Italy's accession to the Rome Statute of the International Criminal Court (ICC). With this law, Italy formally ratified its commitment to cooperate with the ICC and accept its jurisdiction regarding war crimes, crimes against humanity, and genocide.

¹⁹ Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 94-105.

to the sovereignty of major powers. It envisioned substantial powers for the Security Council and States. The Court would only have been able to address situations falling under Chapter VII of the United Nations Charter²⁰ (threats to international peace and acts of aggression) with the consent of the Security Council.²¹ Except for genocide, states would have had the choice to selectively accept which crimes to prosecute. The initiation of proceedings would have been entrusted to the States Parties and the Council, excluding prosecutor-initiated investigations. Additionally, the territorial and custodial consent of the accused state would have been prerequisites for the admissibility of the case. Throughout the negotiations, compromises had to be reached among positions supported by at least three groups: around sixty like-minded states advocating for a strong, independent court with broad jurisdiction, the sovereign states (United States, China, Russia) seeking a weak court controlled by the Council, and the non-aligned states that wanted complete independence from the Council, granting the court jurisdiction over drug trafficking and terrorism but not war crimes committed during non-international conflicts. The results were balanced, although the implementation practice has revealed a series of inherent weaknesses in the Statute as well as the Court's heavy reliance on the will of states.²²

The issue of the relationship between the international body and national jurisdictions has been resolved by granting the Court the so-called “complementary jurisdiction” to national jurisdictions. This means that the Court can proceed only when the state that would normally exercise jurisdiction is unwilling or unable to do so, as stated in the Statute²³ (referred to as “unwilling or unable to proceed”²⁴ in the Statute's terminology).

²⁰United Nations Charter, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, (San Francisco, 1945), Articles 39-51.

²¹ *Ibid.* Article 39: «*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*».

²²Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 94-105

²³Relevant it's also Article 17 - *Issues of admissibility* of the Rome Statute of the International Criminal Court.

²⁴Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 94-105

The Court can still decide to exercise jurisdiction if it is determined that national proceedings are merely designed to shield the accused from responsibility or are not conducted impartially and independently.²⁵ However, determining such conditions can be extremely difficult.

The Statute cannot be regarded as a comprehensive code of international criminal law that systematically collects customary law in the field.²⁶ There are significant differences in various categories of crimes, both in a restrictive and expansive sense. Nonetheless, the Statute reflects the most advanced evolution of the subject matter in many areas and contributes to the formation of customary law.²⁷ The widespread adherence of a significant number of states to the Court (currently almost two-thirds of the 193 members of the United Nations) demonstrates a collective willingness to recognize the legal principles enshrined in the Statute. These principles are part of the international community's heritage, even for states that are not party to the Statute. They include individual criminal responsibility for serious violations of international law, as well as the obligation of states to prevent and suppress such violations, either directly or by collaborating with national and international judicial bodies. The significance of functional immunity, superior orders, the essential elements of international crimes, and the role of defense rights and principles of due process in international proceedings are also recognized.²⁸

²⁵The Rome Statute of the International Criminal Court, in Article 17 paragraph 2 (a), (b), (c) states: «(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice».

²⁶Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021). 97

²⁷ *Ibid.*

²⁸Salvatore Zappala', *La giustizia penale internazionale. Perché non restino impuniti genocidi, crimini di guerra e contro l'umanità* (Il Mulino, 2020), 116.

The Statute is very specific about the admissibility of cases and the assessment of the conditions by the judges. Complementarity is the hallmark of the Court that indirectly shapes its geopolitical function in the global political system. The most obvious implication of this choice is that, despite the ambitious and solemnly declared objectives in the Preamble of the Statute - preventing international crimes, ending impunity and ensuring respect for international justice - the Court was intended to be a last resort, activated only in exceptional cases of pathologies that prevent normally competent jurisdictions from functioning due to conflicts or institutional failures, provided that the proceedings are in line with the political interests of the most influential countries. In alternative, a Court with a broader mandate would have triggered political controversies that would have led to the rapid and irreversible demise of the project.

The trigger mechanisms for initiating proceedings were highly controversial, everyone recognized that the effectiveness of the Court would depend on the solution adopted. While in national jurisdictions the initiation of criminal proceedings or the formal opening of an investigation is the prerogative of the prosecution or law enforcement authorities, in an international jurisdiction, especially one of a complementary nature, the procedure must necessarily be different. Countries more inclined to defend national sovereignty and protect their citizens²⁹ wanted to reserve the power of initiation for the Security Council, citing the dangers of political abuse, inefficiency and risks to international stability if too much autonomy were granted to the prosecutor. On the other hand, it was emphasized that a Court subject to the political decisions of the Council would be useless, especially in view of the veto power of the permanent members. As a result, it was established that the Court could initiate proceedings upon referral by both States Parties and the Council. In the second scenario, the limitations on jurisdiction *ratione loci* do not apply. Since the Council acts within the scope of its powers for the maintenance of peace and security, the proceedings may concern crimes committed on the territory of non-States Parties and by citizens of any State. The

²⁹ Countries such as the United States and the five permanent members of the Security Council.

Council was also granted the power of deferral,³⁰ allowing it to defer the commencement or continuation of a proceeding for a period of twelve renewable months. It was also decided that the Prosecutor could initiate proceedings, but this power was subject to strict control by a Pre-Trial Chamber.

The organs of the Court³¹ are the Presidency (composed of the President and two Vice-Presidents elected by the full bench), the Chambers (composed of eighteen judges divided into Pre-Trial, Trial and Appeals Chambers), the Office of the Prosecutor (headed by a Prosecutor and a Deputy Prosecutor) and the Registry, which performs administrative and diplomatic functions and is headed by the Registrar. The Assembly of States Parties is not an organ of the Court. It normally meets once a year and has the main function of approving the budget of the Court and electing the judges, the Prosecutor and the Deputy Prosecutor. The Registrar is elected by the full bench. The first eighteen judges were elected in February 2003 with differentiated terms of three, six and nine years, respectively, in order to provide for a triennial renewal mechanism for six of the judges. The Prosecutor of the Court was elected in April of the same year and the Registrar in the summer.

In addition to the Rome Statute of the International Criminal Court, the Diplomatic Conference held on July 17, 1998, also adopted a Final Act,³² which outlined the establishment of a Preparatory Commission by the United Nations General Assembly. The Commission was entrusted with several tasks, with the drafting of the Rules of Procedure and Evidence being of utmost importance. These rules provide detailed guidelines on procedural and evidentiary matters. Another significant task was the formulation of the Elements of Crimes, which further elucidate the definitions of crimes specified in Articles 6, 7, 8, and 8 bis of the

³⁰ See the Rome Statute of the International Criminal Court, Article 16 - Deferral of investigation or prosecution «No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions».

³¹ *Ibid.* Article 34 - Organs of the Court.

³² Bruce Broomhall, "Diplomatic Conference on the Establishment of an International Criminal Court, Rome, 15 June to 17 July 1998" International Centre for Criminal Law Reform and Criminal Justice Policy, Volume 3, Issue 2, (1998): 4-5.

Statute. The Commission successfully met the deadline of June 30, 2000, as stipulated in the Final Act, for completing the Rules and Elements.

For the Statute to come into effect, it required a minimum of sixty ratifications or accessions. July 1, 2002, marked the date of entry into force, which held great significance since the Court could only prosecute crimes committed after this date. Entry into force also initiated the formal procedures for establishing the Court, including the election of judges and the Prosecutor. States were invited to sign the Statute, indicating their intention to ratify it. They had until the end of 2000 to sign, and approximately 139 states did so. Notably, even states that had initially voted against the Statute at the Rome Conference, such as the United States and Israel, eventually decided to sign, but they are not State Parties yet. Several states that had abstained during the July 17, 1998 vote also became signatories. States wishing to join the Court but failing to deposit their signatures by the December 31, 2000 deadline were considered to be acceding to, rather than ratifying, the Statute.

The Assembly of States Parties promptly convened for its inaugural session, held from September 3 to 10, 2002. During this session,³³ the Assembly formally adopted the Elements of Crimes and the Rules of Procedure and Evidence, which remained unchanged from the versions previously adopted by the Preparatory Commission. Additionally, other important instruments were adopted, and plans were made for the election of eighteen judges and the Prosecutor. Nominations for these positions closed at the end of November 2002, resulting in over forty candidates for judges, but none for the crucial position of Prosecutor. The election of judges was completed by the Assembly during the first week of February 2003, at its resumed first session. Notably, more than one-third of the judges elected in February 2003 were women, marking an unprecedented development for international courts.

³³ See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP/1/3 and Corr.1).

In 2010, the first Review Conference under Article 123 of the Rome Statute³⁴ was held in Kampala, Uganda. During the conference, the crime of aggression and its jurisdictional rules were defined. Article 8 bis was added to supplement the crimes listed in Article 5 of the Statute, while Article 25(3) bis introduced a specific type of liability (the so-called “leadership clause”). Articles 15 bis and 15ter dealt with the conditions for the exercise of jurisdiction over the crime. Certain war crimes were added to article 8, and in 2019 the crime of starvation was extended to non-international armed conflicts.

3. The Court's Jurisdiction: a focus on the *ratione materiae*

The jurisdiction of the International Criminal Court is a fundamental and integral aspect of its mandate and operational framework. It determines the scope of cases that the Court can investigate and prosecute, and thus plays a critical role in its ability to bring justice for the most serious international crimes. This part of the work examines the ICC's jurisdiction, focusing on its *ratione materiae* (subject matter jurisdiction) and *ratione personae* (personal jurisdiction), as well as its triggering mechanisms for initiating proceedings.

The ICC's jurisdiction is defined by the *ratione materiae*, which refers to the types of crimes falling within its jurisdiction. In a first moment it was limited to core international crimes - genocide, crimes against humanity, and war crimes - although the scope of the latter was disputed. Positions advocating the inclusion of terrorism and certain transnational crimes, such as arms and drug trafficking, were not successful. The highly politicized nature of the crime of aggression and the role assigned to the Security Council prevented agreement in Rome. The definition of

³⁴ In Article 123 Review of the Rome Statute, it is stated: «1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions. 2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference. 3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference. »

the crime was established at the Kampala Conference in 2010,³⁵ while its jurisdiction was activated in December 2017.

When a State becomes a party to the Statute, it automatically accepts the ICC's jurisdiction over the crimes listed in Article 5 of the Statute. A non-party State may also accept jurisdiction over a specific crime by means of a declaration submitted to the Registry (Article 12 of the Statute).

Genocide, recognized as one of the most terrific crimes under International Law,³⁶ involves deliberate acts intended to destroy, in whole or in part, a national, ethnic, racial or religious group. The ICC's jurisdiction over genocide finds its legitimate source in the Genocide Convention (1948), which imposes obligations on states to prevent and punish this crime.³⁷ By holding individuals accountable for acts of genocide, the ICC ensures that those responsible for such grave atrocities face justice in an international court.

Crimes against humanity cover a wide catalog of conducts committed as part of a widespread or systematic attack directed against a civilian population. These acts include murder, enslavement, torture, rape, enforced disappearance and other inhumane acts which are listed in art. 7 of the Statute of Rome. The ICC's jurisdiction over crimes against humanity aims to address serious violations of human rights and ensure that perpetrators are brought to justice.

³⁵As stated in Art. 8bis of the ICC Statute: «For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations».

³⁶ Important reference is the General Assembly resolution 96 (I), adopted on 11 December 1946, affirmed «that genocide is a crime under international law which the civilized world condemns».

³⁷ The definition of Genocide is set out in Article II of the Genocide Convention: «Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.»

War crimes are serious violations of the laws and customs of armed conflict and include acts committed during both international and non-international armed conflicts. These crimes include the targeting of civilians, the use of torture, inhumane treatment, the use of prohibited weapons and the deliberate targeting of protected objects such as hospitals or cultural sites. The ICC's war crimes jurisdiction seeks to hold accountable individuals who commit serious violations of the laws of armed conflict.

The crime of aggression was added to the ICC's jurisdiction in 2010 thanks to the Kampala Convention. It includes acts of planning, preparation, initiation or execution of acts of aggression by a state against the sovereignty, territorial integrity or political independence of another state according to the new art. 8-bis. The definition and exercise of jurisdiction over the crime of aggression is subject to specific provisions set out in the Rome Statute. These provisions include the activation of jurisdiction by the Assembly of States Parties and the existence of certain safeguards.

It is relevant to point out that the ICC's jurisdiction over these crimes extends beyond state actors to non-state actors, including rebel groups and individuals acting in a non-official capacity. This ensures that individuals responsible for these crimes cannot escape accountability because of their affiliation or lack of formal authority.

The *ratione personae* jurisdiction of the International Criminal Court focuses on individuals who can be held accountable for the commission of international crimes. It recognizes the principle of individual criminal responsibility and seeks to hold perpetrators accountable for their actions. The ICC may exercise jurisdiction over persons accused of these crimes, regardless of their official status or affiliation. Immunities which are a core principle of International customary law

for the ICC are not recognized³⁸ because the Statute of Rome relies on two fundamental aspects: the universal jurisdiction and the individual criminal responsibility. Universal jurisdiction refers to the authority of a nation to prosecute individuals for international crimes, while international jurisdiction pertains to the jurisdiction exercised by international tribunals over such crimes.³⁹

The International Criminal Court (ICC) may promote the exercise of universal jurisdiction by States to alleviate its caseload.⁴⁰ If States respond to this encouragement, the ICC stands ready to provide assistance, as stipulated in Article 93(10)(a) of the Rome Statute, which enables the Court to cooperate and offer support to a State Party conducting an investigation or trial related to conduct falling within the Court's jurisdiction or considered a serious crime under the requesting State's national law.⁴¹ However, Article 17 of the Rome Statute does not grant bystander States unrestricted authority. To prevent potential abuses by national courts, the ICC should exercise oversight over all national proceedings based on the universality principle by implementing a stringent ability test. The ICC may advise States to refrain from exercising universal jurisdiction in cases where national courts are incapable of effectively prosecuting and where the ICC is purportedly better suited to address the matter. National courts of States Parties to the Rome Statute should recognize the ICC's authority in enforcing international humanitarian law.⁴²

The ICC's jurisdiction extends to persons who are nationals of States Parties to the Rome Statute and to persons who committed crimes on the territory of States Parties to the Statute. This dual jurisdiction ensures that both the nationality of the

³⁸ Article 27 (2) - Irrelevance of official capacity of the ICC's Statute, affirms: «Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person».

³⁹ Paul Ryngaert, "Universal Jurisdiction in an ICC Era," *European Journal of Crime, Criminal Law, and Criminal Justice* 14, no. 1 (2006): 46–80.

⁴⁰ *Ibid.*

⁴¹ Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses," *Human Rights Quarterly* 23, no. 4 (2001): 940–74, <http://www.jstor.org/stable/4489367>.

⁴² *Ibid.*

accused and the place where the crimes were committed are taken into account. In addition, States not party to the Statute may accept the jurisdiction of the Court for certain crimes on a case-by-case basis by making a declaration to the Court, such as the Ukraine case-study.⁴³

Ratione temporis jurisdiction refers to the temporal scope of the jurisdiction of the International Criminal Court and determines the period of time during which the Court can exercise jurisdiction over crimes. It defines the applicable law and determines whether the ICC can investigate and prosecute crimes that occurred within a certain period of time. The principle of non-retroactivity, temporal limitations and the application of law are the basis of it.

The principle of non-retroactivity is a fundamental one of criminal law that prohibits the retroactive application of laws to criminalize a conduct that was not considered criminal at the time it was committed.⁴⁴ The Rome Statute, which governs the ICC, upholds this principle by stating that the Court can only exercise jurisdiction over crimes committed after the Statute entered into force (on 1 July 2002). This means that the ICC cannot retroactively prosecute individuals for crimes committed before that date, even if those crimes fall within its jurisdiction. The jurisdiction of the International Criminal Court (ICC) is further limited by time constraints. The Court has the power to investigate and prosecute crimes that have taken place within the specific time parameters of the Rome Statute. With regard to genocide, crimes against humanity and war crimes, the ICC's jurisdiction covers acts committed during both international and non-international armed conflicts. Conversely, with respect to the crime of aggression, the Court's jurisdiction is limited to acts committed after the activation of jurisdiction over this crime, which occurred on 17 July 2018 following the adoption of the Kampala Amendments in 2010.

⁴³Marina Mancini, "La dichiarazione di accettazione della giurisdizione della Corte penale internazionale da parte dell'Ucraina: significato, limiti e conseguenze possibili," SIDIBlog, 2014, Accessed July 24, 2023, <http://www.sidiblog.org/author/marina-mancini/>

⁴⁴Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 152-156.

The ICC's temporal jurisdiction also recognizes the concept of continuing crimes. This principle recognizes that certain crimes, such as crimes against humanity or war crimes, may be committed over an extended period of time. In such cases, the Court may exercise jurisdiction over acts constituting these crimes that occurred prior to the establishment of the Court, as long as they are part of a continuing criminal enterprise that extends into the temporal jurisdiction of the Court.

The principle of legality guides the ICC in determining the applicable law within its temporal jurisdiction. This principle requires that individuals be prosecuted on the basis of the laws in force at the time the alleged crimes were committed. Under the Rome Statute, the Court can only apply substantive criminal laws that were in force at the time of the alleged crimes. Conversely, procedural laws may be applied retroactively if they are favorable to the accused.⁴⁵

In summary, the *ratione temporis* jurisdiction of the International Criminal Court determines the time frame within which the Court can exercise jurisdiction over crimes. In accordance with the principle of non-retroactivity, the ICC can only prosecute crimes committed after the entry into force of the Rome Statute. Temporal limitations, together with the principle of continuing crimes, further shape the Court's jurisdiction and ensure that it focuses on crimes committed within specific temporal limits. By upholding the principle of legality, the ICC applies the relevant laws in a manner that respects the rights of the accused. Through its temporal jurisdiction, the ICC contributes to the accountability and prosecution of individuals responsible for the most serious international crimes within a well- defined temporal framework.

⁴⁵ Relevant it's Article 24 - Non-retroactivity *rationae personae*, of the Rome Statute of the International Criminal Court: «1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply».

The initiation of a case before the ICC requires the activation of referral mechanisms. These mechanisms determine how cases are brought to the Court and affect its ability to investigate and prosecute crimes. There are two main triggering mechanisms: initiation and *ex officio* investigation.

Initiation occurs when situations are referred to the ICC by States Parties or the UN Security Council. States Parties have the right to refer “situations” (so called Referral by a State Party) that fall within the jurisdiction of the Court, while the Security Council may refer “situations” (referral by Security Council) even if the State concerned is not a party to the Statute. This mechanism ensures that both States Parties and the international community have the opportunity to refer cases to the Court.⁴⁶

Proprio motu investigations allow the ICC Prosecutor to open investigations on his own initiative. The Prosecutor has the power to open an investigation in situations brought to his attention, even if the case has not been referred. However, this power is subject to review by the Pre-Trial Chamber to ensure that it has a sufficient legal basis and evidentiary support.

The ICC's jurisdiction is an important part which enables it to accomplish its mandate to combat impunity and promote accountability for the most serious international crimes. By defining the crimes within its jurisdiction and identifying the persons subject to its jurisdiction.

4. Atrocity Crimes occurring in Ukraine: a substantial law analysis

This section provides a substantial law analysis of the atrocity crimes committed during the War in Ukraine, focusing on war crimes, crimes against humanity, genocide, and the crime of aggression. It delves into the legal elements, modes of liability, and specific acts constituting each crime. The analysis considers

⁴⁶Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 103-105.

the evidence and allegations of these crimes in the context of the Ukrainian conflict, evaluating their legal significance and potential for prosecution before the ICC.

The current war in Ukraine has its roots in historical tensions and events spanning decades as stated in the “Introduction and Conflict Overview”. The conflict's origin lies in the Soviet era, when Ukraine was part of the Soviet Union. Following the dissolution of the Soviet Union in 1991, Ukraine gained independence, but the legacy of Soviet influence persisted.

In 2014, Russia's annexation of Crimea ignited the crisis. This move, met with global condemnation and sanctions, raised concerns about Russia's intentions in the region. The same year, pro-Russian separatist movements emerged in Eastern Ukraine, particularly in Donetsk and Luhansk. The Ukrainian government's efforts to control these movements led to clashes, marking the conflict's onset.

International attempts at resolution included the Minsk agreements of 2014 and 2015, which aimed to establish ceasefires and political solutions. However, sporadic clashes continued, and tensions remained high. The downing of Malaysia Airlines Flight MH17 in 2014 further strained Ukraine-Russia relations.

In 2022, the conflict escalated with reports of a significant Russian military buildup near Ukraine's border. This sparked global concerns and intensified diplomatic efforts for de-escalation. The conflict's ongoing impact is profound, leading to displacement, infrastructural damage, and humanitarian crises among civilians. In 2022, the situation took a more critical turn with reports of increased Russian military involvement and allegations of human rights abuses. The conflict has seen a series of significant international crimes. A natural question arises: what are International Crimes?

International crimes refer to severe violations (or grave breaches) of rules safeguarding fundamental principles for the international community, particularly

in the realms of international humanitarian law and human rights.⁴⁷ These norms predominantly belong to the *jus cogens*, which denotes general customary norms accorded a unique legal status above all other international laws.⁴⁸ They are regarded as grave violations that, due to their extent and systematic nature, jeopardize protected interests. A defining characteristic is that perpetrators of international crimes can be either individuals or state entities, and in some cases, private actors. The key distinction between international crimes and transnational crimes lies in the non-relevance of functional immunity and their imprescriptibility.⁴⁹

International criminal prosecution safeguards both collective and individual international interests. Individual interests typically encompass fundamental rights held by human beings, protected and recognized by the international legal system. Examples include the right to life, physical integrity, dignity, equality, and more. These interests are protected because they are essential for the international community. On the other hand, collective legal interests pertain to the global community of States as a whole and align with the safeguarding and protection of international law from more serious violations.

The preamble of the Rome Statute entrusts the International Criminal Court with the task of preventing the commission of international crimes, deeming them a matter of concern for the entire international community. It highlights three primary interests: peace, security, and the well-being of individuals. Peace and security are also fundamental objectives of the United Nations, encompassing not only the absence of armed conflicts between states but also the prevention of situations involving grave violations of human rights. The significance of the legal interests protected by international criminal offenses, particularly those related to fundamental human rights, such as genocide, establishes a positive obligation for states to provide for their respective criminal protection by criminalizing and

⁴⁷ Marina Mancini, “Crimini Internazionali - Treccani,” Treccani, 2019, Accessed July 25, 2023, [https://www.treccani.it/enciclopedia/crimini-internazionali_\(Diritto-on-line\)/](https://www.treccani.it/enciclopedia/crimini-internazionali_(Diritto-on-line)/).

⁴⁸ The rules of *jus cogens*, in so far as they protect the fundamental values of the international community as a whole, cannot be derogated from by custom or treaty.

⁴⁹ Antonio Cassese, *International Law*. (Oxford University Press, 2020). 404.

punishing relevant conduct. This obligation is derived from customary international law, as these norms are considered to be of *jus cogens* nature.⁵⁰

Furthermore, various international instruments impose the duty on states to criminalize and exercise penal action against specific international crimes, such as the Convention against Torture,⁵¹ the Geneva Conventions⁵² concerning grave breaches, and indirectly, the Genocide Convention and so on.

The ICC Statute goes a step further by explicitly establishing this obligation and, in close relation to the principle of complementarity, emphasizing the duty of every state to exercise its criminal jurisdiction over individuals responsible for international crimes. In international criminal law, international crimes serve multiple functions, closely tied to the specific structural characteristics of each offense. International criminal law incorporates contextual elements into its penal norms, which serve as the demarcation factor distinguishing ordinary crimes from international crimes. In other words, it transforms a domestic criminal offense into an international criminal offense.

Crimes of war entail the commission of acts within the context of an international or non-international armed conflict and in connection with hostilities. Crimes against humanity involve systematic and widespread attacks conducted against civilian populations. In the case of genocide, a specific intent to destroy, in whole or in part, a national, ethnic, racial, or religious group is a subjective requirement. As for aggression, it refers to the organized use of military force.

⁵⁰ Francesco Viganò, "L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali," Studi in onore di Mario Romano, (Napoli, Jovene 2011). 2651.

⁵¹ See UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on the 10 December 1984 by the General Assembly resolution 39/46.

⁵² The First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field"; The Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea"; The Third Geneva Convention "relative to the Treatment of Prisoners of War"; The Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War".

The situation regarding the international crimes committed in Ukraine by Russian military leaders and their subordinates is of significant concern. An increasing number of actions by the Russian armed forces appear to fall within the definition of war crimes under the Rome Statute of the International Criminal Court. These actions include deliberate attacks on civilians and civilian objects, as well as disproportionate attacks on military objectives resulting in civilian casualties and damage to civilian properties.

Cluster bomb attacks and the use of civilians as human shields are also considered potential war crimes. The ICC has initiated an investigation into these crimes and crimes against humanity committed in Ukraine since November 2013, following a referral by 39 ICC States Parties, including Italy.

While the ICC has jurisdiction over war crimes and crimes against humanity, it lacks jurisdiction over the crime of aggression committed by Russian leaders, as Russia is not a party to the ICC Statute. Prosecution of Russian perpetrators for aggression would require a referral from the UN Security Council, which is currently unlikely due to potential Russian veto.⁵³

In addition to the ICC investigation, Russia has brought its case to the International Court of Justice (ICJ), accusing Ukraine of genocide in the self-proclaimed Donetsk and Luhansk Republics. Ukraine seeks to ascertain that no genocide has occurred in these areas, as claimed by Russia.

The prospect of accountability for the perpetrators of international crimes committed in Ukraine remains promising. While the ICC can bring individuals to trial, national courts of States with universal jurisdiction over international crimes may also play a role in prosecuting the offenders. The pursuit of justice and

⁵³Marina Mancini, "La Dichiarazione Di Accettazione Della Giurisdizione Della Corte Penale Internazionale Da Parte Dell'Ucraina: Significato, Limiti E Conseguenze Possibili," SIDIBlog, April 28, 2014, Accessed July 26, 2023, <http://www.sidiblog.org/2014/04/28/la-dichiarazione-di-accettazione-della-giurisdizione-della-corte-penale-internazionale-da-parte-dellucraina-significato-limiti-e-conseguenze-possibili/>.

accountability for the grave violations of human rights in Ukraine is critical to ensuring that such atrocities do not go unpunished and to preventing future similar acts in the international community.

Numerous actions by the Russian armed forces appear, upon initial examination, to qualify as war crimes under the Rome Statute of the International Criminal Court, to which Ukraine has accepted jurisdiction. Notably, deliberate attacks against civilians, non-combatant individuals, and civilian infrastructure are of particular concern. The Russian bombardments have targeted numerous residential buildings, which are considered quintessential civilian objects. These structures can only be deemed military objectives and consequently be attacked if they are used by the enemy for military purposes, such as weapon storage.⁵⁴

As outlined in the First Additional Protocol⁵⁵ to the Geneva Conventions of 1949, a normally civilian object must be presumed not to be used for military purposes in cases of doubt.⁵⁶ Additionally, civilians are protected from attacks unless they directly participate in hostilities. Individuals whose status is uncertain should be considered civilians. The deliberate targeting of schools, universities, theaters, churches, and even hospitals by Russian forces constitutes a war crime explicitly addressed in the ICC Statute.

Further war crimes encompass attacks on military objectives with the awareness that they will not adhere to the principle of proportionality, meaning they will result in civilian casualties or excessive damage to civilian objects compared

⁵⁴Marina Mancini, “Quale Giustizia per I Crimini Delle Forze Russe in Ucraina?,” *Affari Internazionali - Politica ed economia estera*, March 10, 2022, Accessed July 26, 2023, <https://www.affarinternazionali.it/quale-giustizia-per-i-crimini-delle-forze-russe-in-ucraina/>.

⁵⁵ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

⁵⁶ It’s relevant Article 52 (3) - General protection of civilian objects of Protocol Additional to the Geneva Conventions of 12 August 1949, which states:

«3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used».

to the anticipated military advantage. There are valid concerns about whether many Russian attacks comply with this principle.⁵⁷

Indiscriminate attacks, such as those employing cluster bombs repeatedly dropped by Russian aircraft, may also amount to criminal conduct, despite Russia not being a party to the Convention on Cluster Munitions⁵⁸ of 2008, which prohibits their production and use. Cluster bombs⁵⁹ are considered indiscriminate weapons since their effects cannot be limited solely to military objectives unless the submunitions they contain have deactivation mechanisms. Unexploded submunitions pose risks of detonation, leading to civilian fatalities or injuries.

Attacks on nuclear power plants, which are military objectives in their own right, could also violate the principle of proportionality and therefore be regarded as war crimes. The First Protocol prohibits attacks on installations containing dangerous forces, such as nuclear power plants, even when they constitute military objectives. This prohibition also extends to military objectives in the vicinity, if the attack could result in the release of hazardous forces (e.g., radiation from nuclear power plants), causing severe harm to the civilian population. Attacking such installations with the knowledge that the principle of proportionality will not be respected constitutes a grave violation of the First Protocol.

Additionally, the use of civilians as human shields to protect military objectives and deliberately depriving civilians of essential necessities for survival, including water, food, and medicine, particularly by obstructing humanitarian aid delivery, are considered war crimes.

⁵⁷ Marina Mancini, “Quale Giustizia per I Crimini Delle Forze Russe in Ucraina?,” *Affari Internazionali - Politica ed economia estera*, March 10, 2022, Accessed July 2023, <https://www.affarinternazionali.it/quale-giustizia-per-i-crimini-delle-forze-russe-in-ucraina/>.

⁵⁸ The Convention was concluded by the Dublin Diplomatic Conference on Cluster Munitions at Dublin on 30 May 2008. In accordance with its article 15, the Convention was opened for signature at Oslo, Norway, by all States on 3 December 2008.

⁵⁹ According to Cluster Munitions Coalition: «Cluster munitions are dropped from aircraft or fired from the ground or sea, opening up in mid-air to release tens or hundreds of submunitions, which can saturate an area up to the size of several football fields. Anybody within the strike area of the cluster munition, be they military or civilian, is very likely to be killed or seriously injured.»

Regarding the Russian-occupied territory of Ukraine, serious breaches of the Fourth Geneva Convention of 1949, amounting to war crimes, involve intentional killings, inflicting great suffering or serious injuries, torture, and inhuman treatment of civilians by occupying forces. It is imperative to differentiate the ICC's investigation from the proceedings before the International Court of Justice (ICJ), initiated by Ukraine against the Russian Federation on charges of genocide in the self-proclaimed Donetsk and Luhansk Republics, as claimed by the Moscow Government against Ukrainian authorities.

On February 26, 2022, Ukraine submitted an application to the ICJ against Russia,⁶⁰ requesting a determination that no genocide has been committed against the Russian-speaking minority in the Donetsk and Luhansk regions, as repeatedly claimed by Putin to justify the recognition of the secessionist republics and the subsequent declared "special military operation" in Ukraine. This dispute pertains to the interpretation and application of the 1948 Genocide Convention, to which both Ukraine and Russia are parties.

On March 7, 2022, a hearing was held on Ukraine's request for provisional measures.⁶¹ Ukraine urged the ICJ to order Russia to immediately suspend the military operations initiated on February 24. Russia did not attend the hearing.

Overall, this chapter establishes a comprehensive understanding of the general aspects of the International Criminal Court, including its Statute of Rome and jurisdiction. It further examines the specific international crimes committed in Ukraine, analyzing their legal frameworks and implications for the ICC's involvement. The subsequent subsections will build upon this foundation, providing

⁶⁰ See ICJ Application Instituting Proceedings Filed In The Registry Of The Court On 26 February 2022 Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation), 2022 General List No. 182

⁶¹ See No. 2022/8 7 March 2022 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) Conclusion of the public hearing on the Request for the indication of provisional measures submitted by Ukraine

a detailed examination of each crime and its application in the Ukrainian context, as well as the challenges and potential avenues for accountability and justice.

5. War Crimes and the violation of International Humanitarian Law

The conflict in Ukraine has been marred by numerous war crimes, which are serious violations of international humanitarian law. In the aftermath of the horrific events in Bucha, Borodyanka, and other towns near Kyiv, allegations of violence perpetrated against Ukrainian civilians by Russian forces have surfaced. More recent massacres in Mariupol and the Donbas region have further reinforced these accusations. The term 'war crimes' may seem contradictory, as it implies unlawful acts in the context of war. However, there are limits to what is considered lawful during armed conflicts. It is essential to recognize that even in times of war, moral and legal principles must be upheld, and individuals cannot be exempted from accountability for their actions. This is why both philosophers and lawmakers emphasize the significance of addressing and prosecuting 'war crimes' is not an oxymoron. Awful things are done in war, things that would be considered crimes in times of peace, yet there is a limit to what is lawful during war. Above all, war is not an excuse to be exempt from moral or legal conduct, which is why philosophers and lawmakers believe that the concept of 'war crimes' is meaningful.⁶²

The International Criminal Court has jurisdiction over all war crimes and crimes against humanity committed by Russian forces, thanks to Ukraine's declaration accepting the Court's jurisdiction on September 8, 2015. Despite not being a party to the ICC Statute, Ukraine declared in 2014 its acceptance of the Court's jurisdiction for crimes committed on its territory from the onset of protests against the pro-Russian regime of Viktor Yanukovich on November 21, 2013, until his removal by the Ukrainian Parliament on February 22, 2014. Subsequently, in 2015, Ukraine made a second declaration accepting the ICC's jurisdiction over

⁶²Vittorio Bufacchi, "War crimes in Ukraine: Is Putin responsible?" *Journal of Political Power* 16, no. 1 (2023): 1-6.

crimes committed on its territory starting from February 20, 2014, without specifying an end date.

Building upon the first declaration, the former ICC Prosecutor, Fatou Bensouda, initiated a preliminary examination of potential crimes in Ukraine, leading to the conclusion in 2020 that reasonable grounds existed to believe that war crimes and crimes against humanity were perpetrated in Crimea, as well as war crimes in the Donbass region. On March 2nd 2022, based on this preliminary examination, the current ICC Prosecutor, Karim Khan, announced the commencement of a full-scale investigation into war crimes and crimes against humanity committed in Ukraine since November 21, 2013. This investigation will also encompass newly reported crimes that occurred in recent weeks. The investigation may proceed without the need for authorization from the Pre-Trial Chamber, thanks to the referral of the situation in Ukraine by 39 ICC States Parties, including Italy.

Potential main perpetrators of war crimes and crimes against humanity committed on Ukrainian territory could face ICC arrest warrants in the future and, if apprehended and transferred to The Hague, undergo trial. However, it is crucial to acknowledge that the ICC cannot conduct trials *in absentia* (so as it will be analyzed in the further chapters the presence of Putin is needed).

As elucidated by Jeff McMahan, war crimes encompass severe breaches of the legal principles known as *jus in bello*, which govern the conduct of warfare.⁶³ These principles are delineated in various international legal instruments, including

⁶³In 2009, Jeff McMahan, a scholar from the Ethics department at Oxford, challenged traditional just war theory in his thought-provoking book, "Killing in War." In this work, he questioned the viability of just war theory as a moral framework for restraining warfare. McMahan further presented his ideas in a two-part article for The New York Times Opinionator Blog (Part 1 and Part 2). He asserts the «principles of *jus ad bellum* [principles that distinguish just war from unjust war] apply not only to governments but also to individual soldiers, who in general ought not to fight in wars that are unjust.» McMahan's key idea is that rethinking just war theory by merging the moral principles governing the justification for going to war (*jus ad bellum*) and the ethical conduct during war (*jus in bello*) is much more reasonable than the existing system that keeps these concepts separate. In the current setup, soldiers are assessed as having equal moral standing, regardless of the justice of the war they are involved in.

the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1864 and 1949, as well as the two Additional Protocols of 1977, and the Rome Statute of the International Criminal Court from 2002, which falls under international criminal law.

A significant aspect of the legal definition of war crimes involves the deliberate targeting of civilians by combatants. According to Article 8(2b) of the Rome Statute, war crimes include intentionally directing attacks against the civilian population, civilian objects, personnel, installations, material, units, or vehicles involved in humanitarian assistance or peacekeeping missions, and knowingly launching attacks that will cause incidental loss of life or injury to civilians.

Violations of the laws and customs of war are deemed serious when they pose a threat to protected individuals or objects or when they undermine fundamental values. However, when these violations are committed deliberately, they are categorized as grave breaches. In this context, the term "grave breaches" is closely tied to the principle of *mens rea*, which refers to the mental state or intent of the perpetrator. The term "serious" pertains to the *actus reus*, or the physical act of the crime, while "grave breaches" relate to the *mens rea*. The combination of both elements is considered the most severe form of international crimes, even in non-international armed conflicts, as recognized by the International Criminal Court.⁶⁴ The Rome Statute of the ICC provides a comprehensive definition of war crimes, encompassing various scenarios observed in both international and non-international armed conflicts. It is important to note that the interpretation of war crimes differs in international armed conflicts compared to non-international armed conflicts.

Article 8 of the ICC Statute outlines a comprehensive list of war crimes that fall within the Court's jurisdiction.⁶⁵ These war crimes encompass a wide range of

⁶⁴ Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021), 169-170.

⁶⁵ In Rome Statute of the International Criminal Court at Article 8 - War Crimes, can be found the definition of such crimes and the contextual element:

«The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

For the purpose of this Statute, 'war crimes' means:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or un-lawful confinement; (viii) Taking of hostages. Furthermore, the Rome Statute describes twenty-six war crimes as: other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when tak-en by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flat-ten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced

serious violations of international law applicable to both international and non-international armed conflicts.

It is essential to recognize that Article 8 of the ICC Statute plays a vital role in holding individuals accountable for their actions during armed conflicts and ensuring that those responsible for grave violations of international law are brought to justice.

The list includes crimes against persons, such as willful killing, torture, and inhuman treatment, as well as willfully causing great suffering or serious injury to body or health. It also covers crimes against property, such as extensive destruction and appropriation of property without military necessity and carried out unlawfully and wantonly.

Moreover, the article addresses crimes against prisoners of war and other protected persons, such as compelling them to serve in the forces of a hostile power or willfully depriving them of the right to fair and regular trial. Unlawful deportation, transfer, or confinement, as well as the taking of hostages, are also considered war crimes.

pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including Wilfully impeding relief supplies as provided for under the Geneva Conventions;(xxvi) Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. In the case of an armed conflict without international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;(iii) Taking of hostages;(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.»

The Rome Statute further specifies additional war crimes that encompass acts intentionally directed against civilians and civilian objects, humanitarian personnel and missions, and the environment. These include intentionally directing attacks against the civilian population or individual civilians not taking part in hostilities, as well as attacks against civilian objects and humanitarian assistance or peacekeeping missions protected under the United Nations Charter.

The use of certain prohibited weapons, attacks on undefended towns or villages, and acts resulting in the physical mutilation or medical and scientific experimentation on persons are also deemed war crimes under Article 8.⁶⁶

Additionally, the statute addresses acts considered as grave breaches of the Geneva Conventions, such as the unlawful transfer of civilian populations into occupied territory, intentionally attacking buildings dedicated to religion, education, art, or science, and committing outrages upon personal dignity, including rape, sexual slavery, and enforced prostitution. The use of starvation as a method of warfare and the enlistment or conscription of children under the age of fifteen into armed forces or using them to participate actively in hostilities are also regarded as war crimes.

Furthermore, the Rome Statute, in addition to the war crimes specified in Article 8(2)(b) and 8(2)(c) that apply to non-international armed conflicts,⁶⁷ explicitly excludes situations involving internal disturbances, tensions, riots, isolated acts of violence, or similar acts. However, Article 8(2)(e) of the Rome Statute presents a substantially similar catalog of other serious violations of the laws and customs applicable in non-international armed conflicts, in accordance with established principles of international law. These violations encompass a range of

⁶⁶ Knut Dörmann. "Elements of War Crimes Under the Rome Statute of the International Criminal Court : Sources and Commentary" (Cambridge, Cambridge University Press, 2002), *passim*. <https://catdir.loc.gov/catdir/samples/cam033/2002023351.pdf>.

⁶⁷ Article 8(e)(2) of the Rome Statute which pertains specifically to non-international armed conflicts and does not encompass situations involving internal disturbances, tensions, riots, isolated acts of violence, or similar occurrences. It is applicable in cases where protracted armed conflict transpires within the territory of a state, either between governmental authorities and organized armed groups or between such groups themselves.

acts, including but not limited to the following: «(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;(v) Pillaging a town or place, even when taken by assault;(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;(x) Declaring that no quarter will be given;(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;(xii) Destroying or seizing the property of an adversary.»

6. Crimes Against Humanity

Crimes against humanity involve systematic and extensive attacks specifically aimed at a civilian population. These offenses have significant international implications. Before the establishment of the International Criminal Court, there was often confusion between crimes against humanity and war crimes. General Telford Taylor, in his final report⁶⁸ on the Nuremberg war crimes trials, highlighted the broad scope of crimes that fall under the category of crimes against humanity. These include discriminatory policies, concentration camps, medical experiments, and extermination squads. After World War II, although such acts could also be classified as war crimes if committed during a belligerent occupation, crimes against humanity encompassed atrocities committed as part of a well-organized campaign of discrimination or persecution.⁶⁹ These crimes contravene international law, regardless of whether they are perpetrated by nationals against their fellow citizens or against individuals of other nations.

It is crucial to recognize that crimes against humanity and war crimes have distinct legal definitions, as acknowledged by the Rome Statute. Initially confined to a single paragraph within the Nuremberg Charter's Article 6,⁷⁰ crimes against humanity have burgeoned into a multifaceted framework composed of numerous interconnected definitional elements and a substantial reservoir of practical applications. This evolution has bestowed crimes against humanity with their

⁶⁸ See the Final report to the Secretary of the Army on the Nuremberg war crimes trials under control council law no. 10

⁶⁹ Yvonne McDermott, "Prosecutor v. Bemba" *American Journal of International Law*, Volume 110, no. 3 (2016): 526-533. <http://www.jstor.org/stable/10.5305/amerjintelaw.110.3.0526>

⁷⁰ Article 6(c) of the Nuremberg Charter defined "Crimes Against Humanity" as one of the categories of offenses falling under the jurisdiction of the International Military Tribunal. The relevant excerpt from Article 6(c) stated: «Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.» In essence, this part of Article 6 addresses widespread and systematic acts committed against civilians that go beyond the specific context of war. The crimes listed, such as murder, extermination, enslavement, deportation, and persecution, are considered particularly egregious and in violation of fundamental principles of humanity and international law. This notion of crimes against humanity has since become a foundational concept in international law and has been further developed and codified in subsequent legal instruments and statutes of international criminal tribunals.

distinct normative identity complete with a distinct contextual component and an expansive spectrum of underlying offenses. These encompass crimes rooted in discrimination, translating grave human rights violations into criminal acts, encompassing a variety of gender-related offenses, and encompassing a residual charge of other inhuman acts.⁷¹

According to article 7 of the Statute of Rome «for the purpose of this Statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder;(b) Extermination;(c) Enslavement;(d) Deportation or forcible transfer of population;(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;(f) Torture;(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;(i) Enforced disappearance of persons;(j) The crime of apartheid;(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. For the purpose of paragraph 1:(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of

⁷¹ Guénaél Mettraux, “International Crimes : Law and Practice”, Volume 2, Crimes against Humanity, (Oxford, United Kingdom: Oxford University Press, 2020), *passim*.

trafficking in persons, in particular women and children; (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;(g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime».

Consequently, in order to determine a crime against humanity based on its definition, certain essential elements must be satisfied.

First, there must be an "attack" that is either widespread or systematic. Additionally, this attack must be directed towards a civilian population. Moreover, the actions of the accused must be linked to the attack, and they must have been aware of the commission of a widespread or systematic attack. Therefore, when an attack fulfills the criteria of being widespread or systematic and specifically targets a civilian population, it falls under the category of crimes against humanity. As stated by the ICTY Appeals Chamber in Tadić⁷² International crimes are considered

⁷²Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 42.

to be 'universal in nature' and are recognized as serious violations of international humanitarian law. These crimes, which are beyond the interests of any one state, are distinguished from domestic crimes. The widespread or systematic attack on a civilian population, which is the *chapeau* element of crimes against humanity, reflects the international aspect of the crime and is in line with the interest of the international community in penalizing such crimes.⁷³

As of 2022, there have been significant and credible reports of crimes against humanity committed by Russian forces in Ukraine since the war began. Human rights organizations and international bodies have documented numerous instances of violence and abuses directed at the civilian population, constituting systematic and widespread attacks. These allegations include deliberate attacks on civilians, unlawful killings, sexual violence, torture, and destruction of civilian infrastructure, such as homes, hospitals, and schools.

According to reports from Human Rights Watch, an independent human rights group, and the United Nations Human Rights Office, there have been credible accounts of war crimes perpetrated by Russian forces, including incidents of rape, summary executions, and looting of civilian properties. These documented violations indicate a grave violation of international humanitarian law and raise serious concerns about the protection and well-being of civilians caught in the conflict.

The International Criminal Court has also expressed concern over possible war crimes and crimes against humanity in Ukraine and has opened investigations to hold perpetrators accountable. In March 2022, the ICC Prosecutor, announced the opening of a formal investigation into alleged war crimes committed in Ukraine since 2013, including during the 2022 invasion.

Bucha, a town seized early in the invasion of Ukraine following President Putin's order on February 24, 2022, has witnessed numerous Russian atrocities. Human Rights Watch reported summary executions, unlawful killings, enforced

⁷³Guénaél Mettraux, "International Crimes : Law and Practice", Volume 2, Crimes against Humanity (Oxford, United Kingdom, Oxford University Press, 2020).

disappearances, and torture in Bucha. Amnesty International also documented indiscriminate attacks resulting in civilian deaths in Kharkiv, an airstrike that killed civilians waiting for food in Chernihiv, and collected evidence from civilians living under siege in Kharkiv, Iziium, and Mariupol. These crimes in Bucha may potentially amount to crimes against humanity, indicating a widespread or systematic attack on the civilian population that could be part of a government policy.⁷⁴ There is also an objective difficulty in collecting evidence. Probably most crimes are unknown and will remain so until Ukraine is freed.

7. Crime of Genocide

Genocide represents the most heinous form of international crime, involving the intentional destruction of a particular national, ethnic, racial, or religious group. This section explores the concept of genocide and its applicability to the Ukrainian situation. It examines the legal definition of genocide as provided in the Genocide Convention and analyzes the specific acts and intent required to establish the crime of genocide.

Although the conducts falling under genocide are analyzed under the Rome Statute, it is important to note that they were initially classified as a component of crimes against humanity by the Nuremberg Tribunal. The term "genocide" was coined by Raphael Lemkin⁷⁵ in 1946, as there were no existing words that adequately described the horrors of the Holocaust. Winston Churchill referred to these heinous crimes as "a crime without a name" in reference to the Nazis' large-scale exterminations. Raphael derived the term "genocide" from the ancient Greek word *genos* meaning race or tribe, and the Latin word *cide* meaning killing. The term gained acceptance when the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, defining it as

⁷⁴Denakpon L. R. Tchobo, "Potential International Crimes in Ukraine: Should Atrocities in Bucha Be Classified as Genocide, War Crimes, or Crimes against Humanity?," *Law and Safety* 85, no. 2 (June 30, 2022): 13–20, <https://doi.org/10.32631/pb.2022.2.01>.

⁷⁵ Douglas Irvin-Erickson, "Raphael Lemkin and the Concept of Genocide", (University of Pennsylvania Press, 2017), *passim*. <http://www.jstor.org/stable/j.ctv2t4ds5>

acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. The convention also addresses acts such as conspiracy, incitement, attempt, and complicity in genocide, which are punishable. It should be noted that genocide is prohibited both in times of war and peace under the Rome Statute of the International Criminal Court.

Considering the definition provided by the Rome Statute "genocide" means: «any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group». ⁷⁶

It is relevant that the definition of "genocide" as outlined in the Convention has been *verbatim* incorporated into the Rome Statute and the statutes of international tribunals. This observation highlights the fundamental distinction between war crimes and crimes against humanity, which lies in the specific targeting of a "group" with "intent." However, upon considering Raphael Lemkin's definition of genocide, it becomes apparent that the term may be linguistically inadequate and inappropriate in capturing the true nature of the crime. The term *geno* in Greek does not necessarily mean "group," indicating that the commission of genocide is not solely based on race, despite the inclusion of terms such as "national" and "religious" groups in the definition. Notable instances of recognized genocides by the international community include the Armenian Genocide committed by the Ottoman Empire (1915-1916), the Jewish Holocaust perpetrated by the Nazis (1941-1945), and the Genocide of the Tutsis in Rwanda (1994). Proving the crime of genocide requires demonstrating both the *actus reus*, which encompasses the material elements or consequences of the alleged perpetrators' actions, such as the killing of Ukrainians, and the *mens rea*, which involves

⁷⁶ See Rome Statute of the International Criminal Court, Article 6 - *Genocide*

establishing a double intent. This includes proving the *dolus directus*, the intent to directly kill Ukrainians, and the specific *dolus*, the specific intent to destroy, in whole or in part, the national group (i.e., Ukrainians).

To go back to the categorization of the crimes that were committed in Bucha, while these atrocities cannot be classified as genocide due to the difficulty in proving the psychological element or double character of intent required, there are allegations of war crimes.⁷⁷ Moreover, these crimes committed in Ukraine may potentially qualify as crimes against humanity, which entail a widespread or systematic attack on the civilian population.

It is essential to enforce and to empower the Genocide Convention, considering, for example, adopting a proposed convention on the prevention and punishment of the crime of “groupicide”.⁷⁸ This proposal, as suggested by Tchobo⁷⁹, aligns with the nature of these atrocities and would provide comprehensive protection to the victims.⁸⁰

⁷⁷Denakpon. L. R. Tchobo, “Potential International Crimes in Ukraine: Should Atrocities in Bucha Be Classified as Genocide, War Crimes, or Crimes against Humanity?”, *Law and Safety* 85, no. 2 (June 30, 2022): 13–20, <https://doi.org/10.32631/pb.2022.2.01>.

⁷⁸ Furthermore, Tchobo in 2021 has put forward the concept of "groupicide" as a potential framework to address the atrocities committed in Ukraine. The proposed convention on the prevention and punishment of the crime of “groupicide” emphasizes the intrinsic alignment of the term "group" with the nature of these heinous acts. Groupicide theory seeks to recognize and protect specific targeted groups from systematic destruction, beyond the scope of conventional genocide definitions. By adopting this convention, the international community would demonstrate a commitment to holding perpetrators accountable and providing full protection to the victims of such acts of violence. Incorporating the “groupicide” theory into legal frameworks would serve as a crucial step in addressing the unique challenges posed by mass atrocities that target specific groups according with this doctrine.

⁷⁹ Denakpon L. R. Tchobo, “The Crime of *Groupicide* as a New International Crime”, SSRN, January 1, 2021, accessed December 2023, https://www.academia.edu/75973651/THE_CRIME_OF_GROUPICIDE_AS_A_NEW_INTERNATIONAL_CRIME?uc-sb-sw=7359027.

⁸⁰Vittorio Bufacchi, "War Crimes in Ukraine: Is Putin Responsible?" *Journal of Political Power* 16, no. 1 (2023): 1-6.

8. Crime of Aggression

The crime of aggression is the most recent addition to the ICC's jurisdiction, as defined by the Kampala Amendments to the Statute of Rome. The crime of aggression is explicitly defined in Article 8bis (1) of the Rome Statute of the International Criminal Court, stating that it involves the planning, preparation, initiation, or execution of an act of aggression by an individual who holds a position of effective control or directs the political or military actions of a State. This act of aggression must manifestly violate the United Nations Charter in terms of its nature, gravity, and scale. Paragraph 2, provides examples of acts that meet the criteria for an act of aggression. While there may be room for debate regarding the precise contours of the State act element of the crime, there is no doubt that Russia's invasion of Ukraine in February 2022, along with its ongoing use of force against Ukrainian sovereignty, territorial integrity, and political independence, constitutes an act of aggression that flagrantly violates Article 2(4) of the UN Charter.⁸¹ This assertion is supported by numerous scholarly analyses and widely recognized by States.

Furthermore, Russia's alleged annexation of Ukrainian regions such as Donetsk, Kherson, Luhansk, and Zaporizhzhia in September 2022 represents a distinct and prototypical act of aggression, satisfying the criteria of the State act element. President Vladimir Putin's nearly absolute control over Russia's political and military actions establishes his eligibility as a leader in accordance with the definition of the crime of aggression. However, it is crucial to emphasize that the responsibility of determining guilt or innocence lies with an independent and impartial court of law. Defendants must be given the opportunity to exercise their fair trial rights and present their case. Nonetheless, considering Putin's prominent role as the driving force behind Russia's invasion of Ukraine, a compelling

⁸¹ In Article 2(4) of the UN Charter it is stated: «The Organization and its Members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles. [...]

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. »

argument can be made that his conduct could be readily established by such a court, meeting the criteria for the individual conduct elements of the crime. President Alexander Lukashenko of Belarus, due to his support of Russia, also emerges as a significant suspected.⁸²

Nevertheless, the ICC lacks jurisdiction to prosecute Russian political and military leaders for the crime of aggression. Since Russia is not a party to the ICC Statute, the Court lacks jurisdiction over the crime of aggression committed by citizens of non-State Parties when acting based on the referral of one or more States Parties, as in the present case. Only a referral from the UN Security Council could grant the ICC jurisdiction over aggression committed by Putin. Such a referral appears unlikely, as Russia would likely exercise its veto power against any relevant resolution. The main (and critical) issues related to the Crime of Aggression will be deepened in Chapter IV section 3 and it will be shown the consequence on the effectiveness of Putin's Arrest Warrant.

9. Conclusion

In conclusion, this chapter has examined the role of the International Criminal Court in addressing the international crimes committed in Ukraine. It has provided an overview of the ICC's jurisdiction and the relevant international legal framework, including the Rome Statute. The atrocities committed in Ukraine, such as the invasion by Russian forces, have raised serious concerns regarding war crimes, crimes against humanity, and the crime of aggression and remarks about genocide. The chapter explored the concept of war crimes and the violation of International Humanitarian Law, emphasizing the grave breaches committed during the conflict in Ukraine and a general context on the ICC reality.

⁸²Carrie McDougall, "The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine," *Journal of Conflict and Security Law*, Volume 28, Issue 2, Summer 2023:203–230, <https://doi.org/10.1093/jcsl/krad004>

The escalating list of potential international crimes⁸³ committed by Russian military leaders and their subordinates during the hostilities against Ukraine has brought to the forefront the critical role of international criminal justice mechanisms in addressing and holding perpetrators accountable for their actions. The International Criminal Court has assumed a significant position in this regard, with jurisdiction over war crimes and crimes against humanity committed by Russian forces in Ukraine. This jurisdiction has been made possible by Ukraine's acceptance of the ICC's jurisdiction, despite not being a party to the ICC Statute. The ICC's involvement has the potential to bring justice to the victims and serve as a deterrent to future atrocities. However, it is essential to acknowledge that the ICC lacks jurisdiction over the crime of aggression committed by Russian political and military leaders, as Russia is not a party to the ICC Statute. This limitation highlights the complexities and challenges faced by international criminal justice institutions in addressing crimes committed by non-State Parties.

The international community's commitment to upholding international law and ensuring accountability for heinous crimes remains paramount. Cooperation and support for the ICC and ICJ's work will be crucial in advancing the cause of international justice and ensuring that those responsible for grave violations of international law are held to account, irrespective of their position or nationality.

In conclusion, the situation in Ukraine underscores the importance of a robust and effective international criminal justice system in addressing gross human rights violations and upholding the principles of international law. The pursuit of justice and accountability remains essential to provide redress to victims and deter future atrocities, thereby contributing to a more just and peaceful world.

⁸³Marina Mancini, "Quale Giustizia per I Crimini Delle Forze Russe in Ucraina?," *Affari Internazionali - Politica ed economia estera*, March 10, 2022, Accessed August 23, 2023, <https://www.affarinternazionali.it/quale-giustizia-per-i-crimini-delle-forze-russe-in-ucraina/>.

CHAPTER III: The Ukrainian Situation at the ICC: Putin's Arrest Warrant

1. Introduction

One year has passed since the onset of the Russo-Ukrainian war on February 24, 2022. This conflict has brought immense suffering to Ukrainian civilians and has exacted a significant toll on military personnel from both sides, constituting a profound tragedy. According to the United Nations, the conflict has resulted in approximately 7,155 civilian fatalities, with 11,662 individuals sustaining injuries.⁸⁴ These figures are believed to be substantial underestimations. Furthermore, Ukraine is grappling with a severe humanitarian crisis, with approximately 5.4 million internally displaced persons, the so called IDPs, within its borders and over 8 million refugees primarily residing across various European nations.⁸⁵

This chapter aims to address a fundamental question: can President Putin and other individuals be held accountable for the atrocities committed in Ukraine under International Criminal Law? To answer this crucial question, we will explore the legal remedies and frameworks available to the international community.

The conflict arising from Russia's invasion of Ukraine stands as a distinctive and alarming event, having caught many by surprise. It has not only deeply impacted the lives of Ukrainians but has also evoked widespread consternation and apprehension among Western nations.⁸⁶ This war presents unique features that differentiate it from other conflicts. There is a growing concern regarding potential consequences, such as the escalation of the conflict to a nuclear level, its spillover

⁸⁴ See OHCHR, "Ukraine: Civilian casualty", update 6 February 2023.

⁸⁵ See International Organization for Migration, "Displacement Tracking Matrix (DTM) Ukraine: General Population Report Round 12, November 2022"

⁸⁶ Lorena Forni, "Discutendo una nuova guerra. alcune riflessioni filosofico-giuridiche, tra vita e libertà," *Milan Law Review* 3, no. 2 (2022): 52-73.
<https://doi.org/10.54103/milanlawreview/19508>.

into neighboring European nations, or its entanglement with NATO.⁸⁷ Additionally, during the initial months of hostilities, the number of refugees and internally displaced persons surpassed what was witnessed during the Balkans and Kosovo conflicts in the 1990s.⁸⁸

Within Ukraine, the deliberate targeting of civilian infrastructure, including healthcare facilities,⁸⁹ has led to clear violations of the laws of war, amounting to war crimes.⁹⁰ However, the question arises as to how Mr. Putin can be held responsible for these crimes since he was not directly involved in perpetrating the atrocities within Ukrainian territory? Furthermore, how can one be held accountable for the crime of aggression, primarily a leader's crime, if the International Criminal Court's jurisdictional criteria are not met?

Before addressing these questions, it is essential to examine the dimensions of this conflict's severe breaches of international criminal law through data, numbers, and examples. War crimes continue to be committed daily, as evidenced by a recent joint report by eyeWitness to Atrocities, Insecurity Insight, the Media Initiative for Human Rights, Physicians for Human Rights, and the Ukrainian Healthcare Center. This report meticulously documented 707 attacks on Ukraine's healthcare system from February 24 to December 31, 2022, revealing that almost 9% of Ukraine's hospitals suffered direct damage due to Russian-initiated assaults.⁹¹

Due to the objective difficulty in collecting evidence, efficient coordination mechanisms are required for the strategic selection of proofs, including those offered by Eurojust's EU Genocide Network and collaborative investigative teams

⁸⁷ *Ibid.*

⁸⁸ "Ucraina: La Più Grande Crisi Europea Dalla Seconda Guerra Mondiale," ISPI, March 13, 2022, <https://www.ispionline.it/it/pubblicazione/ucraina-la-piu-grande-crisi-europea-dalla-seconda-guerra-mondiale-34105>.

⁸⁹ Ingrid Brunk and Monica Hakimi. "Russia, Ukraine, and the Future World Order." *American Journal of International Law* 116, no. 4 (2022): 687–97. <https://doi.org/10.1017/ajil.2022.69>.

⁹⁰ Elena Chachko and Katerina Linos, "Ukraine and the Emergency Powers of International Institutions," *SSRN Electronic Journal* 4 (2022), <https://doi.org/10.2139/ssrn.4172318>.

⁹¹ Paul Spiegel, Pavlo Kovtoniuk and Katarzyna Lewtak, "The War in Ukraine 1 Year On: The Need to Strategize for the Long-Term Health of Ukrainians," *The Lancet (British Edition)* 401, no. 10377 (2023): 622-625.

comprising multiple states, the International Criminal Court, domestic Ukrainian authorities, legal representatives of victims, and non-governmental organizations (NGOs). In the context of war crimes investigations, it is crucial to identify which other entities are concurrently examining specific individual cases, patterns of criminal activities, or particular locations like Bucha, Kherson, or Izyum. Equally important is the identification of key suspects holding pivotal positions within the chain of command. Some areas of Ukraine are still under Russian control and are not accessible.

NGOs also employ their own strategic procedures for case selection, focusing on analyzing crime patterns, command hierarchies, and locating evidence for subsequent investigative efforts (such as ECCHR's web dossier).⁹² The EU Genocide Network plays a vital role by acting as a bridge between NGOs and war crimes units, facilitating direct communication and information exchange to collect evidence.⁹³

The grave breaches under scrutiny as potential international crimes have inflicted extensive physical and psychological suffering upon Ukraine. However, the question remains: who bears responsibility for these atrocities? Can individuals be held responsible?

It is essential to consider that international crimes have been committed in Ukraine since 2014. Moreover, Russian military forces have been implicated in the commission of international crimes over an extended period, extending beyond Ukraine to encompass multiple regions, including Chechnya, Georgia, and Syria. Similar patterns of behavior are evident in the actions of individuals associated with the Wagner group and Chechen security forces.⁹⁴

⁹²Andreas Schüller, “What can(‘t) international criminal justice deliver for Ukraine?”, *VerfBlog*, February 24, 2023, accessed December 2023, <https://verfassungsblog.de/justice-ukraine/>

⁹³ *Ibid.*

⁹⁴ *Ibid.*

In this chapter, I will delve into the Ukrainian Situation before the International Criminal Court and explore the subsequent issuance of an arrest warrant for two individuals, Mr. Vladimir Vladimirovich Putin and Ms. Maria Alekseyevna Lvova-Belova. Subsequently, I will address a critical dimension of the conflict: the trafficking of children and the illicit transfer of minors amid the Russian invasion of Ukraine. The chapter also deepens into the issue of immunities and the accountability of individuals under International Law.

Finally, I will analyze Putin's arrest warrant, focusing on the concept of individual criminal responsibility and the complex issue of immunity in international law, comparing it to the Al Bashir Case. Through this comprehensive study, this chapter endeavors to shed light on the complexities and legal nuances surrounding Ukraine's pursuit of justice at the international level and the implications of these developments on the global stage.

2. Focusing the Lens: a Shift to Putin's Individual Criminal Responsibility

This section outlines the deliberate shift in focus from the broader canvas of international criminal law principles, explored in Chapter II, to a concentrated examination of individual criminal responsibility, anchored by President Putin's case. The *ratio* by centering the analysis on Putin's arrest warrant is the thesis' aim to provide an effective understanding of the advantages and challenges inherent in the application of international criminal law to high-ranking officials, ultimately contributing to a more comprehensive discourse on accountability for conflict-related atrocities. As we transition from the overarching examination of international criminal law in Chapter II to the more specific scrutiny of individual criminal responsibility in Chapter III, it is essential to underscore that the conflict in Ukraine unfurls a tapestry of intricate issues that demand consideration, encompassing procedural intricacies such as Russia's jurisdictional challenges and the pragmatic hurdles associated with the collection of evidence during an ongoing conflict.

Furthermore, the expansive realm of potential responsibility introduces a myriad of individuals on both sides of the conflict, invoking legal principles like command responsibility, thus adding layers of complexity to the accountability landscape.

The decision to narrow the focus in Chapter III is a purposeful one, strategically portraying the figure of President Putin and the arrest warrant issued against him. This deliberate choice is motivated by the thesis's overarching goal to provide a nuanced and comprehensive understanding of the tangible advantages inherent in international criminal law. By centering on Putin's individual criminal responsibility, the thesis aims to facilitate a profound analysis that extends beyond the confines of theoretical discussions.

The examination of President Putin's case becomes a gateway to unraveling intricate challenges related to immunity, grappling with the complexities surrounding the accountability of high-ranking officials, and drawing valuable lessons from historical precedents, such as the case of Al Bashir. Through this concentrated exploration of such cases, the thesis seeks to offer a more expansive and nuanced perspective on the broader implications and efficacy of international criminal law.

By strategically utilizing Putin's individual criminal responsibility as a focal point, the thesis endeavors to provide a compelling lens through which to navigate the intricate landscape of accountability for international crimes within the specific context of the conflict in Ukraine. This approach allows for a more profound analysis of the multifaceted dimensions surrounding Putin's accountability, thereby contributing to a richer discourse on the role and impact of international criminal law in addressing the complexities of conflict-related atrocities.

3. The path from the Ukrainian Situation to the ICC’s Arrest Warrant: Can President Putin and others be held responsible for the atrocities committed in Ukraine?

On the 2nd of March 2022, Karim Khan, Chief Prosecutor of the International Criminal Court, made a significant announcement. He declared the commencement of an investigation encompassing all past and present allegations related to war crimes, crimes against humanity, or genocide associated with the ongoing conflict in Ukraine. This declaration followed a week after the eruption of the conflict. Prior to this announcement, Khan's office had already indicated they had a «reasonable basis to believe crimes had been committed in Ukraine».⁹⁵ The entire world looked to the ICC for a means to hold individuals accountable for the atrocities in Ukraine.

On March 17, 2023, Pre-Trial Chamber II of the International Criminal Court issued arrest warrants for two individuals in relation to the situation in Ukraine: Mr. Vladimir Vladimirovich Putin and Ms. Maria Alekseyevna Lvova-Belova.⁹⁶ The key questions arising are: Can President Putin and Ms. Lvova-Belova be held responsible for the atrocities committed in Ukraine, and who are they?

Mr. Vladimir Vladimirovich Putin, born on October 7, 1952, and presently holding the office of President of the Russian Federation, stands accused of committing war crimes involving the unlawful deportation and transfer of the population, specifically focusing on children, from areas within Ukraine that were under Russian occupation. These charges contravene the provisions outlined in

⁹⁵ “The International Criminal Court’s Investigation in Ukraine,” Strategic Comments 28, no. 2 , February 7, 2022: x–xii. <https://doi.org/10.1080/13567888.2022.2073082>.

⁹⁶ “Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova,” International Criminal Court, 2023, March 17, accessed October 9, 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

articles 8(2)(a)(vii)⁹⁷ and 8(2)(b)(viii)⁹⁸ of the Rome Statute. The alleged criminal acts are believed to have occurred in territories of Ukraine that were under Russian control. The case is founded on substantial evidence, which suggests that Mr. Putin carries individual criminal responsibility for these crimes, both due to his direct participation in these acts and his failure to adequately exercise control over civilian and military subordinates who either committed these acts or allowed them to happen under his jurisdiction. This is in accordance with the principles of “joint

⁹⁷Article 8 of the Statute of Rome states: « 2. For the purpose of this Statute, "war crimes" means:
(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: [...] (vii) Unlawful deportation or transfer or unlawful confinement. »

⁹⁸Article 8 of the Statute of Rome says: « 2. For the purpose of this Statute, "war crimes" means:
(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...] (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.»

liability” and superior responsibility, as defined in articles 25(3)(a),⁹⁹ as amended by resolution RC/Res.6 of 11 June 2010, and article 28(b)¹⁰⁰ of the Rome Statute.¹⁰¹

Similarly, Ms. Maria Alekseyevna Lvova-Belova, born on October 25, 1984, and serving as the Commissioner for Children's Rights in the Office of the

⁹⁹ According to Article 25 of the Statute of Rome - Individual criminal responsibility:

«1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

1. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.3 bis. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State. 4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.»

¹⁰⁰ Article 28 of the Statute of Rome - Responsibility of commanders and other superiors, states:

«In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.»

¹⁰¹ "Situation in Ukraine", International Criminal Court, October 5, 2023, accessed October 5, 2023, <https://www.icc-cpi.int/situations/ukraine>.

President of the Russian Federation, faces charges related to the same war crimes involving the unlawful deportation and transfer of the population, particularly children, from Ukrainian territories under Russian occupation to the Russian Federation. Analogous to Mr. Putin, these charges are grounded in articles 8(2)(a)(vii)¹⁰² and 8(2)(b)(viii)¹⁰³ of the Rome Statute, with the alleged crimes dating back to at least February 24, 2022. There are sound reasons to believe that Ms. Lvova-Belova holds individual criminal responsibility for these offenses, be it through her direct participation, collaboration with others, or actions conducted by others under her authority, as stipulated in article 25(3)(a)¹⁰⁴ of the Rome Statute.¹⁰⁵

The Pre-Trial Chamber II, based on the submissions made by the Prosecution on February 22, 2023, concluded that there exist “substantial grounds” to hold each suspect accountable for these war crimes concerning the unlawful deportation and population transfer, with a particular emphasis on Ukrainian children as victims.

The Pre-Trial Chamber, while recognizing the confidentiality of the arrest warrants to safeguard the security and well-being of victims and witnesses and to uphold the integrity of the ongoing investigation, also took into consideration the enduring nature of the alleged criminal activities. Therefore, in the interest of justice and the potential deterrence of further crimes, the Chamber authorized the Registry to publicly disclose critical information. This information encompasses the existence of the arrest warrants, the identities of the suspects, the charges for which the warrants were issued, and the modes of liability as ascertained by the Chamber.

In light of President Putin's potential accountability, it is noteworthy that the International Criminal Court has, for the third time, issued an arrest warrant against a sitting President of a state. The precedent comprises warrants directed at former Sudanese President Omar Hassan Al-Bashir in 2009 and 2010, as well as former

¹⁰² See Footnote no. 97.

¹⁰³ See Footnote no. 98.

¹⁰⁴ See Footnote no. 99.

¹⁰⁵ *Ibid.*

Kenyan President Uhuru Kenyatta. The present warrant stands out as it signifies the inaugural instance of the ICC indicting a sitting Russian President, a noteworthy member of the United Nations Security Council, which bears principal responsibility for global peace and security.¹⁰⁶

Remarkably, this arrest warrant charges President Putin with war crimes, specifically pertaining to the unlawful deportation and transfer of children from occupied regions of Ukraine to the Russian Federation, as mentioned before. These charges are in direct violation of the Rome Statute. It is imperative to acknowledge, however, that the ICC's jurisdiction does not extend to addressing the crime of aggression within the context of the Russian-Ukrainian conflict that seems to be a more evident and intuitive violation of the ICC Statute. To grasp the underlying *ratio* behind the ICC's decision to investigate crimes against humanity, genocide, and war crimes as opposed to addressing the issue of aggression, one must delve further into the matter.

Since neither Ukraine nor Russia are signatories to the Rome Statute of the ICC, as we have seen in the previous chapter, it is important to recall that ICC Statute binds only those states that have formally ratified it. Russia, being a non-signatory to the Rome Statute, implies that the ICC lacks the authority to assert jurisdiction over Russia or its nationals under the provisions of Article 13(b) "Exercise of jurisdiction".¹⁰⁷ Investigation of the crime of aggression, when it pertains to nationals of a non-state party or offenses committed on its territory, requires a referral from the United Nations Security Council. Unfortunately, the likelihood of the UN Security Council making such a determination is remote (almost impossible), given the probable *veto* by Russia.

¹⁰⁶Ovo Imoedemhe, "The International Criminal Court: Whether the Crime of Aggression in Ukraine," *International and Comparative Law Review* 23, no. 1 (2023): 27–52. <https://doi.org/10.2478/iclr-2023-0002>

¹⁰⁷ Article 13 of the Statute of Rome - Exercise of jurisdiction, affirms: «The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [...] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.»

Although Ukraine, as the victim of territorial invasion, has twice issued Article 12(3)¹⁰⁸ “Declarations”, thereby granting the ICC jurisdiction, these declarations may not be deemed adequate to initiate ICC intervention on this specific issue. Notably, the second declaration, dated 4 February 2015,¹⁰⁹ may be viewed as inadequate as it specifically delineated the crimes over which Ukraine accepted the ICC's jurisdiction, namely war crimes and crimes against humanity. Moreover, this declaration was issued prior to the ICC's activation of jurisdiction over the crime of aggression, further constraining its applicability.

A second key consideration for the ICC's focus on investigating war crimes, *in lieu* of addressing the crime of aggression, is the historical absence of a universally accepted definition for the latter. The ICC's jurisdiction over the crime of aggression was only formally established in 2018 following the adoption of a consensus definition in 2010 at the First Review Conference of the Rome Statute held in Kampala, Uganda.¹¹⁰

A third pivotal factor to consider involves the limitations on the ICC's exercise of jurisdiction concerning the crime of aggression. A significant challenge stems from the “opt-in, opt-out” provision pertaining to the amendment. This provision affords member states the prerogative to “opt out” of the court's jurisdiction in situations not involving a referral from the United Nations Security Council.¹¹¹

The issuance of these arrest warrants signifies the International Criminal Court's commitment to fulfill its pledge of ensuring the accountability of Russian

¹⁰⁸ See Article 12.3 of Statute of Rome: «[...] If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.»

¹⁰⁹ On 4 February 2015, Ukraine made a second declaration extending the time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards.

¹¹⁰ Ovo Imoedemhe, "The International Criminal Court: Whether the Crime of Aggression in Ukraine," *International and Comparative Law Review* 23, no. 1 (2023): 27–52.

<https://doi.org/10.2478/iclr-2023-0002>.

¹¹¹ *Ibid.*

leadership for the perpetration of atrocity crimes in Ukraine. The choice to initiate legal proceedings against President Putin conveys a robust message to individuals at lower echelons involved in criminal acts, emphasizing that nobody is exempt from potential prosecution. Additionally, this action may serve as a disincentive for Russian officials engaged in unlawful activities.

As per reports emanating from the State Department's Conflict Observatory, a distressing revelation has emerged that over 6,000 children have been forcibly relocated from Ukraine subsequent to Russia's full-scale incursion that commenced in February 2022.¹¹² These vulnerable minors have been placed either in orphanages or entrusted to Russian adoptive families, with a majority of them being subjected to a process commonly referred to as "re-education". While the current arrest warrants characterize these actions as war crimes, several commentators have strongly asserted that the nature of these transgressions leans more towards constituting acts of genocide and crimes against humanity. If the category of the so called "cultural genocide" was contemplated in the Statute of Rome, this would probably be one of the examples. I will delve better into the matter in the next subsection.

Moving a step back, the prosecutorial decision to frame these offenses within the context of war crimes may indicate the prosecutor's initial evaluation of the strength of the evidence gathered, focusing on discerning the underlying intent behind these actions. It is worth noting that both the alleged offenses and the process of evidence collection are ongoing, suggesting that charges may be subject to amendment as the investigative process advances. This underscores the complexity and fluidity of the situation, emphasizing the importance of a meticulous legal assessment.

The ICC arrest warrants are already having an international impact on President Putin and are expected to intensify as pressure mounts for nations to

¹¹²Heather Ashby, Lauren Baillie and Mary Glantz, "How the ICC's Warrant for Putin Could Impact the Ukraine War," United States Institute of Peace, March 23, 2023, <https://www.usip.org/publications/2023/03/how-iccs-warrant-putin-could-impact-ukraine-war>.

distance themselves from Russia. These warrants are not only impeding the international travel of Putin but also making it less appealing for countries to host Russian officials, which has implications for diplomatic meetings involving Putin. The ICC arrest warrants may impact foreign governments seeking to engage with President Putin and senior Russian officials. The combined effect of these warrants, in tandem with sanctions, amplifies the challenges faced by countries in turning a blind eye to Russian activities in Ukraine and the severity of the conflict's brutality.

Regrettably, the ICC warrant for Lvova-Belova is unlikely to generate a substantial international impact on Russian foreign policy. Lvova-Belova's international travels have been relatively limited since the full-scale invasion, with her focus primarily directed towards Russian-occupied territories in Ukraine. Nevertheless, the ICC's issuance of a warrant for Lvova-Belova further undermines Russia's justifications, which date back to 2014, for its military intervention in Ukraine. Russian government officials have long asserted that their actions aimed to protect Russian-speaking Ukrainians from the specter of genocide.

In sum, the stakes are mounting for foreign governments seeking to engage with President Putin and senior Russian government officials. The combined effect of these ICC warrants, in *tandem* with sanctions, amplifies the challenges faced by countries in turning a blind eye to Russian activities in Ukraine and the severity of the conflict's brutality.

The issuance of these warrants not only addresses a critical gap in Ukrainian prosecution endeavors but also lends heightened legitimacy to their efforts. Ukraine has taken a leading role in holding Russian actors accountable for the commission of atrocity crimes within its borders, and it is poised to prosecute the majority of alleged offenders. However, due to the doctrine of head-of-state immunity, Ukrainian courts are unable to prosecute Russian leadership, which safeguards sitting heads of state from indictment by foreign states. Consequently, Ukraine has turned to the International Criminal Court to bridge this jurisdictional void, despite not being a signatory to the Rome Statute. With the issuance of these warrants, the

ICC has proactively stepped in to address the limitations posed by head-of-state immunity. This development serves as a significant *moral booster* for Ukrainian prosecutors and the broader Ukrainian populace, who are fervently seeking justice for the crimes perpetrated against them.

Furthermore, the ICC arrest warrants furnish added credibility to Ukraine's ongoing investigations and prosecutions by bestowing international recognition upon the crimes under scrutiny. Ukraine's domestic justice system is under immense pressure to handle a substantial volume of war crimes cases. As of the current juncture, over 74,500 war crimes have been reported,¹¹³ yet only 26 trials have been conducted. Consequently, the prosecution of war crimes is anticipated to be a protracted endeavor, necessitating unwavering determination and ample resources. The international acknowledgment of the gravity of the crimes they are investigating may serve as a driving force for Ukrainian prosecutors as they grapple with their formidable caseloads.¹¹⁴

4. Main issues related to children trafficking and minor's transfer during the Russian invasion of Ukraine

In the midst of the Russian invasion of Ukraine, a conflict fraught with grave humanitarian consequences, the issue of children trafficking, and the illicit transfer of minors has come to the forefront, raising significant concerns within the international community. This part delves into the multifaceted challenges and critical considerations surrounding this distressing dimension of the conflict, shedding light on the crimes committed against children and the legal implications thereof. With millions of Ukrainian civilians directly affected by the conflict and the displacement of vulnerable minors from their homes, this section explores the pressing need for accountability, protection, and the pursuit of justice for these

¹¹³Stephanie van den Berg and Anthony Deutsch, "Explainer: How are war crimes in Ukraine being investigated?", Reuters, February 2023, accessed November 20, 2023, <https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/>.

¹¹⁴*Ibid.*

young victims who have suffered the consequences of this ongoing crisis. Through an examination of the legal frameworks and consequences related to children trafficking and minors' transfer during the Russian invasion of Ukraine, it is possible to better understand why in the ICC's Arrest Warrants this issue is so relevant.

First of all, anchored in the UN Convention on the Rights of the Child,¹¹⁵ every child is entitled to shield from all forms of violence, including protection against illicit removal from their homeland.¹¹⁶ Actions taken by Russia against Ukrainian children not only directly imperil the lives and well-being of civilians but also infringe upon a net of international and domestic laws, thereby transgressing the constitutional rights and freedoms of Ukrainian citizens.¹¹⁷

This part of the chapter embarks on an in-depth exploration of the abduction and deportation of Ukrainian children as a disturbing facet of this conflict. The legal, political, and humanitarian dimensions of this dire situation and its implications raise the overarching question of Putin's accountability before the International Criminal Court.

The exact number of children who have been forcibly separated from their parents or orphaned remains a subject of ongoing investigation and documentation. The abduction and deportation of Ukrainian children by Russian forces have been extensively documented and have triggered alarm and outrage globally. The horrifying extent of these actions was such that, last fall, as Russian forces prepared to withdraw from cities. To cite one example in Kherson, the medical staff at Kherson Regional Hospital resorted to desperate measures to safeguard infants. Babies were hastily hidden, and their records were falsified in a frantic bid to protect

¹¹⁵ See United Nations Convention on the Rights of the Child. Treaty Series (1989), 1577, 3.

¹¹⁶ John Tobin, "The UN Convention on the Rights of the Child: A Commentary", 1st ed. (Oxford: Oxford University Press, 2019), *passim*.
<https://doi.org/10.1093/law/9780198262657.001.0001>

¹¹⁷ Anatolii Frantsuz, Nataliia Stepanenko, and Dymitro Shevchenko, "Abduction of ukrainian children during full-scale invasion". *Journal of International Legal Communication*, volume 9, no.2 (2023): 16-26. <https://doi.org/10.32612/iw.27201643.2023.9.pp.16-26>

them from being swept up in a campaign that has systematically transported thousands of Ukrainian children to Russia. These children usually are then resettled in foster families with the ultimate aim of having them become Russian citizens. The actions of the Russian authorities, which have not been concealed but rather flaunted, have drawn condemnation from the international community.

In order to give an idea of the multidimensional humanitarian crisis, in an attempt to escape the perils of the full-scale Russian aggression, a staggering number of Ukrainian children, exceeding 900,000 in total, have sought refuge in the European Union. To provide a breakdown, nearly 500,000 children have sought shelter in Poland, close to 150,000 in Moldova, over 100,000 in Hungary, and in excess of 90,000 have been evacuated to Romania and Slovakia (more than 900,000 Ukrainian children have sought refuge in the EU). This alarming statistic necessitates more than just national acknowledgment; it calls for tangible support, resolute action, and unwavering determination, extending beyond mere sympathy that can often exhibit inconsistencies and double standards in responses.¹¹⁸

Moreover, concerning the deportation of minors, Daria Herasymchuk, the Commissioner of the President of Ukraine for the Rights of the Child and Child Rehabilitation, disclosed in January 2023 that her department had successfully identified and verified data on 16,221 children who were abducted and forcibly relocated by the Russian military.¹¹⁹ It is essential to recognize that these figures represent only documented cases, and Ukrainian officials concede that the precise count of deported children remains elusive due to Ukraine's restricted access to the occupied territories, indicating that the actual number may be considerably higher. Encouragingly, as of February 24, 2023, Ukraine has successfully repatriated 307

¹¹⁸Stephanie van den Berg and Anthony Deutsch, "Explainer: How are war crimes in Ukraine being investigated?", Reuters, February 2023, accessed November 20, 2023, <https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/>.

¹¹⁹*Ibid.*

children, and among these repatriated children, over 50 are now residing within the EU under the care of their parents or guardians.¹²⁰

In the forefront of concern lies the danger faced by children residing in orphanages and those who have lost their parents due to Russian aggression (or for other reasons), placing them at risk of deportation. The disconcerting statistics reveal that 4,177 children from institutionalized facilities were evacuated from Ukraine, of which 2,382 are either orphans or bereft of parental care. This demographic, particularly the orphans, confronts a tangible threat of illicit adoption within Russian territory, circumventing the legislatively mandated procedure for international adoption in Ukraine, thereby engendering a matter of paramount importance within our nation's purview, more than 4,000 children in 2022.¹²¹

Indeed, their age below eighteen, makes them incapable of autonomous decision-making, thus characterizing their displacement as involuntary. If the evacuation of children is ostensibly framed as a rescue from the ravages of conflict, it stands to reason that the aggressor nation should facilitate their repatriation to regions in Ukraine where active hostilities have subsided. Of pivotal note is the Russian Federation's current endeavors to confer Russian citizenship upon Ukrainians and assimilate them into Russian society, signifying a conspicuous lack of intent to facilitate the return of our citizens.¹²²

¹²⁰ “Abduction of children is one of the components of the crime of genocide of the Ukrainian people committed by Russia”, Official website of the President of Ukraine, accessed 11 February 2024, <https://www.president.gov.ua/news/vikradennya-ditej-ye-odniyeyu-zi-skladovih-zlochynu-genocidu-81217>

¹²¹ “Russia Deports over 4,500 Ukrainian Orphans and Children Deprived of Parental Care: Ukraine’s Deputy Prime Minister”, *Ukrainska Pravda*, June 1, 2023, accessed December 2023, <https://www.pravda.com.ua/eng/news/2023/06/1/7404788/>.

¹²² Stephanie van den Berg, Anthony Deutsch, “Explainer: How are war crimes in Ukraine being investigated?”, *Reuters*, February 2023, accessed November 20, 2023, <https://www.reuters.com/world/europe/how-are-war-crimes-ukraine-being-investigated-2023-02-23/>

According to criminal data, the Russian Federation has forcibly relocated over thousands of children from Ukraine to its own territory.¹²³ It is of utmost import to delineate that children separated from their parents in the midst of an extraordinary humanitarian crisis do not meet the legal criteria of orphans and therefore are not eligible for adoption. Russia is presently amending its legislation to streamline the process of adopting deported Ukrainian children. There exists compelling evidence of systematic and orchestrated methods employed to separate children from their parents and guardians, accompanied by a revision of the normative legal framework to expedite their "adoption." This constitutes a challenge to global democracy and progressive humanity, evidencing the commission of crimes against humanity and war crimes, incurring individual criminal liability before the International Criminal Court.

Russia orchestrates the intentional abduction of children, camouflaging this practice as benevolent endeavors, charitable work, or humanitarian initiatives. Ostensibly, Russia purports to temporarily evacuate children from Ukrainian territory under the guise of providing respite in free camps, subsequently obstructing their reunification with parents and legal custodians in most instances.

During the de-occupation of the right-bank part of the Kherson region, a startling revelation emerged: not a single child remained in the region's orphanages, it is suspected that the actual number could involve more than 13 thousand Ukrainian children.¹²⁴ A disconcerting incident came to light, revealing that 14 orphaned children aged 2 to 5 years had been transported from Kherson to the Simferopol children's home "Yalinka" under the pretext of letters addressed to Ded Moroz (the Russian equivalent of Santa Claus). These details were brought to public attention through posts on an Adoption website in the Moscow region, explicitly

¹²³Katarina Adamova, "Deportation of Ukrainian Children to Russia: Chronology of the Crime. українських дітей до Росії: хронологія злочину", LB.ua News, December 30, 2022, accessed December 2023. https://lb.ua/blog/kateryna_adamova/540942_deportatsiya_ukrainskih_ditey.htm.

¹²⁴The Kyiv Independent news desk, "Official: Over 13,000 Ukrainian Children Illegally Deported to Russia.," The Kyiv Independent, December 9, 2022, accessed December 2023, <https://kyivindependent.com/official-over-13-000-ukrainian-children-illegally-deported-to-russia/>.

linking these children to Kherson's children's orphanage.¹²⁵ Regrettably, this is not an isolated occurrence. Another relevant example could be the Russian forces have employed various pretexts such as "recovery, treatment, or recreation" to transport 1,620 children from the occupied territory of the Zaporizhia region just before the New Year holidays. Alarming uncertainties surrounded the duration of their absence and the timing of their return. The adversary has repeatedly demonstrated their intentions to exploit these children for propaganda and use them as human shields. A similar episode unfolded in autumn, when children were taken from Energodar under the pretext of a two-week absence but were only returned after two months.¹²⁶ These actions transgress multiple tenets of international agreements.

According to Article 24 of the IV Geneva Convention¹²⁷ and Article 78 of Additional Protocol I,¹²⁸ the temporary evacuation of children, with parental or guardian consent, is permitted to a neutral state.

¹²⁵Кіра Молчанова, "The Orphans Taken by the Occupiers from Kherson Are Being Held in a Crimean Orphanage, Which Is Called a 'Concentration Camp'" *Ukrainsky novyny*, accessed February 11, 2024, <https://ukranews.com/ua/news/911472-syrit-yakyh-okupanty-vyvezly-z-hersonu-utrymuyut-v-krymskomu-dytbudynku-yakyj-nazyvayut>.

¹²⁶Victoria Andreeva, "Occupants Took about 200 Children for 'New Year Holidays'", *LB.ua news Portal*, 2022, accessed December 2023, <https://life.pravda.com.ua/society/2022/12/23/251996/>.

¹²⁷ Relevant is the text of Article 24 of the IV Geneva Convention: Measures relating to child welfare: «The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavor to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means. »

¹²⁸See also Article 78 of the I Additional Protocol: Evacuation of children

«1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

Moreover, it necessitates the establishment of a system for registering the whereabouts of all evacuated children. Altering the family or personal status of children, including their nationality or citizenship, is strictly prohibited under Article 50¹²⁹ of these accords. However, Russia has clearly contravened these provisions, as indicated by the Russian Ministry of Social Policy. Disconcertingly, statements from Russian officials have emerged, suggesting that children classified as "problematic" will be sent to special camps for "re-education." For instance, Ramzan Kadyrov, the head of the Chechen Republic, proclaimed collaboration with the Russian Federation's authorized representative for children's rights, Maria Lvov-Belova, to facilitate the transfer of "difficult teenagers" from various Russian regions and the occupied Donetsk and Luhansk regions to Chechnya for "preventive

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parent's desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:(a) surname(s) of the child;(b) the child's first name(s);(c) the child's sex;(d) the place and date of birth (or, if that date is not known, the approximate age);(e) the father's full name;(f) the mother's full name and her maiden name;(g) the child's next-of-kin;(h) the child's nationality;(i) the child's native language, and any other languages he speaks;(j) the address of the child's family;(k) any identification number for the child;(l) the child's state of health;(m) the child's blood group;(n) any distinguishing features;
(o) the date on which and the place where the child was found;(p) the date on which and the place from which the child left the country;(q) the child's religion, if any;(r) the child's present address in the receiving country;(s) should the child die before his return, the date, place and circumstances of death and place of interment. »

¹²⁹Article 50 of the fourth Geneva Convention - Children, states:

«The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible, by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favor of children under fifteen years, expectant mothers, and mothers of children under seven years. »

work" and "military-patriotic education". Russia has established 43 camps on its territory and in the occupied Crimea for the "ideological re-education" of Ukrainian children, flouting international agreements.

According to a report by the U.S. Department of State representative Ned Price, citing the official report of the Conflict Observatory, approximately 6,000 Ukrainian children have passed through these camps within a year after the full-scale invasion.¹³⁰ Seven officially known points of temporary stay exist for evacuated children in Russian territory: the "Raketa" camp in the Voronezh region, the "Polyana" sanatorium in the Moscow region, the "Orlovchanka" camp in the Oryol region, the "Morskaya Zvezda" children's health center in the Krasnodar Krai, the "Gornyy Klyuch" camp in the Chechen Republic, the "Litvinovo" camp in the Moscow region, Dr. Roshal's clinic, and the Russian Children's Clinical Hospital in Moscow.¹³¹

Additionally, it is worth noting that 76 orphaned children have been transported to social rehabilitation centers for minors in the Moscow region of Russia. Four more regions in Russia are expected to receive these children as part of family groups. Furthermore, 104 children under the care of social institutions in the so-called "LNR" are being prepared for "transfer to Russian families under guardianship".¹³² This multifaceted issue underscores a disregard for international legal norms and demands concerted attention and action.

Another crucial aspect of the issue is Russia's depopulation strategy (throughout mass deportation and consequent adoption of minors). This campaign amounts to a clear violation of the Convention on the Prevention and Punishment

¹³⁰ "Verkhovna Rada Appeals to the UN over Deportation of Ukrainian Children to Russia." Інтерфакс-Україна, February 24, 2023, Accessed December 2023, <https://ua.interfax.com.ua/news/general/893697.html>.

¹³¹ Oleg Tereshchenko, "Ukrainian Children Stolen by Russia: Where They Are Taken, How Deportation Works and Who Is behind It.", Channel 24, Accessed December 2023, https://24tv.ua/yak-rosiya-vikradaye-ukrayinskih-ditey-kudi-vezut-hto-za-%20tsim_n2229723#2.

¹³² "Invaders Take 76 More Orphans from Luhansk Region to Russia," www.ukrinform.net, October 2, 2022, Accessed December 2023, <https://www.ukrinform.net/rubric-ato/3584075-invaders-take-76-more-orphans-from-luhansk-region-to-russia.html>.

of the Crime of Genocide.¹³³ Article 49(1) of the Fourth Geneva Convention¹³⁴ strictly prohibits the deportation of civilian populations or the forced displacement of children. Furthermore, Article 147 of the Fourth Geneva Convention¹³⁵ and Article 85(4)(a) of Additional Protocol I¹³⁶ categorize the deportation or displacement of civilian populations from occupied territories as grave breaches of these agreements, warranting legal prosecution, except in cases of civilian relocation for security or military necessity. The Rome Statute of the International Criminal Court also includes provisions for holding individuals accountable for involving children in armed conflicts, which has hindered Ukraine's ratification of this statute.¹³⁷

Of paramount significance are the amendments in Russian legislation, which provide compelling evidence of their deliberate perpetration of some conducts integrating genocide against the Ukrainian people. Notably, on April 24, 2019, Russian President Vladimir Putin signed a decree simplifying the acquisition of Russian citizenship for specific categories of individuals from the so-called "DPR" and "LPR." The Ministry of Foreign Affairs of Ukraine has categorically

¹³³United States. Congress. Senate. Committee on Foreign Relations, *The Genocide Convention: Hearing before the Committee on Foreign Relations, United States Senate, Ninety-seventh Congress, First Session on Ex. O, 81-1, the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted Unanimously by the General Assembly of the United Nations in Paris on December 9, 1948, and Signed on Behalf of the United States on December 11, 1948* (Washington: U.S. G.P.O., 1982).

¹³⁴Article 49 of the IV Geneva Convention: Deportations, transfers, evacuations, affirms «Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.»

¹³⁵International Committee of the Red Cross, "Commentary of 1958: Article 147 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War," accessed October 27, 2023, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-147/commentary/1958?activeTab=undefined>.

¹³⁶Article 85(4) of the I Additional Protocol - Repression of breaches of this Protocol, says: «4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;»

¹³⁷Frenchman, and Nataliia Stepanenko, "Observance of the rights of the child in the zone of military conflict", *Legal Bulletin of the University "KROK"* (2017): 295-13.

declared these decrees unlawful, devoid of legal consequences, and unrecognized by Ukraine.¹³⁸

It is important to underscore that, until 2022, the Russians refrained from adopting Ukrainian children without Ukraine's consent. However, since the commencement of the full-scale invasion, they have systematically revised their legislation to expedite child abduction procedures. For example, on February 18, 2022, the leaders of the so-called "LPR" and "DPR" issued an "evacuation order" for the local population, commencing evacuations to Russia. Specifically, on February 20, 74 infants from the Luhansk Baby House were transported to Rostov-on-Don.¹³⁹ Orphanages situated in the occupied territories were among the first to be deported under the pretext of "evacuation." Initially, this process was referred to as temporary custody since even under Russian Federation law, the Family Code (Article 165) did not provide for the adoption of Ukrainian children by Russians.

Carrying out such adoptions would have necessitated involvement of the Minsk Convention and required adoption permission from Ukraine, which Ukraine would never have granted. However, on March 5, 2022, Russia signed a decree permitting entry with any documents from the "LPR" and "DPR".¹⁴⁰ Russian military personnel and collaborators forcibly remove children from families deemed "unreliable" during the "filtration" process. Irrespective of whether these children have parents or guardians, the forced deportation of orphans and children from institutions occurs, with many being transported to occupied Crimea and Russian territory. A report by the American Institute for Strategy and Policy New Lines and the Canadian Raoul Wallenberg Centre for Human Rights posits that

¹³⁸ Katarina Adamova, "Deportation of Ukrainian Children to Russia: Chronology of the Crime. українських дітей до Росії: хронологія злочину," LB.ua news portal, December 30, 2022, accessed December 2023, https://lb.ua/blog/kateryna_adamova/540942_deportatsiya_ukrainskih_ditey.htm.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

cases of orphan exports can serve as compelling evidence of genocide; a charge Ukraine has already leveled against Russia.¹⁴¹

In light of the complex legal and political landscape surrounding these events, International Criminal Law seeks to explore the dynamics of accountability and the pivotal role of the ICC in the pursuit of justice, all within the broader context of the question: Once again, can President Vladimir Putin be held responsible for these atrocities committed in Ukraine? The answer according to the decision of the Pre-Trial Chamber seems to be affirmative. Notably, this case stands out due to the swiftness of the charges being brought, effectively in real time. The judges at The Hague underscored the urgency of the situation, as the deportations are reportedly ongoing.

Another relevant issue is the potential of the conduct to integrate genocide, which is a discussed topic at the moment. According to the ICJ jurisprudence, the forcible transfer of children of the group to another group «can also entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival»,¹⁴² integrating the contextual element of the crime of genocide.

Russia has conducted these deportations under the guise of rescue operations, medical rehabilitation initiatives, and adoption programs. However, the facts have come to light through witness accounts, reports by The New York Times,¹⁴³ the Ukrainian news media, independent investigators, the United Nations, and numerous government and rights organizations. The Verkhovna Rada of

¹⁴¹ "There Is Already Enough Evidence of Russia's Violation of the UN Genocide Convention in Ukraine.– CNN," LIGA, May 27, 2022, accessed December 2023, <https://news.liga.net/ua/politics/news/dokazatelstv-narusheniya-rossiey-v-ukraine-konventsii-oon-o-genotside-uje-dostatochno-cnn>.

¹⁴² See also *Croatia v. Serbia* judgment

¹⁴³ Marc Santora, and Emma Bubola, "Russia Signals It Will Take More Ukrainian Children, a Crime in Progress." The New York Times, 2023, accessed December 2023, <https://www.nytimes.com/2023/03/18/world/europe/putin-arrest-warrant-children.html>

Ukraine has issued a Statement¹⁴⁴ to prominent international entities, including the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the OSCE Parliamentary Assembly, the NATO Parliamentary Assembly, and various foreign governments and parliaments, stating that the forcible transfer of children between ethnic groups, in line with the “UN Convention on the Prevention and Punishment of the Crime of Genocide,” constitutes an element of genocide. The European Union, while urging the cessation of the illegal deportation of Ukrainian citizens, particularly children, and their immediate safe return to Ukraine, has struggled to translate these appeals into concrete actions due to the absence of operational legal mechanisms.¹⁴⁵

Nonetheless, the imposition of forced adoption programs and the deceptive deportation of children, often disguised as vacation and rehabilitation initiatives, seemingly underpin a substantial Russian depopulation strategy. This strategy potentially contravenes the Convention on the Prevention and Punishment of the Crime of Genocide and raises concerns about broader ethnic cleansing efforts. The

¹⁴⁴“Verkhovna Rada Appeals to the UN over Deportation of Ukrainian Children to Russia.” Інтерфакс-Україна, February 24, 2023, <https://ua.interfax.com.ua/news/general/893697.html>.

¹⁴⁵The English translation of “The Verkhovna Rada appealed to the United Nations regarding the deportation of Ukrainian children to the Russian Federation”: «The Verkhovna Rada passed a resolution addressing the United Nations Human Rights Committee, the United Nations Committee on the Rights of the Child, the International Court of Justice, and the United Nations High Commissioner for Refugees regarding the deportation of Ukrainian children to the Russian Federation. The resolution, known as Draft Resolution No. 9038, received support from 330 members of parliament during a plenary session on Friday, as reported by Yaroslav Zheleznyak, a member of the "Holos" faction, via Telegram. According to the document, the Ukrainian parliament urgently calls for decisive actions to halt the genocide against the Ukrainian people. This genocide is perpetrated through the forced deportation of children who are Ukrainian citizens or have resided in Ukraine to the aggressor state, Russia, or within the occupied territories of Ukraine. The resolution demands the prompt return of these children to their parents or lawful representatives. The resolution acknowledges and appreciates the efforts of international organizations and governments aimed at assisting Ukraine and upholding democratic values worldwide. Simultaneously, it calls for continuous and resolute actions to protect Ukrainian citizens, especially Ukrainian children, whom the Russian Federation seeks to "ideologically re-educate." The document further specifies that Russia, in violation of all international agreements, has established 43 camps on its territory and in occupied Crimea for the "ideological re-education" of Ukrainian children. In a span of almost a year, at least 6,000 Ukrainian children have passed through these camps, as reported by Ned Price, a representative of the U.S. Department of State, citing the official report of the Conflict Observatory. The resolution emphasizes that in many cases, Russia ostensibly evacuates children from Ukrainian territory, disguising it as participation in free summer camps, only to obstruct their return to their parents or lawful representatives. The Verkhovna Rada urges the international community to unite and stand as a single front against Russia's armed aggression in Ukraine, in the name of global peace and security, justice, the protection of democratic and human values, the defense of human rights and freedoms, and the cessation of the genocide against the Ukrainian people.»

process of integrating children into a new group can lead to the loss of their identity as members of their original protected group, potentially endangering the group's future existence.

For example, in 2016, the Independent International Commission of Inquiry on the Syrian Arab Republic determined that a genocide was committed against the Yazidi community through the forced transfer and separation of Yazidi children from their families. These children were placed with ISIS fighters, resulting in their disconnection from the Yazidi religious community and the erasure of their Yazidi identity. Similarly, in the wake of the full-scale invasion of Ukraine in 2022, Russia has systematically engaged in forcibly relocating Ukrainian children to territories occupied by Russia or regions within Russia.¹⁴⁶

Instances of “reprogramming” children, forced “passportization”, and the coerced alteration of a child's name, patronymic, and surname to Russian equivalents are violations of the UN Convention on the Rights of the Child,¹⁴⁷ particularly Articles 8 and 12,¹⁴⁸ which emphasize states' obligations to uphold a child's right to preserve their individuality, encompassing aspects such as citizenship, name, and family ties, while guarding against undue interference. According to the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁴⁹ Article 2 specifies that forcibly transferring children from one group to another, with the intent to annihilate one of the protected groups (in this instance, national), constitutes genocide.¹⁵⁰

¹⁴⁶Denys Azarov et al., “Understanding Russia’s Actions in Ukraine as the Crime of Genocide,” *Journal of International Criminal Justice* 21, no. 2 (June 13, 2023): 233–64, <https://doi.org/10.1093/jicj/mqad018>.

¹⁴⁷ “The United Nations Convention on the Rights of the Child”, UNICEF UK, 1989, accessed 10 December 2023, https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_PRESS200910web.pdf?_ga=2.78590034.795419542.1582474737-1972578648.1582474737.

¹⁴⁸ *Ibid.*

¹⁴⁹ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, 1948, <https://www.refworld.org/docid/3ae6b3ac0.html>

¹⁵⁰ Anatolii Frantsuz, Nataliia Stepanenko, and Dmytro Shevchenko, “Abduction of ukrainian children during full-scale invasion”. *Journal of International Legal Communication*, volume 9, no.2 (2023): 16-26. <https://doi.org/10.32612/iuw.27201643.2023.9.pp.16-26>

The Kremlin has repeatedly used Ukrainian children as part of its propaganda campaign to garner support for the war. In some instances, children who fled the Russian bombing of Mariupol during the early stages of the conflict were stopped at Russian checkpoints and portrayed as being rescued. Such incidents have been showcased in pro-Russian media, contributing to a negative portrayal of Ukrainians.¹⁵¹

The mass deportations in Ukraine evoke memories of a dark chapter in Russian history, when Stalin employed deportations as a means to consolidate control. Between 1936 and 1952, an estimated three million people were forcibly uprooted from their homes along the Soviet Union's western borders and other regions, subsequently exiled thousands of miles away to Siberia and Central Asia. The Kremlin euphemistically referred to these individuals as "special settlers." In the meantime, President Volodymyr Zelensky of Ukraine aptly observed that the full extent of the deportations may be even greater than currently known.

The arrest warrant for President Putin and Maria Lvova-Belova is a sign that individuals can be held responsible despite their office. I will consider in the next part the issues about immunities. It is relevant to know that Maria Lvova-Belova, holding the position of Commissioner for the Rights of the Child in the Russian Federation, is engaged in the illicit adoption of a 16-year-old Ukrainian boy from Mariupol. This act constitutes the evidence of a massive international crimes happening now. Lvova-Belova's open pride in this wrongful adoption serves a deliberate purpose. Primarily, it seeks to offer reassurance to Russians who have already unlawfully adopted Ukrainian children. It conveys the message that despite her inclusion on the sanctions lists of prominent nations like the EU, the US, Canada, and Australia, and despite information regarding her actions being reported to the International Criminal Court, she has yet to face any consequences. This implies a sense of impunity for those who have committed similar acts.¹⁵²

¹⁵¹ *Ibid.*

¹⁵² Marc Santora, and Emma Bubola, "Russia Signals It Will Take More Ukrainian Children, a Crime in Progress." *The New York Times*, accessed December 2023, <https://www.nytimes.com/2023/03/18/world/europe/putin-arrest-warrant-children.html>

Examining the extensive body of evidence, factual accounts, reports, and other information sources, several assumptions can be drawn about potential motives behind the abduction of Ukrainian children: to extend influence over Ukraine through channels of Russian education and culture, which propagate Russian national ideology. To gather diverse data and intelligence about Ukraine, including details regarding political figures or military activities. With the intent of demanding ransom from parents or the Ukrainian state. To recruit children into the intelligence services or armed forces of Russia.

It is imperative to acknowledge that any actions associated with the abduction of children constitute a breach of human rights and International Law. Various protective measures can be employed to uphold the rights of children unlawfully taken outside Ukraine. These may include legal procedures, collaboration with international organizations focused on children's rights, and the development and execution of specialized programs and initiatives. However, it is crucial to recognize that each case of repatriation necessitates a tailored and individualized approach.¹⁵³

In the case under consideration, it is reasonably believed that, in addition to this arrest warrant, further warrants will be issued against officials of the Russian government and the military-bureaucratic apparatus. It is presumed that the proceedings will conclude with the conviction of all the accused, perhaps when Putin is no longer in power. The consequences will be significant, as beyond the highly relevant political and symbolic aspects, the convicted individuals will be unable to travel to the 123 ICC member states that have signed the Rome Statute of 2002 for fear of being arrested.

A first initial sign of the political effectiveness of the ICC's measure was observed on March 22 when Russia released the first group of 15 children from the

¹⁵³Frantsuz Anatolii, Nataliia Stepanenko, and Dmytro Shevchenko, "Abduction of ukrainian children during full-scale invasion". *Journal of International Legal Communication*, volume 9, no.2 (2023): 16-26. <https://doi.org/10.32612/iuw.27201643.2023.9.pp.16-26>.

Kherson region who had been deported to Crimea nearly a year before. These were not orphans transferred from child centers, but children separated from their original families in Russian "filtration camps" and transported to Crimea.¹⁵⁴

Nonetheless, despite the evident challenges, efforts must be made to ensure that those responsible for the alleged crimes are held accountable for their actions and that the children are returned to their families and communities. Children should not be treated as "spoils of war", as emphasized by Prosecutor Karim Khan. In every conflict or crisis, they must be protected at any cost.

5. Putin's Arrest Warrant: the individual criminal responsibility and the issues related to Immunity

International crimes are frequently committed by individuals who hold State positions, a circumstance that often hinders the potential for their prosecution. A thorough consideration is required before addressing the issue of Putin's individual criminal responsibility and, in turn, responding to the question of whether he can be held accountable for the atrocities in Ukraine. This entails an examination of the two types of immunity recognized in international law and their implications within international criminal law.¹⁵⁵

In International Law, State Officials are typically granted functional immunity (also known as conduct-based immunity) for acts carried out in the exercise of their official functions. The *ratio* behind this provision is to prevent state officials from being prosecuted in foreign courts for their official actions, for which only their respective state is held accountable. However, it is established in customary International Law that functional immunity cannot be invoked for

¹⁵⁴Paolo Gentilucci, "Tribunale Penale Internazionale: Mandato Di Arresto per Putin," Il portale giuridico online per i professionisti - Diritto.it, March 30, 2023, <https://www.diritto.it/tribunale-penale-internazionale-arresto-putin/>.

¹⁵⁵Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021). 252-259

international crimes. This means that individuals cannot use functional immunity as a shield against prosecution for such crimes.¹⁵⁶

This principle of functional immunity underscores the importance of holding individuals accountable for their actions, particularly in cases involving international crimes. It ensures that those who commit severe violations (grave breaches) of international law cannot evade responsibility by invoking immunity related to their official capacities. This established practice in international law may also extend to high-ranking state officials who are not immune from the domestic and international criminal jurisdictions for the commission of international crimes.

As previously noted, international criminal law revolves around the concept that international atrocities are not committed by abstract entities but by individuals who must be held personally accountable. The principle of official capacity's irrelevance for international crimes, therefore, constitutes an exception to the general principles of international law, albeit one that is duly recognized and enforced, as has been underscored by scholars such as Cassese on numerous occasions.¹⁵⁷

Conversely, personal immunities (also known as status-based immunity),¹⁵⁸ in principle, prevent public officials belonging to certain categories from being prosecuted for international crimes during the duration of their mandate. The *ratio* behind this lies in the fact that certain categories of public officials can still be pursued for international crimes even while in office. This represents a broader immunity granted to specific categories to safeguard against interference in their private lives. Immunity from proceedings for ordinary offenses and international crimes is temporary and remains valid only for the duration of the person's holding of that particular position.¹⁵⁹

¹⁵⁶ *Ibid.*

¹⁵⁷ Antonio Cassese, *International Law*. (Oxford Univ Press, 2020). 247.

¹⁵⁸ Aghem Hanson Ekori and Paul S. Masumbe, "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts," *Polit Journal Scientific Journal of Politics* 2, no. 1 (2022): 29–36, <https://doi.org/10.33258/polit.v2i1.621>

¹⁵⁹ Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021). 252-259.

Article 27 of the Rome Statute, however, excludes the paralyzing effect of personal immunity on the exercise of criminal proceedings against heads of government or state officials responsible for international crimes before the ICC.¹⁶⁰ According to Article 27,¹⁶¹ paragraph two of the Statute, any nullities or specific procedural rules associated with an individual's official capacity, based on international domestic law, do not prevent the Court from exercising its jurisdiction over that individual. However, this provision does not clarify whether States Parties are obliged to execute arrest warrants against heads of state and senior officials from non-States Parties by waiving their personal immunity. This issue seems to involve President Putin.

Article 27 of the Rome Statute, however, negates the incapacitating impact of personal immunity when it comes to initiating criminal actions against government leaders or state officials who bear responsibility for international crimes. As stipulated in Article 27(2) of the Statute,¹⁶² any irregularities or particular procedural regulations linked to an individual's official position, in accordance with international domestic law, do not impede the Court from exercising its legal jurisdiction over that individual. Nonetheless, this provision does not clarify whether States Parties are obligated to execute arrest warrants against heads of state and high-ranking officials from non-States Parties by stripping them of their personal immunity.¹⁶³ This matter appears to be relevant to President Putin.

¹⁶⁰ *Ibid.*

¹⁶¹ Article 27 of the Rome Statute is a key provision that establishes the principle of individual criminal responsibility, regardless of the official capacity of the person accused of committing international crimes.

¹⁶² Article 27 of the Statute of Rome - Irrelevance of official capacity is a key provision. It states: «1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. »

¹⁶³ Rosario Salvatore Aitala, *Diritto Internazionale Penale* (Le Monnier, 2021). 252-259

The situation involving Russia and its leader, Vladimir Putin, is anticipated to mirror that of a previous case: Al Bashir (it will be better analyzed in the following part of the chapter). The likelihood of Putin facing trial before the ICC may be remote, much like the situation with Al Bashir, unless Russia actively collaborates with the Court. This implies that while international courts do not officially recognize immunity for heads of state, the successful prosecution of incumbent national leaders becomes an exceedingly challenging endeavor when there is a lack of cooperation concerning matters of arrest and extradition to the respective court.¹⁶⁴ Several factors contribute to this complexity: first of all, head of state immunity is still upheld within domestic legal systems. Secondly, immunity for heads of state remains recognized by foreign national criminal courts and customary international law. The immunity of heads of state before an international criminal court is primarily dependent on the statute that establishes the court, rather than being rooted in customary international law.¹⁶⁵

These represent the practical realities surrounding head of state immunity and the legal prosecution of sitting national leaders. Consequently, the necessity for cooperation with contemporary international criminal courts emerges as an indispensable prerequisite for bringing senior state officials, including heads of state, to justice. This holds significant relevance within the context of modern international criminal law and its application.

6. The Challenge of Arresting High-Ranking Officials: Lessons from Al Bashir and Putin

The question of whether international criminal courts can effectively hold high-ranking officials accountable for their actions has been a topic of debate and concern. This discussion delves into the practical challenges and implications of

¹⁶⁴Aghem Hanson Ekori and Paul Masumbe, "Putin on Trial: The Reality of Heads of State Immunity before International Criminal Courts," *Polit Journal Scientific Journal of Politics* 2, no. 1 (2022): 29–36, <https://doi.org/10.33258/polit.v2i1.621>

¹⁶⁵Aghem Hanson Ekori, "The ICC or the ACC," *African Journal of International Criminal Justice* 6, no. 1 (September 2020): 50–71, <https://doi.org/10.5553/aj/2352068x2020006001003>.

arresting individuals like President Vladimir Putin, who faces charges related to the atrocity crimes committed in Ukraine. This subsection aims to draw a short lesson from the case of Omar Al Bashir, the former head of state of Sudan, to shed light on the complexities involved in bringing such figures to justice.

The ICC operates on the basis of state cooperation for executing arrest warrants. States are expected to assist with various aspects of the legal process, including identifying suspects, taking evidence, and freezing assets. Article 89¹⁶⁶ The Rome Statute grants the ICC the authority to request or order state parties to arrest individuals, subject to certain exceptions. This raises questions about the practicality of prosecuting high-ranking officials.

The principle of immunity has been a point of contention, as analyzed in the previous paragraph. While some argue that officials enjoy immunity in their national jurisdictions, the ICC takes a different stance. Article 27(1)¹⁶⁷ of the Rome Statute makes it clear that official capacity should not absolve individuals from

¹⁶⁶Article 89 of the Statute of Rome - Surrender of persons to the Court, states: «1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender. 2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility. 3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender. (b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain: (i) A description of the person being transported; (ii) A brief statement of the facts of the case and their legal characterization; and (iii) The warrant for arrest and surrender; (c) A person being transported shall be detained in custody during the period of transit; (d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State; (e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is affected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time. 4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court. »

¹⁶⁷ See footnote no. 162 of this Chapter.

criminal responsibility before the International Criminal Court. This principle, reaffirmed by the ICC Appeals Chamber, indicates that state parties should cooperate with the court, even if it means challenging immunities.

Indeed, it is important to deepen the Al Bashir Case. Omar al-Bashir served as the head of state of Sudan for nearly two decades. His rule witnessed the emergence of the Darfur conflict, driven by demands for equality in resource allocation and representation by non-Arab, non-Muslim populations in Darfur. The ICC indicted him on multiple counts of crimes against humanity, war crimes, and genocide. Despite two arrest warrants issued, Bashir has not been brought before the ICC for trial, which requires his physical presence.¹⁶⁸

Nonetheless, several state parties, including Kenya, Djibouti, Chad, Malawi, Nigeria, and the Democratic Republic of Congo, have demonstrated non-compliance by failing to execute the warrant. Of particular interest is South Africa's non-execution in the Al Bashir warrant,¹⁶⁹ as it has relevance in assessing the potential arrest of Putin. In 2015, Bashir traveled to South Africa for an African Union Summit. Initially, South African authorities refrained from arresting him, citing head-of-state immunity. However, the matter was referred to the domestic court, which ruled that South African authorities were obligated to take reasonable steps to arrest him. Al Bashir left South Africa before his arrest, highlighting the challenge of enforcing ICC warrants.¹⁷⁰

Bashir's escape during the deliberation of his arrest sets a precedent for compliance with ICC warrants. Despite Sudan not being a party to the Rome Statute, Bashir was ousted from power in 2019, and in 2021, Sudan announced its

¹⁶⁸Brishna Gehani, "Putin's Arrest Warrant, Immunity & the International Criminal Court," Research Society of International Law, RSIL, June 15, 2023, accessed December 2023, <https://rsilpak.org/2023/putins-arrest-warrant-immunity-and-the-international-criminal-court/>.

¹⁶⁹"Al Bashir Case", International Criminal Court, accessed February 14, 2024, <https://www.icc-cpi.int/darfur/albashir>.

¹⁷⁰"Clutching at Straws: SA's Reasons for Not Arresting Al-Bashir," ISS Africa, April 18, 2017, accessed December 2023, <https://issafrica.org/iss-today/clutching-at-straws-sas-reasons-for-not-arresting-al-bashir>.

intention to surrender him. However, Bashir remains at large, prolonging the ICC's awaited trial.

To wrap up, Al Bashir who is no longer the president of Sudan, has evaded trial at the ICC despite facing charges. The ICC has been unable to apprehend him, largely due to his personal immunity as the former head of state, which at first obstructed his arrest and surrender to the Court from other states. This highlights that the mere absence of head of state immunity recognition before the ICC, is insufficient to prosecute a sitting national leader. The cooperation of both the leader's home state and other states that are parties to the Statute of Rome is imperative for the successful prosecution of a serving head of state. In the case of Al Bashir, neither Sudan nor African states that are signatories to the Rome Statute were willing to collaborate with the ICC.

Conversely to Russia, in the Darfur situation, Sudan was referred to the ICC Prosecutor by the UN Security Council under Resolution 1593 of 2005,¹⁷¹ in accordance with Article 13(b)¹⁷² of the Rome Statute. While the situation in Ukraine was referred to the ICC Prosecutor by many States Parties, following Article 14(1)¹⁷³ of the Rome Statute. A referral by the Security Council would probably be impossible in this particular case due to the Russian Federation's *veto* power.

The scenario involving Russia and Vladimir Putin is poised to resemble that of Al Bashir and to differ for some aspects. Since ICC indicted Putin for international crimes there is a possibility that he might evade an ICC trial, akin to

¹⁷¹ United Nations Security Council Resolution 1593, adopted on 31 March 2005, after receiving a report by the International Commission of Inquiry on Darfur, the Council referred the situation in the Darfur region of Sudan to the International Criminal Court (ICC) and required Sudan to cooperate fully.

¹⁷² Article 13 (b) of the Statute of Rome, states: «A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. »

¹⁷³ Article 14.1 of the Statute of Rome affirms: «1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. »

Al Bashir, unless Russia actively cooperates with the Court. In other words, the absence of formal immunity recognition before international courts alone does not suffice for the prosecution of a serving head of state. The successful legal proceedings against such leaders become a considerably challenging task when cooperation on matters of arrest and extradition to the respective court is lacking.

This difficulty arises from some key elements, which create discrepancies between the domestic and the international criminal dimensions:

I. The persistence of head of state immunity recognition within domestic legal jurisdictions.

II. The continued acknowledgment of head of state immunity by foreign national criminal courts and customary international law.

III. The determination of head-of-state immunity before an international criminal court primarily hinges on the statute that establishes the court, rather than on customary international law.

These sobering realities underscore the intricate web of complexities surrounding head-of-state immunity and the legal prosecution of incumbent national leaders. Consequently, unwavering cooperation with contemporary international criminal courts stands as an indispensable prerequisite for bringing senior state officials, such as heads of state, to justice.

Putin's indictment for war crimes pertaining to the unlawful deportation and transfer of children from the occupied areas of Ukraine to the Russian Federation has faced resistance and denial from the Kremlin. The charges have not only been contested on jurisdictional grounds but have also led to retaliatory proceedings initiated by the Russian government against the ICC prosecutor and judges who issued the warrant, notably Italian Judge Rosario Salvatore Aitala (who was the

President of the Pre-Trial Chamber also in the issuance of Al Bashir’s arrest warrant).¹⁷⁴

The challenges inherent in arresting high-ranking officials for international crimes are manifest, echoing the complexities observed in the Al Bashir case. The ICC's reliance on state cooperation, intertwined with the intricate question of immunities, creates a complex and nuanced landscape. Political considerations add further layers of complexity, rendering it challenging to predict which states will comply with arrest warrants. Despite these formidable hurdles, the ICC's unrelenting pursuit of accountability symbolizes a commitment to holding leaders accountable for their actions.

Russia's permanent membership in the UN Security Council may influence state parties to abstain from executing arrest warrants for political reasons. Nevertheless, the warrant's issuance has already begun to exert pressure on Russia, impacting its diplomatic engagements and interactions. The arrest warrant serves not only a legal function but also a symbolic one, aiming to dissuade states from engaging with President Putin and diplomatically isolating him.¹⁷⁵

The symbolic significance of an ICC arrest warrant against Vladimir Putin holds profound importance for various characters at the international level. Primarily, it serves as a meaningful gesture to Ukrainians, aiming to delegitimize Putin's leadership on the international stage. This impact extends beyond Ukraine and resonates with diplomats, Russian dissidents, and even Russian soldiers and their families involved in the highly publicized child transfer operation. Highlighting the particular nature of forced child transfers also underscores the gravity of the conflict for the international community. The issuance of an arrest warrant for Putin has the potential to reshape the discourse within Russia. Initially,

¹⁷⁴Al Bashir, International Criminal Court, Accessed February 14, 2024, <https://www.icc-cpi.int/darfur/albashir>.

¹⁷⁵Brishna Gehani, “Putin’s Arrest Warrant, Immunity & the International Criminal Court,” Research Society of International Law RSIL, June 15, 2023, accessed December 2023, <https://rsilpak.org/2023/putins-arrest-warrant-immunity-and-the-international-criminal-court/>.

there may be state-sponsored demonstrations of support for Putin. However, for opponents of Putin's regime, whether vocal dissidents or those who have remained silent, the arrest warrant could reinvigorate discussions about a post-Putin Russia. Specifically, in the context of the charges related to the unlawful deportation and transfer of Ukrainian children, the arrest warrant provides a counter-narrative to Putin and Maria Lvova-Belova's efforts to portray the transfer program as a humanitarian endeavor to the Russian public.

Furthermore, the warrant alters the dynamics for all political actors working towards ending the war. A key debate that may unfold in the near future relates to the UN Security Council's potential exercise of authority under Chapter VII of the UN Charter to mandate the ICC to suspend its investigation against Putin "in the interests of international peace and security." Article 16 of the ICC's founding document,¹⁷⁶ empowers the UN Security Council to halt any prosecution for a period of 12 months, with the option for annual renewals indefinitely.¹⁷⁷

One perspective suggests that Russia could initiate such a resolution. In exchange for supporting the suspension, other UN Security Council members could leverage Russia to withdraw from Ukraine or secure concessions that would otherwise be unattainable. However, this move may face opposition from human rights advocates, many Ukrainians, and states viewing it as an unacceptable trade-off between justice and peace. It is equally plausible that Russia, given its refusal to recognize the ICC, may perceive such a resolution as granting undue recognition

¹⁷⁶ This article provides the United Nations Security Council with the authority to request the ICC to defer an investigation or prosecution for a renewable 12-month period under specific conditions, primarily for the sake of maintaining or restoring international peace and security.

«No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.»

¹⁷⁷ Brishna Gehani, "Putin's Arrest Warrant, Immunity & the International Criminal Court," Research Society of International Law RSIL, June 15, 2023, accessed December 2023, <https://rsilpak.org/2023/putins-arrest-warrant-immunity-and-the-international-criminal-court/>.

to the Court. In this case, even if other Security Council members pursue an Article 16 strategy, it could be thwarted by a Russian *veto*.

Additionally, as noted by the ICC itself, «public awareness of the warrants may contribute to the prevention of the further commission of crimes. » While it may not deter Putin, the ongoing relocation program relies on the actions of Putin's subordinates. Whether they are aware of potential individual criminal liability and choose to defy orders or refuse cooperation remains uncertain, but these outcomes may be factors motivating the ICC to pursue these specific charges in its ongoing investigation. Finally, the taint of war crimes charges related to the program may discourage further participation by Russian families fostering and adopting Ukrainian children.

The decision to make the arrest warrant public, a decade after the ICC's first arrest warrant for a sitting head of state, Omar Al Bashir, was deliberate. While there may be drawbacks, such as the potential alerting of Putin to avoid arrest, the full impact of an ICC arrest warrant transcends mere apprehension. It encompasses symbolic, diplomatic, and deterrent effects that will continue to unfold in the coming months.¹⁷⁸

7. Conclusion

Chapter III of this thesis has delved into the Ukrainian Situation at the International Criminal Court, specifically focusing on the issuance of an arrest warrant for President Vladimir Putin. The comprehensive examination of this intricate matter has led to several significant insights.

Firstly, the chapter has traced the trajectory from the Ukrainian Situation to the ICC's issuance of an arrest warrant. This exploration has shed light on the

¹⁷⁸ *Ibid.*

complexities and legal intricacies involved in holding high-ranking officials accountable for the atrocities committed in Ukraine. The examination of this path has demonstrated the evolving role of international criminal law in addressing grave violations of human rights.

A fundamental aspect addressed in this chapter pertains to the distressing issue of children trafficking and the transfer of minors during the Russian invasion of Ukraine. The analysis of this dramatic subject has highlighted the profound humanitarian concerns arising from such conducts, emphasizing the urgent need for international legal responses to protect and safeguard the rights and well-being of these vulnerable individuals.

Furthermore, this chapter has scrutinized the arrest warrant issued for President Putin, addressing critical questions related to individual criminal responsibility and the interplay with issues of immunity. The complexities surrounding the application of international legal principles in cases involving sitting heads of state have been thoroughly examined, drawing upon lessons from previous cases (such as the one of Al Bashir).

In conclusion, this chapter provides an affirmative response to the question of whether individuals, including President Putin, can be held accountable for the commission of atrocity crimes in Ukraine, as evidenced by the issuance of the ICC's Arrest Warrant. This milestone marks the initial stride towards establishing international criminal responsibility for their actions. The journey towards effectively prosecuting these prominent figures on the global stage is anticipated to be protracted. Nevertheless, the linchpin in this endeavor lies in the cooperation of member states and their collective endeavors to facilitate the apprehension and presentation of alleged perpetrators before the Court. This collaborative effort is instrumental in upholding the principles of accountability and justice within the realm of international law. It is imperative that the international community remains resolute in its pursuit of bringing those responsible for violations to face the rigors of legal scrutiny.

CHAPTER IV - TOWARDS ACCOUNTABILITY: EXPLORING THE POTENTIAL OF AN *AD HOC* AND HYBRID TRIBUNAL OR AMENDMENTS TO THE ICC STATUTE IN ADDRESSING ATROCITY CRIMES IN UKRAINE

1. Introduction

The international community faces a critical juncture in addressing the atrocity crimes committed in Ukraine. The world is at a pivotal moment when it comes to addressing the horrific atrocities. Among the many challenges that lie ahead, accountability is a crucial issue that must be carefully considered. This chapter delves into the potential avenues for accountability, focusing on the feasibility and implications of two distinct approaches: the establishment of an *ad hoc* tribunal and the reform of the Rome Statute, as proposed by L.M. Ocampo. By navigating through these alternatives, this chapter aims to contribute nuanced insights into the complexities surrounding the pursuit of justice in the aftermath of grave international crimes.

Building upon the compelling question raised in the preceding chapter “Can President Putin and others be held responsible for the atrocities committed in Ukraine?”, this chapter assumes an essential role and a critical approach, trying to deepen proposals made by scholars, doctrine and experts of the International Criminal Law world. The urgency to answer this question is underscored by the gravity of the atrocities unfolding in Ukraine, demanding a meticulous examination of available legal paths. This chapter is not only a scholarly exploration but a critical response to the immediate need for justice.

The significance of such exploration goes beyond mere academic discussion; it is a proactive commitment to seeking justice and accountability. By examining legal frameworks and possibilities, this chapter strives to make a significant contribution to the ongoing conversation about addressing atrocity crimes. Ultimately, the aim is to offer concrete insights that can potentially inspire

new legal strategies and international efforts in alleviating the human suffering caused by these heinous acts.

The establishment of special tribunals has been a historical response to horrible acts, notably exemplified by the creation of the Nuremberg,¹⁷⁹ Tokyo and the Hague tribunals. The possibility of instituting a tribunal specifically tailored to address the Ukrainian situation presents both opportunities and challenges. This chapter critically examines the controversial hypothesis surrounding the creation of such an *ad hoc* tribunal, considering its potential effectiveness, legitimacy, and practicality.

Simultaneously, the discussion extends to the prospect of reforming the Rome Statute, the foundational instrument establishing the International Criminal Court. The Rome Statute, as a cornerstone of international criminal justice, provides a framework for prosecuting individuals responsible for the most egregious crimes but it is not so efficient in addressing the crime of aggression. Exploring the possibility of amendments to the Rome Statute becomes paramount in addressing the unique challenges posed by the Ukrainian situation.

To unravel the complexities surrounding the crime of aggression and other atrocity crimes in Ukraine, this chapter begins by analyzing the problematic issues associated with the crime of aggression. Subsequently, it engages with the controversial hypothesis of establishing an *ad hoc* tribunal, evaluating its strengths and weaknesses. Finally, the chapter delves into the potential of reforming the Rome Statute and the feasibility of adapting this foundational legal instrument to better respond to the specific nuances of the Ukrainian context.

¹⁷⁹According to the Nuremberg Trial's Judgment: «To initiate a war of aggression ... is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole. » «Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. » cf. Nuremberg Trial's Judgment, 30 September 1946.

As it navigates through the intricate terrain of accountability mechanisms, it draws on legal analysis, historical precedents, and contemporary perspectives to shed light on the most viable pathways towards justice in the aftermath of atrocity crimes in Ukraine. The inquiry into the applicability of the crime of aggression in the context of Ukraine, and the potential for the International Criminal Court to prosecute this crime, is a central point. Despite the commendable efforts in addressing war crimes and crimes against humanity, the question arises regarding the ICC's jurisdiction over the crime of aggression due to an apparent lack of jurisdiction (it will be later analyzed).

The history of the crime of aggression, rooted in customary international law, traces its origins to the prosecution of "crimes against the peace" at the Nuremberg and Tokyo international military tribunals. The UN Charter of 1945 outlawed the use of force by a state against the sovereignty, territorial integrity, and political independence of another state. Although recognized under customary law, the ICC's jurisdiction over the crime of aggression was only established in July 2018. Consequently, the ICC lacks jurisdiction over the crime of aggression in the case of Ukraine due to the specific timing of its jurisdictional mandate and Ukraine's Article 12(3) Declaration.¹⁸⁰

Despite this limitation, the undeniable violation of Ukraine's sovereignty, territorial integrity, and political independence prompts a consideration of alternative avenues for accountability. The chapter questions who should be responsible for ensuring the investigation and prosecution of the crime of aggression, given the ICC's jurisdictional constraints. It explores the possibility of establishing a special tribunal or a hybrid court and examines whether state parties to the Rome Statute could invoke universal jurisdiction to ensure accountability for the crime of aggression against Ukraine.

¹⁸⁰“Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed since 20 February 2014,” International Criminal Court, Press Release, 8 September 2015, accessed February 1, 2024, <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014>

In conclusion, this chapter aims to inquire for practical international solutions to extend the accountability of Russian leadership to the crime of aggression and how the international community could use present or new tools to face this contemporary challenge.

2. Bridging the Accountability Gap: From Individual Criminal Responsibility to Possible Institutional Solutions

As the thesis delves into the intricate landscape of individual criminal responsibility in Chapter III, the complexities surrounding the application of arrest warrants, particularly exemplified by the cases of Al Bashir and Putin, lay the foundation for a critical exploration in Chapter IV. The challenges associated with arresting high-ranking officials underscore the limitations of current mechanisms, prompting an essential discussion on the broader implications for international criminal law.

The transition to Chapter IV is a logical progression rooted in the realization that the issuance of an arrest warrant, while a significant step, does not guarantee effective accountability. The challenges outlined in Chapter III prompt a critical evaluation of the broader landscape of international criminal law, especially concerning atrocity crimes in Ukraine. The difficulties encountered in the Al Bashir case, where an arrest warrant was issued but not executed, signal a systemic flaw that warrants comprehensive consideration.

Chapter IV, titled "Towards Accountability: exploring the potential of an *ad hoc* and hybrid Tribunal or amendments to the ICC Statute in addressing atrocity crimes in Ukraine," emerges as a response to the main themes highlighted in Chapter II. This section initiates a critical discussion on potential reforms to enhance the effectiveness of international criminal law. The focal points include the problematic nature of the crime of aggression, the controversial proposition of establishing an *ad hoc* or Hybrid Tribunal, and the possibility of reforming the

existing Statute of Rome. Each subsection in this chapter addresses the challenges posed by current legal frameworks and proposes potential avenues for reform.

The necessity for a critical examination of accountability mechanisms is underscored by the persistent hurdles faced in enforcing ICC warrants against high-ranking officials. Chapter III acts as a catalyst for Chapter IV, urging us to confront the shortcomings of the current legal framework and explore innovative solutions. By scrutinizing the viability of *ad hoc* or Hybrid Tribunals and proposing amendments to the ICC Statute, this thesis seeks to contribute meaningfully to the discourse on enhancing the efficacy of international criminal law in addressing atrocity crimes in Ukraine. For logistical reasons, the thesis must focus on some illustrative aspects or issues in order to give a better understanding of the topic.

3. The Problematic Issue of the Crime of Aggression

The crime of aggression is maybe the most problematic of the four core crimes in the ICC Jurisdiction. As anticipated in the Introduction, it rooted in customary international law and traces its origins to the prosecution of "crimes against the peace" at the Nuremberg and Tokyo international military tribunals, which were defined as «planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of the foregoing. » It did not however specify further what was meant by aggression.

After the Nuremberg and Tokyo trials, the UN General Assembly endorsed the principles outlined in the Nuremberg Charter and the judgments of the Nuremberg Tribunal through Resolution 95(I).¹⁸¹ The UN Charter of 1945 outlawed

¹⁸¹ Antonio Cassese in the "Introductory Note: Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal General Assembly resolution 95 (I) New York, 11 December 1946" affirms «General Assembly resolution 95 (I) was adopted on 11 December 1946 on the initiative of the United States delegation. The adoption of this resolution followed the judgment of 1 October 1946 by the International Military Tribunal ('IMT') at Nürnberg which sentenced twelve Nazi defendants to death and seven to periods of imprisonment ranging from ten

the use of force by a state against the sovereignty, territorial integrity, and political independence of another state. In December 1974, after protracted negotiations, the UN General Assembly adopted Resolution 3314 (XXIX).¹⁸² The resolution included a definition of aggression designed to guide the Security Council in determining the existence of an act of aggression. Noteworthy is that this definition primarily addresses the state's act of aggression, not the actions of an individual responsible for such acts. The definition mirrors the illegal use of force outlined in Article 2(4) of the Charter,¹⁸³ listing specific examples such as invasion, attack, and military occupation. Crucially, core provisions of this 1974 definition were later integrated into the 2010 Kampala definition of the crime of aggression under the Rome Statute. On 14 December 2017, States Parties to the Rome Statute made the historic decision to enable the ICC to prosecute the crime of aggression by adopting Resolution ICCASP/16/Res.5 by consensus.¹⁸⁴

José Ayala Lasso, the former United Nations High Commissioner for Human Rights, succinctly captures a significant paradox in the realm of international criminal justice: «A person stands a better chance of being tried and judged for killing one human being than for killing 100,000. » This statement

years to life. The agreement for the establishment of the IMT had been signed in London on 8 August 1945. Attached to this agreement was “The Charter of the International Military Tribunal” (‘the IMT Charter’). In resolution 95 (I), the General Assembly affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal (‘the Nürnberg principles’). By “affirming” those principles, the General Assembly (consisting at the time of fifty-five Member States) clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT. Translated into law-making terms, this approval and support meant that the world community had robustly set-in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community. »

¹⁸²Wilmschurst in 2008 in the “Introductory note: Definition of Aggression. General Assembly resolution 3314 (XXIX), 14 December 1974” states: «General Assembly resolution 3314 (XXIX), with the Definition of Aggression annexed to it, was adopted on 14 December 1974 after protracted intergovernmental negotiations. The Definition has scarcely ever been used for its primary purpose as a guide to the Security Council in determining aggression by States. It has now taken on a new life as a source for discussion of the definition of the individual crime of aggression within the jurisdiction of the International Criminal Court. »

¹⁸³Article 2 (4) of the UN Charter prohibits the threat or use of force and calls on all Members to respect the sovereignty, territorial integrity and political independence of other States.

¹⁸⁴“Resolution ICC-ASP-16-Res5-ENG: Activation of the Court's Jurisdiction over the Crime of Aggression”, International Criminal Court (2017) https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

underscores the historical challenges associated with prosecuting individuals for the "supreme crime" of aggression.¹⁸⁵

Nowadays, the offense of aggression is defined in Article 8bis (1)¹⁸⁶ of the Rome Statute of the International Criminal Court as «the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.»¹⁸⁷ While the delineation of the State act element of the crime allows for considerable debate regarding its precise parameters, the invasion of Ukraine by Russia in February 2022, coupled with its persistent use of force against Ukrainian sovereignty, territorial integrity, and political independence, unequivocally qualifies as an act of aggression, manifestly contravening Article 2(4) of the UN Charter.¹⁸⁸ Additionally, Russia's alleged annexation of Ukrainian regions represents a distinct act of aggression, satisfying the State act element of the crime.

It is noteworthy, however, that while the ICC possesses jurisdiction over war crimes and crimes against humanity committed in Ukraine, it lacks a corresponding jurisdiction over the crime of aggression. Consequently, it becomes pertinent to delve into the *ratio* behind the ICC's focus on investigating and issuing

¹⁸⁵Alavi Sina, Prince Zeid Ra'ad Zeid Al-Hussein and Stefan Barriga et al. "Handbook on the Crime of Aggression. Permanent Mission of the Principality of Liechtenstein to the United Nations", Global Institute for the Prevention of Aggression (2019). <https://crimeofaggression.info/documents/1/handbook.pdf>.

¹⁸⁶Claus Kreß., "Remarks by Claus Kreß", Proceedings of the Annual Meeting, American Society of International Law, no. 105 (2011): 160–62. <https://doi.org/10.5305/procanmmeetasil.105.0160>

¹⁸⁷ *Ibid.* «This is the so-called threshold requirement which is set out in future article 8bis(1) of the Rome Statute. According to this requirement, the State act of aggression must constitute, by its character, gravity and scale a manifest violation of the UN Charter. As Claus Kreß has said, "the function of this threshold is twofold: First, it implies a magnitude test by referring to the gravity and scale of the act of aggression. Second, by referring to the character, the threshold poses a qualitative requirement: The State use of force must be unambiguously illegal." Furthermore, the three components, "character, gravity and scale" of the act of aggression – not only one, not only two of them – must simultaneously be present to satisfy the manifest standard of the violation of article 2(4) of the UN Charter. »

¹⁸⁸ Article 2 (4) of the UN Charter prohibits the threat or use of force and calls on all Members to respect the sovereignty, territorial integrity and political independence of other States.

an arrest warrant which focuses on war crimes and crimes against humanity rather than the crime of aggression.

One key factor, as analyzed in the previous chapters, is Russia's non-membership in the Rome Statute of the International Criminal Court. According to principles of treaty law, a state is only bound by a treaty if it has both signed and ratified that treaty. Given that Russia is not a party to the Rome Statute, questions arise about the effectiveness of triggering the ICC's jurisdiction through referrals from 43 state parties. As affirmed in the second chapter, the ICC under Article 8(2)(a)(vii) of the Rome Statute,¹⁸⁹ issued an arrest warrant against President Putin for the war crime of unlawful deportation of population (mainly children) and the unlawful transfer of population from the occupied areas of Ukraine to the Russian Federation.

It is crucial to situate the *genesis* of the aforementioned crime within the broader historical context of the Court. Interestingly, the crime of aggression did not find inclusion in the discussions held at the Rome Conference in 1998. Consequently, the Rome Statute was ratified with the original jurisdictional scope of the International Criminal Court limited to crimes of genocide, crimes against humanity, and war crimes. For instance, Corrie McDougall suggested that the lack of consensus on the crime of aggression stemmed from the political dynamics at the Rome Conference.¹⁹⁰ Similarly, other doctrine highlighted sentiments from parties indicating a preference for not prosecuting the crime of aggression at the national level. Notably, a substantial number of states, particularly those from the so-called “Non-Aligned Group”, advocated for the inclusion of aggression as one of the fundamental crimes alongside others. However, this proposition encountered staunch opposition, primarily led by the United States. Consequently, aggression

¹⁸⁹ Article 8(2)(a)(vii) of the Rome Statute pertains to war crimes in the context of international armed conflicts. It specifically addresses serious violations of the laws and customs of war, stating: «Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law. » This provision is part of the Rome Statute of the International Criminal Court, defining and establishing the court's jurisdiction over various crimes, including war crimes.

¹⁹⁰ Carrie McDougall, “The Crime of Aggression under the Rome Statute of the International Criminal Court”, 2nd edition. (London, England: Cambridge University Press, 2021). 1–42.

found its place in the final text as a somewhat nebulous placeholder, devoid of both a clear definition and substantive impact. Persistent debates regarding the inclusion of aggression continued, leading to the Kampala Review Conference in 2010, when finally, the crime of aggression started having a first connotation. Eventually, an agreement on the crime emerged, characterized by a narrowed jurisdictional framework and an elevated, deferred threshold for activation.

The Review Conference in 2010 made fundamental decisions regarding the conditions under which the International Criminal Court can investigate and prosecute crimes of aggression, creating a distinctive legal framework within Articles 15-bis¹⁹¹ and 15-ter¹⁹² of the Rome Statute. A pivotal development

¹⁹¹ Article 15-bis of the Statute of Rome - Exercise of jurisdiction over the crime of aggression (or State referral, proprio motu), affirms: «1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be affected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. »

¹⁹² Article 15-ter of the Statute of Rome - Exercise of jurisdiction over the crime of aggression (Security Council referral), states: «1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

occurred in 2017, when the States Parties to the Rome Statute took a historic stride in New York. They endowed the ICC with the authority to prosecute the crime of aggression, in accordance with the Kampala amendments of 2010. This momentous decision granted jurisdiction to the ICC to hold accountable those individuals responsible for the illegal use of force. It was activated for the first time for the 20th anniversary of the Rome Statute on July 17, 2018.

Currently, the ICC's jurisdiction over the crime of aggression hinges on specific conditions, varying based on whether the referral comes from the Security Council (Article 15ter) or a State Party or the Prosecutor (Article 15bis).

When the Security Council refers a situation to the ICC (Article 15ter), the procedural conditions remain consistent for genocide, crimes against humanity, war crimes, and the crime of aggression. No additional aggression-specific conditions apply, and State consent is not required, aligning with the ICC's jurisdiction deriving from the Security Council's powers under Article 25 of the UN Charter.¹⁹³

Alternatively, when a State Party or the Prosecutor initiates action (Article 15bis), the ICC's jurisdiction over the crime of aggression is more constrained. Several conditions aim to limit the Court's jurisdiction to situations where the involved States express consent. Notably, the Court lacks jurisdiction over non-State Parties, irrespective of their role as aggressors or victims, focusing accountability within the circle of States Parties. Furthermore, States Parties can opt out of the Court's jurisdiction over the crime of aggression, emphasizing a consent-based regime. Controversies persist over jurisdiction regarding States Parties that have not ratified the Kampala Amendments.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. »

¹⁹³ The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the UN Charter.

In essence, the activation of the Court's jurisdiction over the crime of aggression introduces complexities, with distinct conditions based on the referral source. The divergence in conditions reflects a compromise necessary for consensus during the Review Conference. This nuanced legal regime underscores the ICC's evolving role in addressing crimes of aggression, requiring a delicate balance between accountability and the consent of involved states.¹⁹⁴

Crucially, the core of the crime of aggression, as defined in the Rome Statute, centers on acts perpetrated against the sovereignty of states. It is incontrovertible that President Vladimir Putin wields nearly complete control over Russia's political and military endeavors, meeting the leadership qualifier inherent in the crime of aggression's definition. While determinations of culpability should ideally be adjudicated by an impartial court following due process, Putin's conspicuous role as the driving force behind the invasion presents a compelling argument for a court to establish his conduct aligning with the individual conduct elements of the crime. Belarus' support of Russia also raises suspicions concerning President Alexander Lukashenko. The potential culpability of other individuals in *de jure* and *de facto* leadership roles remains subject to debate, contingent on intelligence information elucidating their involvement in national security decision-making circles.

Despite the specific provision's limitations on the ICC Prosecutor's authority over Putin's act of aggression in the Ukrainian situation arise because neither Russia nor Ukraine are States Parties to the ICC. Additionally, the option of a UN Security Council referral under Article 13 of the ICC Statute¹⁹⁵ is precluded by Russia's veto power.

¹⁹⁴“Conditions for Action by the ICC”, the Global Campaign for the Prevention of Aggression, July 17, 2018, accessed December 2023, <https://crimeofaggression.info/role-of-the-icc/conditions-for-action-by-the-icc/>.

¹⁹⁵In order to summarize the Referral under Article 13 of the ICC: it refers to the mechanism outlined in Article 13 of the Rome Statute, the treaty that established the International Criminal Court. Article 13 provides a process through which the ICC can exercise jurisdiction over a situation, even if it is not initiated by a State Party or the United Nations Security Council. Article 13(1) states that the ICC can exercise its jurisdiction with respect to a crime under the Statute if a situation is referred to

This was evident when Russia employed its veto to block the adoption of a draft resolution on February 25, 2022. To circumvent this obstacle, members turned to the General Assembly, urging the adoption of a resolution under the principle of the "Uniting for Peace Resolution of 1950." This type of resolution is invoked in cases where there is a threat to peace, an act of aggression, or a breach of peace, and the UN Security Council has failed to maintain international peace and security, sidestepping the possibility of a *veto*.

In the context of Russia's invasion of Ukraine, it is crucial to recognize that Russia's breach of the prohibition on the use of force poses a significant threat to the international rules-based order. While this claim has been widely asserted, often as a fact without thorough analysis, it is essential to dissect the distinct features of the Russian invasion, differentiating it from previous breaches of Article 2(4) of the UN Charter. This understanding is imperative for comprehending why it is crucial for the international community to take robust measures to reinforce the prohibition on the use of force in response.

While Article 2(4) has been violated since 1945, not all impermissible uses of force are equal, as the Charter recognizes acts of aggression as a subset of unlawful force. Distinctions in the severity of different acts of aggression can be drawn by considering factors outlined in the Nicaragua Case,¹⁹⁶ such as the scale

it by a State Party to the Statute or by the United Nations Security Council acting under Chapter VII of the UN Charter. This means that a State Party or the UN Security Council can bring a particular situation to the attention of the ICC, initiating its involvement in investigating and prosecuting crimes. Article 13(2) further allows the Prosecutor of the ICC to initiate an investigation *proprio motu* (on their own initiative) based on information on crimes within the jurisdiction of the Court. However, for a *proprio motu* investigation, the Prosecutor needs authorization from the Pre-Trial Chamber of the ICC. In summary, referral under Article 13 is a crucial mechanism that allows for the initiation of ICC involvement in situations involving international crimes, ensuring that accountability can be pursued even when States or the Security Council may not take the initial step.

¹⁹⁶In the Nicaragua Case (Nicaragua v. United States of America), the ICJ ruled that the United States had violated international law by supporting Contra rebels in their attacks against Nicaragua. The Court held that these actions amounted to an "armed attack" under the United Nations Charter, constituting unlawful use of force and intervention in Nicaragua's internal affairs. The judgment emphasized customary international law principles, affirming the prohibition of the use of force and non-intervention. The ICJ ordered the United States to make reparations to Nicaragua for the injuries caused by the unlawful use of force. Despite the ICJ's findings, the United States, having withdrawn from the ICJ's compulsory jurisdiction, did not participate in the

and effects of force and its circumstances or motivations. The assessment of unlawful uses of force involves both objective and context-specific subjective factors, helping explain varying State responses to violations.

The invasion's extreme human and economic costs already establish Russia's aggression at the serious end of the spectrum. The attempt to extinguish Ukraine qualifies as especially severe due to its objective of state annihilation, emphasizing the enduring value of the state in international law. Comparatively, the Russian invasion surpasses previous violations of the prohibition.

The temporal context of Russia's invasion is pivotal, aligning with a dynamic global landscape characterized by the rise of a multipolar world, surges in global nationalism, and the erosion of liberal democracies. This occurs concurrently with a diplomatic narrative emphasizing a 'threat to the international rules-based order,' echoing widespread concerns about the system's overall health. The success of Russia's aggression not only raises concerns about further territorial ambitions but also establishes a concerning precedent for aspiring global powers, thereby posing a tangible threat to both the Charter system and the prohibition on the use of force.

Acknowledging this threat underscores the underutilization of available options to reinforce the prohibition. Military intervention is rendered unfeasible due to the Russian veto in the Security Council. However, alternative measures, particularly the exploration of criminal prosecution for those responsible for the invasion, remain largely unexplored.

Contrary to skeptical perspectives, an aggression prosecution may not hinder peace efforts. Historical examples suggest that public shaming and the legal pursuit of leaders can prompt a change in tone and result in a loss of domestic support. In this context, an aggression prosecution can function as an “inter-state

proceedings and did not comply with the Court's ruling. The Nicaragua Case remains a landmark in international law, addressing issues of state responsibility, the use of force, and intervention.

transitional justice mechanism”, signaling a departure from past actions and creating favorable conditions for international peace. Moreover, it holds promise as a deterrent, given that most states base their foreign policy decisions on a rational cost–benefit analysis. While the efficacy of international criminal justice in deterring state actions is debated, criminalizing acts of aggression may wield a more potent deterrent effect compared to other international crimes. This nuanced approach underscores the multifaceted potential of legal avenues in addressing the complexities of Russia's actions in the international arena.

In conclusion, the examination of the problematic issue of the crime of aggression reveals a complex landscape, particularly in the context of Russia's invasion of Ukraine. The invasion unequivocally qualifies as an act of aggression, manifestly violating the UN Charter, yet the International Criminal Court currently lacks jurisdiction over this crime in the present case. This limitation stems from Russia's non-membership in the Rome Statute, raising questions about the efficacy of triggering ICC jurisdiction through state referrals. The arrest warrant issued against President Putin for war crimes underscores the ICC's focus on crimes against humanity and war crimes, but not on the crime of aggression.

The historical evolution of the crime of aggression, from its absence in the Rome Conference discussions to its eventual inclusion through the Kampala amendments, highlights the challenges and controversies surrounding its definition and jurisdiction. While the crime's recognition as *jus cogens* is established, its operationalization faces hurdles, especially in situations involving non-State Parties. However, challenges persist, including debates on adherence to this authority and the jurisdictional limitations based on State ratifications of the Rome Statute.

The essence of the crime of aggression, focused on acts against state sovereignty, is clearly manifested in Russia's invasion, implicating President Putin as a driving force. Despite the limitations posed by Russia's non-membership, the

application of the "Uniting for Peace Resolution of 1950" by the General Assembly provides an alternative avenue.

In the broader geopolitical context, the invasion occurs amid a shifting global landscape, raising concerns about the threat posed to the international rules-based order. The multifaceted nature of this threat necessitates a comprehensive response beyond military intervention. The exploration of criminal prosecution emerges as a viable option, presenting a low-cost, impactful mechanism to signal the intolerance of blatant violations.

To conclude, while challenges persist in holding aggressors accountable, the exploration of legal avenues, particularly criminal prosecution, stands out as a promising path to address the complexities of Russia's actions and reinforce the prohibition on the use of force in the international arena. The next section will delve into potential mechanisms for accountability, including the feasibility of establishing an *ad hoc* tribunal or reforming the Rome Statute to better address atrocity crimes in Ukraine.

4. The Controversial Hypothesis of the Institution of an *Ad Hoc* or Hybrid Tribunal

The proposition to establish an *ad hoc* or a hybrid tribunal to address Ukraine's aggression has sparked considerable debate and intrigue within the international legal community. For some, this would appear as one of the possible means to hold Putin accountable for the crimes committed in Ukraine, particularly to establish jurisdiction for aggression. The exploration of this avenue involves examining the feasibility of creating the Ukraine Aggression Tribunal through agreements with various entities: Ukraine and the UN, Ukraine and the Council of Europe, Ukraine and the EU, or Ukraine and other States.

The potential establishment of a special tribunal has been a subject of contention among experts, with notable opposition from figures such as R.S. Aitala, the President of the Pre-Trial Chamber of the International Criminal Court responsible for issuing the arrest warrant. Aitala, during his lectures at University, vehemently rejected the idea of creating a "second Nuremberg" or a future tribunal *ex post* perceived as favoring the victors. Other doctrine's opposition is grounded in practical constraints related to the UN Charter, highlighting the daunting challenge of obtaining a Security Council resolution (given Russia's *veto* power).

Beyond geopolitical hurdles, the concept of creating a tribunal with judges who may not be entirely impartial raises an anachronistic concern. While such an approach had its justifications in historical contexts like Nuremberg, where a clear and powerful message was deemed necessary after World War II, its application in the 21st century could be seen as conflicting with the fundamental principles that underpin modern conceptions of criminal proceedings. The presumption of innocence and the importance of impartiality in adjudication, central tenets of contemporary justice, might be compromised in a tribunal perceived as predisposed against the accused.

Given this ambiguity, a range of proposals has emerged, drawing inspiration from diverse models in international legal history. The exploration of alternative frameworks reflects a nuanced response to the complexities surrounding accountability mechanisms, seeking approaches that align with contemporary legal values while addressing the challenges posed by the Ukrainian conflict.

In some scholars' analysis, such as the one made by Carrie McDougall,¹⁹⁷ the imperative need to prosecute crimes of aggression against Ukraine is meticulously examined, leading to a resolute conclusion: establishing an *ad hoc* international tribunal stands out as the only viable path in her opinion. The protracted discourse surrounding the definition of the crime within the Rome

¹⁹⁷Carrie McDougall, "The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine," *Journal of Conflict and Security Law*, Volume 28, no. 2, (2023): 203–30, <https://doi.org/10.1093/jcsl/krad004>.

Statute, ratified in 2010, results in a nuanced regime, limiting the International Criminal Court's jurisdiction in scenarios involving non-State Parties, notably Russia. Proposals for amendments to empower the General Assembly face insurmountable UN Charter constraints, rendering the ICC an impractical option for adjudicating aggression against Ukraine. Domestic prosecutions, fraught with jurisdictional challenges, potential immunities, and concerns of impartiality, are scrutinized against the backdrop of the impracticality of ICC-centric reforms. As Ukraine contemplates domestic legal avenues, a myriad of challenges becomes apparent. The intricacies of jurisdiction, reliance on universal jurisdiction, and potential immunities for Russian defendants present formidable hurdles. Issues such as trials *in absentia*, lacking the credibility of participatory proceedings, and the risk of domestic processes being perceived as victor's justice, compound the challenges. According to McDougall, in response to these complexities, Ukraine should lean decisively towards advocating for the establishment of a special international tribunal. But exploring avenues through UN approval or treaty adoption, this proposition encounters challenges in garnering broad support for legitimacy. Nevertheless, the potential benefits of such a tribunal, overcoming jurisdictional and immunity impediments, and offering a more impartial and credible *forum* for justice, position it as a realistic and promising alternative. The *momentum* behind this proposal, supported by international bodies, signifies a pragmatic solution to address the intricate legal landscape surrounding crimes committed against Ukraine, as meticulously elucidated in McDougall's article.¹⁹⁸

Moreover, from another point of view, it would be interesting to consider Kevin Jon Heller's proposal of a Hybrid Tribunal.¹⁹⁹ The main difference between the two types lies in the scope and composition: *ad hoc* tribunals are created for specific conflicts on an international level, while hybrid tribunals involve a combination of international and domestic elements and are often established to address crimes within a specific country or region.

¹⁹⁸ *Ibid.*

¹⁹⁹ Kevin Jon Heller, "The Best Option: An Extraordinary Ukrainian Chamber for Aggression," *Opinio Juris*, March 16, 2022, accessed December 2023, <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

In his analysis, Heller starts from outlining four “traditional” (potential) options for prosecuting Russia's unprovoked aggression against Ukraine including: utilizing the International Criminal Court, establishing an *ad hoc* international tribunal through various means, pursuing domestic court proceedings with territorial or universal jurisdiction, or considering a hybrid tribunal within the Ukrainian judicial system with the support of the Council of Europe. Most of them have been already mentioned in the previous chapters.

Heller weighs the advantages and drawbacks of each option, before getting into the core of the proposal, would be enriching to see some of his critics to the classical approaches. First of all, in his opinion, the ICC while offering economies of scale and addressing selectivity concerns, faces challenges due to the need for amendments to its jurisdiction and potential issues with General Assembly referrals. *Ad hoc* international tribunals, whether created through a General Assembly resolution or a treaty, are seen as fit for purpose but vulnerable to allegations of selectivity, especially given past failures to create similar tribunals. Domestic prosecutions, whether with territorial or universal jurisdiction, pose legitimacy and jurisdictional challenges, especially given the ongoing conflict and political dynamics in Ukraine, Russia, and Belarus.²⁰⁰

Heller proposes another option, suggesting the exploration of a hybrid tribunal named the Extraordinary Ukrainian Chamber for Aggression (EUCA). Drawing inspiration from the Extraordinary African Chambers²⁰¹ that successfully prosecuted the former President of Chad.²⁰² Heller envisions a Council of Europe-

²⁰⁰Kevin Jon Heller, "Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis," *Journal of Genocide Research* (2022): 17–20, 24, <https://doi.org/10.1080/14623528.2022.2095094>.

²⁰¹ The Extraordinary African Chambers (EAC) were established to address cases of international crimes committed in Chad between June 7, 1982, and December 1, 1990. The EAC was created through an agreement between the African Union (AU) and Senegal, signed on August 22, 2012. The chambers operated as a hybrid tribunal within the Senegalese judicial system. Inaugurated on February 8, 2013, the EAC had jurisdiction over crimes such as genocide, crimes against humanity, war crimes, and torture. The EAC served as a model for hybrid tribunals, demonstrating an innovative approach to address atrocities while involving both national and international components in the legal proceedings.

²⁰² The Extraordinary African Chambers (EAC) prosecuted the former President of Chad, Hissène Habré. Habré was accused of committing international crimes, including genocide, crimes against

supported EUCA that could be quickly established within Ukraine's judicial system, operate during the conflict, and involve judges and prosecutors from Ukraine and Council of Europe (CoE) member states. This regional solution aims to maximize benefits while mitigating costs associated with other options. Heller underscores the potential legitimacy of a EUCA, emphasizing the CoE's regional focus and its ability to address the specific issue of Russian aggression against Ukraine.

Ultimately, Heller contends that a regional solution, represented by a CoE-supported EUCA, offers a better chance of success compared to *ad hoc* international tribunals or domestic prosecutions pursued unilaterally. The proposal aims to send a powerful message of accountability for Russia's actions and emphasizes the need for a coordinated, regionally focused approach to address the specific challenges posed by the conflict. But in this evaluation, this approach is unlikely to address all the issues associated with domestic prosecutions, including concerns about immunities, as acknowledged by Heller. Additionally, there are uncertainties regarding the compatibility of this suggestion with the Ukrainian Constitution.²⁰³

Secondly, before continuing, it is important to step back in the past and make a brief digression on past experiences to have a more complete vision of the topic. Precedents set by various international, internationalized, or hybrid tribunals have been invoked to inform the discourse. The proponents argue that understanding the circumstances surrounding the creation and jurisdiction of these tribunals will shed light on the viability and utility of a special tribunal for Ukraine. A comparative analysis of key tribunals is indispensable to assess their effectiveness as precedents, especially concerning issues of immunities and the obligation of cooperation.

humanity, war crimes, and torture during his rule from June 7, 1982, to December 1, 1990, in Chad. The EAC specifically targeted individuals deemed most responsible for these atrocities, and Hissène Habré was one of the primary figures brought to trial for the alleged offenses. In May 2016, Hissène Habré was found guilty of crimes against humanity, war crimes, and torture, and he was sentenced to life in prison. This marked a significant outcome for the EAC in holding a former head of state accountable for serious human rights violations.

²⁰³Carrie McDougall, "The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine," *Journal of Conflict and Security Law*, Volume 28, no. 2 (2023): 203–230. <https://doi.org/10.1093/jcsl/krad004>.

The initial two international military tribunals were established in the aftermath of World War II in Nuremberg and Tokyo. After Germany's unconditional surrender, the United States, the Soviet Union, France, and the United Kingdom collectively assumed supreme authority over the country, inheriting all powers previously held by the German government. On August 8, 1945, in the interests of all United Nations, the four occupying powers reached an agreement for prosecuting and punishing major war criminals from the European axis. Article 1 of the agreement outlined the establishment of the tribunal, to be done in consultation with the Control Council for Germany, consisting of commanders-in-chief from the four occupying powers. These tribunals, addressing crimes against peace, war crimes, and crimes against humanity, are considered by some as relevant precedents. However, distinctions arise between the Nuremberg tribunal and the proposed Ukraine aggression tribunal. The Nuremberg tribunal operated under the authority of occupying states, a dynamic absent in the Ukraine scenario. Consequently, the authors argue against overestimating the Nuremberg tribunal's applicability as a precedent.

In the post-Cold War era, the UN Security Council established the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). While these tribunals were significant in addressing genocide, crimes against humanity, and war crimes, their jurisdictional limitations and high budgets render them less directly relevant to the proposed Ukraine aggression tribunal. Nonetheless, they serve a valuable purpose in highlighting distinctions between these tribunals and potential models for the Ukraine case.

Amid a non-international armed conflict in Sierra Leone, the UNSC was requested to create the Special Court for Sierra Leone (SCSL). Differing from the ICTY and ICTR, the SCSL had jurisdiction over specific crimes and was not a subsidiary organ of the UN Security Council. Despite being mentioned as a potential precedent, it could be argued against its applicability, given the distinction

in the creation process involving the UNSC, making it an improbable model for a Ukraine aggression tribunal.²⁰⁴

The Extraordinary Chambers in the Courts of Cambodia or ECCC, established through an agreement between the UN and Cambodia, aimed to combat impunity for international crimes. While some proponents suggest it as a precedent for a Ukraine aggression tribunal, the Legal Assessment made by the European Parliament caution against its direct relevance due to differences in the negotiation process and the involvement of the UN General Assembly.²⁰⁵ The unique circumstances of Cambodia seeking the ECCC's creation do not align with the Ukraine situation.

The Special Tribunal for Lebanon or STL, established through an agreement between the UN and Lebanon, focuses on crimes related to a specific incident in 2005. While its jurisdiction is limited, it serves as a relevant case study in the context of UN-state agreements.

Indeed, after these remarks, for a better comprehension of the Ukraine case study, it is due to ask: who possesses the authority to create such Tribunals? The United Nations Security Council (UNSC), under Chapter VII of the UN Charter,²⁰⁶

²⁰⁴Oliver Corten and Vaios Koutroulis, "Tribunal for the Crime of Aggression against Ukraine - a Legal Assessment", 2022, accessed January 2024, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf)

²⁰⁵*Ibid.*

²⁰⁶ Indeed, Chapter VII of the United Nations Charter is a crucial component that outlines the powers of the UN Security Council in maintaining international peace and security. This chapter grants the Security Council the authority to assess and respond to situations that pose a threat to peace, involve a breach of the peace, or constitute an act of aggression. The specific language from Article 39 of the UN Charter states that the Security Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". Furthermore, under Chapter VII, the Security Council is empowered to take both military and non-military measures to address such threats and restore international peace and security. These measures may include economic sanctions, diplomatic efforts, and, in more severe cases, the authorization of the use of force. Chapter VII reflects the collective responsibility of the international community, as represented by the Security Council, to address and prevent situations that could escalate into conflicts threatening global peace. The provisions within this chapter underscore the importance of the Security Council's role as a central mechanism for responding to challenges to international peace and security.

holds the authority to establish international tribunals, a practice exercised in the past. While the binding nature of decisions by such a tribunal is advantageous, the geopolitical reality renders the creation of a tribunal with jurisdiction over Russian aggression improbable.

Alternative avenues, such as the UN General Assembly's (UNGA) powers, particularly through Resolution 377 ('Uniting for Peace'),²⁰⁷ may offer an interesting possibility. This resolution empowers the General Assembly to make recommendations for collective measures when the Security Council fails to act due to a lack of unanimity among its permanent members. The legality of creating a tribunal by General Assembly, as evidenced by historical precedents, is acknowledged, yet its efficacy and legitimacy, especially *vis-à-vis* Russia, remain questionable.

Despite the absence of a specific provision in the UN Charter granting coercive powers to the UN General Assembly, historical instances, such as the establishment of the UN Administrative Tribunal, suggest its authority to create judicial bodies within the scope of its functions. However, the key distinction lies in the nature of these bodies; creating a tribunal for citizens of a UN Member State raises doubts about its legality concerning that state. While UN General Assembly resolutions may pave the way for 'recommendations,' they fall short of providing a legal basis for the tribunal's creation or jurisdiction, which would inherently rely on Ukraine's domestic criminal jurisdiction. The debate persists, pondering whether UNGA, through an evolutive interpretation of its powers, could create a special tribunal for the crime of aggression. Such a scenario would mirror the legal basis and jurisdiction exercised by bodies like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).²⁰⁸

²⁰⁷ Lester H. Woolsey, "The 'Uniting for Peace' Resolution of the United Nations," *American Journal of International Law* 45, no. 1 (January 1951): 129–37, <https://doi.org/10.2307/2194786>.

²⁰⁸ Oliver Corten, and Vaios Koutroulis, "Tribunal for the Crime of Aggression against Ukraine - a Legal Assessment," 2022, accessed January 2024, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf)

In this intricate legal landscape, the possibility of the UN General Assembly (UNGA) creating a tribunal binding on UN Member States remains contested, emphasizing the need for a nuanced understanding of evolving international law. The potential adoption of a binding 'Uniting for Peace' resolution by UNGA would signify a strong advancement, yet questions of enforceability and international cooperation persist, particularly in the face of geopolitical complexities surrounding the Ukrainian conflict.

Considering the inherent legal complexities in directly establishing the tribunal by the UN, the option garnering extensive support involves the formation of the special tribunal through an agreement. As elucidated in this analysis of international and internationalized *ad hoc* criminal tribunals, the creation of a criminal tribunal through an agreement between Ukraine and an international organization or willing States is legally viable.

It is crucial to underscore that Ukrainian criminal law already incorporates legal provisions that address acts of aggression. Specifically, articles 332.2 and 437 of the Ukrainian Criminal Code criminalize the “illegal crossing of the state border of Ukraine” and the “planning, preparation, and waging of an aggressive war”.²⁰⁹ These existing legal provisions can be reaffirmed and seamlessly integrated into an agreement, thereby granting Ukraine the sovereign prerogative to delegate jurisdiction to a tribunal established through an international treaty. Within this framework, the tribunal, being “established by law”, conforms to principles that safeguard the rights of the accused. As part of this exploration, careful consideration is given to the feasibility of establishing the Ukraine Aggression Tribunal through agreements with various entities, namely: Ukraine and the UN, Ukraine and the Council of Europe, Ukraine and the EU, and Ukraine and other States. This assessment involves a comprehensive examination of the legal, diplomatic, and practical aspects associated with each potential agreement, ensuring that the establishment of the tribunal aligns with international legal principles and norms.

²⁰⁹See The Criminal Code of Ukraine, Law of 5 April 2001, No 2341-III.

Additionally, such agreements would serve to reinforce Ukraine's commitment to accountability for acts of aggression and contribute to the broader framework of international justice.

Moving to the objections, in this context legitimacy holds paramount significance in the realm of international criminal law, reflecting the reaffirmation of fundamental values within the global community. This issue hinges largely on the modalities of the tribunal's establishment, as previously explored. The criteria used to gauge legitimacy will vary, prompting a nuanced examination of perceived challenges and potential remedies in this section.

It is essential to acknowledge that establishing a 'special' or *ad hoc* court or tribunal inherently poses legitimacy challenges. The historical denunciation of such courts as emblematic of victor's justice underscores the preference for institutional and permanent judicial bodies whenever possible. Introducing an *ad hoc tribunal* with jurisdiction over a crime within the ICC's purview risks undermining the ICC itself.

Regrettably, the current legal landscape does not allow judgment on crimes of aggression in Ukraine. Given the unique circumstances and the forceful reaction to this violation, an exceptional creation might be contemplated. However, to avoid the perception of a tribunal formed by select States acting independently, a strong involvement of universal international organizations is advocated. The following analysis distinguishes between scenarios where the tribunal represents the international community, ensuring high legitimacy, and instances where it arises from agreements between States, leading to lower legitimacy.²¹⁰

Affirming the legitimacy of an international tribunal solely through State agreements is challenging, particularly when universality and representativeness of the international community are pivotal criteria. This option, rooted in the principle

²¹⁰Olivier Corten, and Vaios Koutroulis, "Tribunal for the Crime of Aggression against Ukraine - a Legal Assessment," 2022, accessed January 2024, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf).

of State equality, risks opening avenues for multiple special courts worldwide, potentially allowing any State to create a tribunal with its allies to judge perceived aggressors.

Grounding legitimacy on the democratic character of participating States is a weak argument, as past actions of Western States have faced accusations of aggression without acceptance of international jurisdiction. The application of precedents like Nuremberg and Tokyo is complex due to the absence of an established international criminal court and the acceptance of jurisdiction by Germany and Japan. Moreover, contemporary precedents of international criminal tribunals cited for relevance were established post-conflict, offering limited guidance on the impact of creating a tribunal amid ongoing hostilities. The potential consequences, such as radicalizing positions or fostering internal frictions, remain speculative. Relying solely on agreements between States or regional organizations, European or otherwise, renders the tribunal's legitimacy highly problematic. Thus, the involvement of universal international organizations is deemed crucial to uphold the legitimacy they represent.

Moreover, domestic prosecutions are under consideration, with Ukraine criminalizing aggression, possessing territorial jurisdiction, and initiating investigations into the crime. However, domestic prosecutions face significant challenges. Jurisdictional issues, potential immunities for Russian defendants, and the credibility of trials conducted *in absentia* are formidable obstacles. Furthermore, such proceedings risk being perceived as biased, potentially leading to claims of victor's justice or victim's revenge.

Recognizing these challenges, Ukraine is actively pursuing the establishment of a special international tribunal. This proposal, gaining momentum and support from various entities such as the Council of Europe, the European Union, NATO, and individual states, envisions a tribunal with delegated territorial jurisdiction over the crime. The feasibility of this approach is underscored by the limitations of domestic prosecutions and the need for an impartial and

internationally recognized forum to address the crimes of aggression committed against Ukraine.

The establishment of the proposed tribunal to prosecute crimes of aggression committed against Ukraine holds the potential to signal a departure from the unchecked dominance of might over right. Discussions surrounding the proposal frequently reference Nuremberg as a pertinent precedent. As discussed before, while Nuremberg, along with Tokyo, represents the only international trials for what is now known as the crime of aggression, distinctions should be drawn. Nuremberg primarily exemplifies the use of law by powerful States against defeated enemies. In contrast, a more fitting precedent emerges from the Kampala Conference in 2010, where non-Western States, collaborating with sympathetic Western governments, emphasized the significance of prohibiting the use of force and the role of justice in the international peace and security framework, challenging the interests of the Permanent Five.

Over the past 13 years, the belief that the aggression amendments signified a shift in the balance between power and law has waned. Disappointment in the International Criminal Court and a growing skepticism regarding the efficacy of international law and institutions have contributed to this decline. Establishing a special tribunal for Ukraine, prioritizing justice for the weaker party over the powerful, not only has the potential to address the erosion of confidence in the international criminal justice project but also to reinforce the prohibition of the use of force more emphatically and enduringly than previous international responses to the Russian invasion. The ongoing crisis may also persuade powerful Western States and their allies to recognize the global interest in the vitality of this prohibition. In addition to endorsing the proposed tribunal, States should be encouraged to trust in the safeguards embedded in the definition of the crime of aggression, submit themselves to the ICC's jurisdiction over the crime, and maximize the current events' potential to strengthen the prohibition of the use of force as the cornerstone of the international rules-based order.

Another critique of the suggested tribunal revolves around the accusation of “selective justice”,²¹¹ posing a potential threat to the overarching international criminal justice initiative. This criticism takes two principal forms: firstly, contending that creating an additional justice mechanism for Ukrainians would be inappropriate, especially in light of the relatively neglected plight of victims in regions like Syria and Yemen; secondly, asserting that historical crimes of aggression have frequently gone unpunished.²¹² But the primary objection to the proposed Ukraine Aggression Tribunal centers on two main criticisms. First, concerns about the potential cost of establishing the tribunal are dismissed, emphasizing that the international community's failure to allocate funds for such a purpose would reveal skewed priorities. The tribunal's cost is deemed modest compared to current expenditures on arming Ukraine and imposing financial pressure on Russia.²¹³

To conclude, in evaluating the proposition for special tribunals, it becomes evident that concerns and complexities arise at multiple levels although some people see it the only way to hold Putin responsible. From the potential challenges related to the UN Charter and the Security Council's dynamics, particularly Russia's veto power, to the perceived anachronism of creating a tribunal that may not adhere to the principles of impartiality and fairness characterizing modern criminal proceedings, the opposition underscores significant legal and practical hurdles such as legitimacy and costs. The focus (maybe) should shift towards strengthening existing legal frameworks, fostering international cooperation, and exploring pragmatic solutions that align with established principles of international law.

²¹¹ “Selective justice” refers to the perception or accusation that legal or judicial actions are applied inconsistently, targeting specific individuals or groups while overlooking or neglecting others. The term implies a bias or partiality in the application of legal standards, leading to unequal treatment based on factors such as nationality, political affiliation, or other considerations. When discussing international affairs or legal mechanisms, the concept of selective justice often arises in the context of international criminal prosecutions, where critics argue that certain individuals or nations may be disproportionately targeted or, conversely, shielded from accountability based on political or strategic considerations.

²¹² Carrie McDougall, “The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine,” *Journal of Conflict and Security Law*, Volume 28, no. 2 (March 20, 2023): 203–30, <https://doi.org/10.1093/jcsl/krad004>.

²¹³ *Ibid.*

5. The Possibility of Reforming the Statute of Rome

This section evaluates potential amendments and reforms that could enhance the Statute of Rome's effectiveness in addressing atrocity crimes in order to overcome the issues analyzed before mainly connected to aggression crime. Different international law experts have formulated some theories.

In recent contributions, Luis Moreno Ocampo,²¹⁴ the inaugural Prosecutor of the International Criminal Court, contends that establishing a Special Tribunal for the Crime of Aggression leads to "selective justice." Ocampo suggests a seemingly straightforward solution: the amendment of Article 15bis (5)²¹⁵ of the Rome Statute by removing the words «by that State's nationals or». This change, according to Ocampo, could occur swiftly and enable the ICC to exercise jurisdiction over the crime of aggression committed against Ukraine. This response engages with Ocampo's proposal while emphasizing the complexities and challenges inherent in amending the Rome Statute.²¹⁶

The annals of international criminal law enforcement are marked by instances of selectivity, manifested in forms such as victors' justice and the establishment of "international(ized)" enforcement mechanisms for specific situations while neglecting others. The establishment of the International Criminal Court in 1998 emerged from the pursuit of a permanent and universal international justice mechanism, driven by the goal of ensuring justice and preventing impunity for all victims of crimes under international law. Positioned as a permanent institution with aspirations of universality, the ICC aimed to obviate the necessity

²¹⁴Astrid Reisinger Coracini. "Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?" Just Security Blog. March 21, 2023, accessed January 2024, <https://ssrn.com/abstract=4398313>.

²¹⁵ Article 15 bis(5) of the Statute of Rome.« In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.»

²¹⁶ Luis Moreno Ocampo, "Ending Selective Justice for the International Crime of Aggression," Just Security, January 31, 2023, accessed January 2024, <https://www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/>.

for *ad hoc* or *post hoc* enforcement mechanisms. As seen before the Court possesses a clear mandate that alerts alleged perpetrators to the risk of prosecution from the inception of a conflict. Over time, it has rightfully evolved into what former ICC Prosecutor Fatou Bensouda termed the focal point of "a system of global criminal justice." Sustaining and fortifying this central role is imperative.

However, the Rome Statute itself is not immune to selectivity. The ICC, grounded in an international treaty, exercises jurisdiction tethered to the territory and nationals of States parties (Art 12.2 Rome Statute)²¹⁷ or States that accept the Court's jurisdiction (Art 12.3 ICC Statute).²¹⁸ Consequently, unless the ICC Statute attains universal ratification, its exercise of jurisdiction remains inherently selective. Article 13(b) of the ICC Statute²¹⁹ empowers the United Nations Security Council to refer situations involving non-States parties, it is an inherently political and selective organ.²²⁰ The discretionary use of prosecutorial discretion in selecting or prioritizing situations and cases impacts the perceived legitimacy of the Court. This acknowledgment does not imply an accusation of selective justice at the ICC

²¹⁷ Article 12 ICC Statute of Rome states: Preconditions to the exercise of jurisdiction «1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. »

²¹⁸ *Ibid.*

²¹⁹ Article 13 Statute of Rome - Exercise of jurisdiction, affirms: «The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15. »

²²⁰ Astrid Reisinger Coracini, "Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?" Just Security Blog, March 21, 2023, <https://ssrn.com/abstract=4398313>.

but serves as a reminder that the Court's design inherently incorporates elements of selectivity. Enabling the ICC to exert jurisdiction over the crime of aggression in the context of Ukraine would mitigate the selective enforcement of international criminal law by the ICC, albeit not eliminating it entirely. Specifically, the deletion of five words in Art 15bis (5)²²¹ of the ICC Statute would not conclusively halt the Court's selective exercise of jurisdiction over the crime of aggression but would rather mitigate it.²²²

The International Criminal Court has held jurisdiction over the crime of aggression since the adoption of the Rome Statute, ex art 5.1 (d) ICC Statute, marking a milestone achieved through compromise. Despite being acknowledged as one of the "most serious crimes of concern to the international community as a whole" (Art 5 ICC Statute),²²³ the Court could not immediately exercise jurisdiction over the crime until States established provisions defining the crime's conditions for jurisdiction (Art 5(2) ICC Statute).²²⁴ The culmination of twelve years of negotiations resulted in the approval of provisions at the first Review Conference of the Rome Statute in Kampala, Uganda, in 2010 (RC/Res.6, the Kampala amendments).²²⁵ However, the activation of the Court's jurisdiction over the crime of aggression faced further delays, contingent upon a decision post-January 1, 2017

²²¹ Article 15 bis (5) of the Statute of Rome.« In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.»

²²²Astrid Reisinger Coracini, "Is Amending the Rome Statute the Panacea Against Perceived Selectivity and Impunity for the Crime of Aggression Committed Against Ukraine?" Just Security Blog, March 21, 2023, <https://ssrn.com/abstract=4398313>.

²²³Article 5 of the Rome Statute - Crimes within the jurisdiction of the Court affirms: «1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations. »

²²⁴ *Ibid.*

²²⁵"Amendments to the Rome Statute of the International Criminal Court on the crime of aggression" (Resolution RC/Res.6),International Law Commission, United Nations Treaty Collection (2010). <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>.

(Arts 15bis (3), 15ter (3) ICC Statute)²²⁶ The Assembly of States Parties of the Rome Statute eventually decided in December 2017 to activate the Court's jurisdiction over the crime of aggression from July 17, 2018 (ICC-ASP/16/Res.5, 2017 activation decision, para. 1).²²⁷

In essence, the two-decade timeline provides insights into the intricate legal and political complexities characterizing these negotiations. Altering the conditions of the Court's jurisdiction over the crime of aggression, housed within this compound of compromises, is anticipated to be an equally formidable challenge. Even if an expeditious consensus on amending these conditions were attainable, the immediate entry into force of any amendment following adoption remains doubtful.

²²⁶Article 15 bis Rome Statute - Exercise of jurisdiction over the crime of aggression (State referral, proprio motu): « 1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be affected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. »

²²⁷Officially, the Assembly of States Parties of the International Criminal Court (ICC) adopted a resolution on 14 December 2017 deciding 'to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018: ICC-ASP/16/Res.5, 14 December 2017 ('2017 resolution' or 'activation resolution').

Potential ratification by States, a process prone to protraction, adds another layer of complexity. Thus, the feasibility of successfully amending the ICC Statute within a few months to ensure accountability for the crime of aggression committed against Ukraine appears unrealistic. However, initiating discussions promptly is imperative, not only to facilitate the Court's expeditious enforcement of the crime in comparable future situations but also to prepare for the mandatory review of the amendments on the crime of aggression to be done seven years after the commencement of the Court's jurisdiction over that crime, in 2025 (as stated in RC/Res.6.)²²⁸

The exercise of jurisdiction over the crime of aggression by the ICC is governed by Arts 15bis and 15ter²²⁹ of the ICC Statute. Art 15ter addresses the referral of a situation by the Security Council, aligning with the ICC's jurisdictional framework covering genocide, crimes against humanity, and war crimes. Conversely, Art 15bis, dealing with the referral of a situation by a State party or a *proprio motu* investigation by the Prosecutor, deviates significantly from the Statute's general jurisdictional regime. Acknowledging the Security Council's primary role in international peace and security as per the United Nations Charter, Art 15bis paras. 6-9 introduce an additional requirement for the authorization of the initiation of an investigation of the crime of aggression, either by the Security Council or, if unsuccessful, by the Court's Pre-Trial Division. At the core of the

²²⁸"Amendments to the Rome Statute of the International Criminal Court on the crime of aggression" (Resolution RC/Res.6), International Law Commission, United Nations Treaty Collection (2010). <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>.

²²⁹ Article 15ter Rome Statute: Exercise of jurisdiction over the crime of aggression (Security Council referral), states «1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. »

Kampala compromise, Art 15 bis paras. 4 and 5 limit the Court's exercise of jurisdiction over the crime of aggression.

Paragraph 4 addresses the Court's jurisdiction over a crime of aggression arising from an act of aggression committed by a State party. It is grounded in the understanding that the Statute's general jurisdictional regime, in principle, applies to the crime of aggression. This recognition stems from the fact that the crime of aggression has been listed as a crime within the jurisdiction of the Court since 1998 (Art 5 ICC Statute), and, in accordance with Art 12(1) ICC Statute, a State becoming a Party thereby accepts the Court's jurisdiction over the crimes outlined in Article 5. The discretion provided to States under Art 5(2) ICC Statute to define the conditions for the Court's exercise of jurisdiction over the crime of aggression reinforces the applicability of the Statute's general jurisdictional regime, with Para. 4 allowing States parties the option to opt out. The contested compromise embedded in Art 15 bis paragraph 4 ICC Statute awaits authoritative judgment by the ICC judges, as highlighted in a paper by Jennifer Trahan.²³⁰

Paragraph 5 concerns the Court's jurisdiction over non-State parties, explicitly barring the Court from exercising its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. This provision negates the Court's jurisdiction based on the principles of territoriality or active nationality whenever a non-State party is involved.

In the context of the existing jurisdictional framework, Luis Moreno Ocampo's proposal to eliminate five words from Art 15 bis para. 5 of the Statute of Rome is deemed insufficient to eliminate “selective justice for the international crime of aggression.”²³¹ Primarily centered on bridging the accountability gap in the Ukrainian situation, the proposal exclusively targets acts of aggression

²³⁰Jennifer Trahan, “From Kampala to New York—the Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression,” *International Criminal Law Review* 18, no. 2 (2018): 197–243, <https://doi.org/10.1163/15718123-01802003>.

²³¹Astrid Reisinger Coracini, “Is Amending the Rome Statute the Panacea against Perceived Selectivity and Impunity for the Crime of Aggression Committed against Ukraine?,” *SSRN Electronic Journal*, 2023, accessed December 2023, <https://doi.org/10.2139/ssrn.4398313>.

committed by non-State parties, neglecting to address exceptions to the ICC's jurisdiction over acts committed by a State party.

The potential removal of five words from Article 15bis, paragraph 5, raises questions about the jurisdiction of the International Criminal Court over acts of aggression committed by a non-State party against a State party that has ratified the Kampala amendments. This distinction is crucial because, according to the Rome Statute, only a State party that has accepted the amendments may provide the ICC with the necessary jurisdictional link under Articles 15bis (4) and 12 ICC Statute. As a result, conflicts like the one between Azerbaijan and Armenia or incidents like the U.S. attack in Iraq would remain outside the Court's jurisdiction since these states are not signatories to the ICC Statute.²³² Similarly, although Ukraine enacted the required constitutional changes for ratification in 2016 (effective from 2019), it has not yet achieved the status of a State party, as previously discussed.

Concerns also arise about whether retaining a reference to the territory of non-State Parties in Article 15bis, paragraph 5, might undermine the intended effect. Given that the crime of aggression occurs in both the aggressor and aggressed states, questions emerge regarding the jurisdictional link under Article 12(2) for acts committed by nationals of a non-State party on the territory of another non-State party (pertaining to preparation, planning, and initiation). Additionally, uncertainties persist about whether the jurisdictional link established for acts on the territory of the aggressed state (initiation and waging) would suffice to authorize jurisdiction over preparatory acts.

While these questions are resolvable, they require extensive deliberation among states before contemplating an amendment to the aggression provision. Time is one of the more significant issues concerning the proposals of reforming the Rome Statute. The likelihood of conducting such diplomatic discussions within a short span of a few months is doubtful.

²³² *Ibid.*

In addition to the aforementioned inquiries tied to Ocampo's²³³ specific proposal, the preparation of an amendment to the Court's conditions for the exercise of jurisdiction will inevitably instigate a more extensive discourse. If such an amendment were to be proposed to eliminate the Court's "selective exercise of jurisdiction"²³⁴ over the crime of aggression, the fundamental question would emerge regarding the extent of selectivity that should be rectified.

Various questions may arise in the context of proposing amendments to the ICC Statute, particularly concerning the crime of aggression. These include considerations such as whether the amendment should remove the exception for non-State parties in Article 15bis, paragraph 5, potentially extending to Article 15bis, paragraph 4. Another point of discussion is whether this exception for non-State parties should align with the situation of State parties that have not accepted the aggression amendments, thereby incorporating jurisdiction under Article 12(2) and the opt-out provision outlined in Article 15bis, paragraph 4. This proposal prompts a potential reopening of discussions on the content of Article 15bis, paragraph 4, and raises questions about the applicability of Article 12(3) to the crime of aggression. Alternatively, there is the consideration of whether the amendment should eliminate all exceptions to the Court's jurisdiction, applying to both non-State parties and State parties opting out, and align the Court's jurisdiction over the crime of aggression with its jurisdiction over the other three core crimes.²³⁵ Additionally, there is the awareness of accusations of selectivity, prompting consideration of whether an amendment should address the root cause of potential

²³³Luis Moreno Ocampo, "A Pragmatic Legal Approach to End Russia's Aggression," Just Security, February 23, 2023, accessed December 2024, <https://www.justsecurity.org/85218/a-pragmatic-legal-approach-to-end-russias-aggression/>.

²³⁴Luis Moreno Ocampo, "Ending Selective Justice for the International Crime of Aggression," Just Security, January 31, 2023, accessed January 2024, <https://www.justsecurity.org/84949/ending-selective-justice-for-the-international-crime-of-aggression/>.

²³⁵Astrid Reisinger Coracini, "Is Amending the Rome Statute the Panacea against Perceived Selectivity and Impunity for the Crime of Aggression Committed against Ukraine?," SSRN Electronic Journal, 2023, accessed December 2023, <https://doi.org/10.2139/ssrn.4398313>.

future selective jurisdiction over "amended most serious crimes" as outlined in Article 121(5) of the ICC Statute.²³⁶

Pursuant to Art 121(3) of the ICC Statute,²³⁷ an amendment necessitates adoption by consensus or a two-thirds majority. While non-State parties may not have voting rights against the adoption of an amendment at the Assembly of States Parties, it would be naive to assume that their positions would not be effectively endorsed by close allies or States with shared political or economic interests. Finally, acknowledging that impunity for perpetrators of crimes under international law is not a right of their state of nationality, the implications of an amendment on the rights of third States must be addressed. Despite the resolvability of these issues, anticipating that these intricate legal questions, intertwined with or used as a pretext for delicate political considerations, could be conclusively decided in a swift debate either leading up to or during the forthcoming session of the Assembly of States Parties is deemed unrealistic.

²³⁶ Article 121 Rome Statute - Amendments, states: «1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference. »

²³⁷ *Ibid.*

Ocampo's perspective on the adoption of an amendment by a two-thirds majority of the assembly (a conference) of States parties as sufficient for its application appears inconsistent with the amendment mechanisms outlined in the ICC Statute, which mandate ratification or acceptance for an amendment to enter into force, a process that may also entail a significant duration.²³⁸

Except for amendments solely affecting institutional aspects,²³⁹ the Statute delineates two entry-into-force mechanisms. Amendments to Arts 5, 6, 7, 8, and 8bis of the Statute come into effect «for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance» according to Article 121. All other amendments come into effect «for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them. »

Regarding an amendment to the conditions for the exercise of jurisdiction over the crime of aggression, it is not entirely clear which entry-into-force regime would apply. Since Art 15bis is explicitly not listed in Arts 121(5), Art 121(4) seems the likely candidate. From a temporal standpoint, this would significantly delay the practical effect of the amendment, as it would only enter into force if accepted by seven-eighths of States parties.

A strict interpretation of Art 121(5) indicates that it does not extend to amendments of Article 15bis, ruling the jurisdiction over the Crime of Aggression. However, considering that the introduction of Article 15bis was based on the provisions of Article 121(5), one could argue that any future amendment to Article 15bis should follow a similar procedural framework.²⁴⁰ Article 121(5) suggests a subjective entry into force for each ratifying/accepting State party, prompting

²³⁸ *Ibid.*

²³⁹ See Article 122 of the Rome Statute - Amendments to provisions of an institutional nature.

²⁴⁰ Astrid Reisinger Coracini, "Is Amending the Rome Statute the Panacea against Perceived Selectivity and Impunity for the Crime of Aggression Committed against Ukraine?" SSRN Electronic Journal, 2023, accessed December 2023, <https://doi.org/10.2139/ssrn.4398313>.

questions about whether a single ratification would have an objective effect concerning a non-State party or a non-accepting State party. In the context of the situation in Ukraine, it raises further inquiries, such as whether this singular ratification must be by Ukraine, a potential future State party, or if Ukraine's ratification is necessary regardless of the number of ratifications. It's notable that the Kampala amendments established a minimum requirement of 30 ratifications as a precondition for the exercise of jurisdiction, a threshold that has already been met.

Indeed, it is important to highlight that currently two versions of the ICC Statute are in force concerning the crime of aggression. First, the original ICC Statute applies among States parties that have not accepted the Kampala amendments and another one between States parties that have accepted the Kampala amendments and those that have not (Art 40(3) of the Vienna Convention on Law of Treaties²⁴¹ on amendments of multilateral treaties). Second, a version of the (amended) Rome Statute applies among States parties that have accepted the amendments. If Art 121(5) was to apply, three versions of the ICC Statute would coexist simultaneously until all States parties that have ratified the Kampala amendments also ratify the new amendment.

To avoid creating further sub-regimes, some scholars²⁴² argue for the suspension of individual entry into force of the amendment for States parties that have accepted the Kampala amendments until all "Kampala states" ratify the new amendment. Legal precautions would also need to be taken to ensure that a State party that has not yet accepted the Kampala amendments or a new State party could

²⁴¹ Article 40(3) of the Vienna Convention on the Law of Treaties stipulates that the prior practice of the parties and the subsequent practice in the application of the treaty shall be taken into account in the interpretation of a treaty, along with relevant rules of international law. This provision underscores the importance of considering the parties' conduct before and after the treaty's conclusion to elucidate its meaning and application, in addition to adhering to established principles of international law.

²⁴² Fiona Abken, "Amending the Amendment: In Search of an Adequate Procedure for a Revision of the Jurisdictional Regime for the Crime of Aggression in the Rome Statute," EJIL: Talk!, January 13, 2023, accessed December 2023, <https://www.ejiltalk.org/amending-the-amendment-in-search-of-an-adequate-procedure-for-a-revision-of-the-jurisdictional-regime-for-the-crime-of-aggression-in-the-rome-statute/>.

not be allowed to ratify the Kampala amendments without the new aggression amendment.

The process of amending the conditions governing the International Criminal Court's jurisdiction over the crime of aggression involves intricate legal considerations and delicate political issues, necessitating comprehensive deliberations among all States parties. While achieving this objective within a short timeframe or during a single session of the Assembly of States Parties is unlikely, initiating this discourse is crucial, especially in anticipation of the mandatory review of the aggression provision in 2025. The active involvement of Ukraine, the most recent State party to the (amended) ICC Statute, would significantly enhance the amendment process.

Simultaneously, it is imperative not to postpone accountability for the crime of aggression committed against Ukraine. *Ad hoc* or *post hoc* or Hybrid enforcement mechanisms, such as a Special Tribunal for Crimes of Aggression, could bridge the enforcement gap in the ICC Statute, thereby mitigating the selective application of international criminal law more broadly but they would arise other critical issues as analyzed in the previous section of the chapter.

The potential amendments discussed above carry significant implications for holding individuals, including high-profile figures like President Putin, accountable for acts of aggression in Ukraine. By addressing uncertainties in the jurisdictional framework, these amendments may contribute to closing accountability gaps and ensuring that those responsible for the aggression face legal consequences. The removal of obstacles related to the jurisdiction over crimes of aggression involving non-State parties could enhance the ability to prosecute and hold individuals criminally responsible for their actions. In particular, this could have notable consequences in the context of the ongoing conflict in Ukraine, where allegations of aggression against President Putin and other top government officials have been raised. Clarifying and expanding the ICC's jurisdiction over the crime of aggression would strengthen the international community's capacity to pursue

justice and establish individual criminal responsibility for such grave offenses committed on the global stage.

However, the implementation of these reforms would take too much time or appear highly challenging to achieve in reality. Unfortunately, the ICC's jurisdiction over the crime of aggression (at least for now) seems destined to remain impaired. Fortunately, the competence of the Pre-Trial Chamber, which issued the arrest warrant for Putin, was able to circumvent the obstacle through skillful reasoning.

6. Conclusion

Drawing upon the multifaceted exploration of the crime of aggression and the potential mechanisms for accountability in Ukraine, several key conclusions emerge.

The analysis of the problematic issue of the crime of aggression within the context of Russia's invasion of Ukraine drives to very intricate insights and challenges. The following conclusions encapsulate key findings and considerations after drafting this dissertation thesis.

First of all, the ICC, empowered to prosecute the crime of aggression, faces jurisdictional limitations. Russia's non-membership in the Rome Statute raises intricate questions. Notably, in issuing the arrest warrants the ICC has focused on war crimes and crimes against humanity in Ukraine, excluding the crime of aggression; it underscores the serious problems of prosecuting such offenses.

The historical evolution of the crime of aggression, from its omission in the Rome Conference to its inclusion through the Kampala amendments, reveals challenges and controversies. While recognized as *jus cogens*, operationalizing the crime, especially in situations involving non-State Parties, remains complex and contentious.

To sum up, while challenges persist in holding aggressors accountable for this leaders' crime, the examination of legal avenues, particularly a special tribunal or amendments to the Rome Statute, offers a promising path to address the complexities of Russia's actions and reinforce international norms.

The exploration of the controversial hypothesis surrounding the institution of an *ad hoc tribunal* or hybrid tribunal for addressing Ukraine's aggression against Russia is very complicated. The proposition to establish a special tribunal has triggered extensive debate within the international legal community, serving as a potential means to hold Putin accountable for crimes committed in Ukraine. However, the opposition, notably from experts like R.S. Aitala (in his University lectures), raises concerns about creating an impartial tribunal or a "Second Nuremberg", there are also constraints related to the UN Charter and the near impossibility of a Security Council resolution, given Russia's veto power. The perceived anachronistic nature of an *ad hoc* tribunal, reminiscent of Nuremberg, raises questions about impartiality and fairness in modern criminal proceedings.

At the same time the costs and the time to create it must be taken into consideration. While swift, such an approach may undermine contemporary principles and the presumption of innocence, prompting a reevaluation of the relevance and effectiveness of this model in the 21st century. The authority of the UN Security Council to establish international tribunals is acknowledged, but geopolitical realities, especially Russia's veto, render this avenue improbable. Alternative possibilities, such as invoking Resolution 377 ('Uniting for Peace') by the UN General Assembly, offer interesting perspectives. However, questions persist about the enforceability and legitimacy of such measures, especially concerning Russia. Legitimacy remains a paramount concern in establishing a new tribunal.

Moreover, exploring the possibility of reforms to the Statute of Rome, particularly addressing challenges related to the crime of aggression, reveals a complex landscape. Luis Moreno Ocampo's proposal to amend Article 15bis (5)

faces legal intricacies, providing a seemingly straightforward solution to enhance the ICC's jurisdiction over aggression. However, the inherent “selectivity” in the jurisdiction and the historical complexities of amending the Rome Statute suggest challenges in achieving immediate practical results. The proposed amendments, while holding promise for accountability and justice, are deemed challenging to implement promptly. It is evident that thanks to the elaborate reasoning made by the Pre-Trial Chamber, the Judges were able to circumnavigate all the obstacles connected to crime of aggression and issue Putin’s Arrest Warrant within the actual legal framework.

In summary, the exploration of reforms to the Statute of Rome and the contemplation of establishing an *ad hoc* or hybrid tribunal as mechanisms to address accountability in the Ukrainian conflict reveal significant limits that dampen their practical viability. The intricate legal considerations involved in amending the ICC Statute, coupled with the complex diplomatic and political dynamics, present formidable challenges that hinder swift implementation.

Despite all these considerations, the aim of this thesis (and in particular of this chapter) is to analyze the main practical theories proposed nowadays to find a solution to a present and still ongoing conflict. These findings might not be easy to apply but they are efforts made by international criminal law’s experts. Some interesting proposals deserve more space in the international community’s debate and that’s why it is important to study and consider them.

To conclude, reforming the Rome Statute in a more effective way (than the one presented by Ocampo) could be one way to improve the ICC power to change this to have an actual impact. Currently, it is hard to think that such a Court can’t proceed *in absentia* or that the Crime of Aggression (a Leader’s Crime) requires all these jurisdictional requirements to be prosecuted. While creating a special tribunal would be a step back in the past on the ground of criminal guarantees and presumptions, an implementation or amendments of the present tools could be the key.

The world is strongly asking for peace and everybody is looking at the ICC with high hopes. International Criminal Law must be the answer to hold individuals accountable for the atrocity crimes committed in Ukraine.

CHAPTER V - FINAL REMARKS AND CONCLUSIONS

1. Conclusions

In the midst of this dissertation's extensive exploration, it is crucial to humanize the conflict in Ukraine, framing it as a significant threat to both regional and international security. Beyond numbers and statistics there are people and children. This conflict, driven by geopolitical tensions, carries implications that extend far beyond Ukraine's borders.

The ongoing crisis poses multifaceted dangers on various fronts, reaching beyond immediate humanitarian concerns to challenge the foundations of international law. The disregard for established norms and the hesitancy of powerful actors to be held accountable undermine the core principles of the international legal order. The Security Council's inaction in the face of aggression raises doubts about the effectiveness of international institutions in ensuring global peace and security. The conflict exposes gaps in the current framework for addressing such crimes. The limited jurisdiction of the ICC and challenges in holding high-ranking officials accountable underscore the urgent need for legal reforms.

In response to Russia's invasion of Ukraine, the European Union has taken a prominent role in pursuing international criminal justice initiatives. Various actions, including the referral of the situation to the International Criminal Court and the issuance of a warrant for Vladimir Putin's alleged war crimes, showcase Europe's commitment. European states, along with Ukraine and the ICC, have established joint investigations and support structures like Eurojust or the Atrocity Crimes Advisory Group.²⁴³

²⁴³ The Atrocity Crimes Advisory Group, formed by the European Union, the UK, and the US, plays a crucial role in offering specialized knowledge to enhance the capabilities of Ukraine's War Crimes Unit within the Office of the Prosecutor General.

There's also a civil-society proposal for a special tribunal within Ukraine's justice system to prosecute Russian and Belorussian leadership for the crime of aggression. Yet, challenges emerge both in legal and political spheres. Legally, prosecuting a sitting head of state without their state's consent faces obstacles due to international law on immunity. Politically, establishing a tribunal solely for Putin might be viewed as “selective”, given past instances like the US-led Iraq invasion.²⁴⁴ While legal issues limit actions against Putin in international courts, support for national-level prosecutions and evidence collection remains crucial.²⁴⁵

The suggested prudent course for the EU and European states is to continue supporting in gathering evidence, preservation, and sharing, especially with the ICC. The focus should be on building national capacity for prosecuting international crimes, particularly in Ukraine, while remaining prepared for unforeseen developments in the future.²⁴⁶

In the face of these threats, the international community must reflect on the shortcomings of existing mechanisms and collectively work to fortify the foundations of international law. Lessons learned from the Ukrainian crisis should inspire a renewed commitment to strengthening accountability, promoting justice, and safeguarding the principles underpinning the international legal system. Only through collaborative efforts and a steadfast commitment to upholding the rule of law can the international community effectively respond to challenges posed by conflicts like the one in Ukraine, ensuring a more just and secure world for future generations

²⁴⁴ According to Roger O’Keefe, Full Professor at the Department of Legal Studies at Bocconi University: « Politically, the establishment an international tribunal specifically to try Putin and others for the crime of aggression would smack of selectivity, even hypocrisy, given the US-led invasion of Iraq in 2003, NATO’s military campaign against the Federal Republic of Yugoslavia in 1999 and other manifest yet unpunished violations of the UN Charter.»

²⁴⁵ Roger O’Keefe, “Taking Putin to Court?,” Via Sarfatti 25 (Bocconi, December 21, 2023), <https://www.viasarfatti25.unibocconi.eu/notizia.php?idArt=25888>.

²⁴⁶ *Ibid.*

This dissertation, delving into a thorough investigation of individual criminal responsibility with a focus on the Ukrainian crisis, concludes with insights amalgamated from each chapter. The key findings of the study consist of open-ended questions, each with numerous potential answers, as there is no single definitive solution. The first one is: Is it possible to take Putin to Court?²⁴⁷ For example, Ursula von der Leyen, President of the European Commission, in July 2023, addressed it, underscoring: «We will leave no stone unturned to hold Putin and his henchmen accountable. » This is what the international community (and civil society) are hoping for; unfortunately, sometimes reality is harder than what is auspicious. My ultimate research has tried to shed a light on this particular hurdles.

Concerning the Thesis' initial chapter, titled "Introduction and Conflict Overview," the Ukrainian crisis is portrayed not just as a regional issue but as a direct challenge to international law's core principles. This sets the stage for a comprehensive examination, emphasizing the lack of consistent literature on the topic. The second and third chapters laid the foundation for a complete understanding of the challenges posed by atrocity crimes in Ukraine, paving the way for the proposals and findings detailed in the fourth chapter.

In Fact, in the second chapter, a panoramic exploration unfolded, introducing readers to the International Criminal Court and the foundational elements embedded in the Rome Statute. The in-depth examination of the general aspects of the ICC laid the groundwork, providing a comprehensive understanding of the legal apparatus essential for addressing international crimes. The findings highlight the inherent challenges in prosecuting individuals for war crimes, crimes against humanity, and genocide in Ukraine highlight inherent challenges in existing legal frameworks. The (sometimes) limited jurisdiction of the ICC and challenges in holding high-ranking officials accountable reveal the need for legal reforms.

Moving forward, the third chapter, titled "The Ukrainian Situation at the ICC: Putin's Arrest Warrant," emerged as an essential juncture, narrowing the focus

²⁴⁷ *Ibid.*

onto individual criminal responsibility, particularly scrutinizing the arrest warrant issued for President Putin. This chapter dissected the path from the Ukrainian situation to the ICC's issuance of the arrest warrant. Specific topics such as children trafficking and the complexities of arresting powerful figures, exemplified by cases like Al Bashir and Putin, were examined, providing critical insights into the practical hurdles of enforcing warrants against leaders in charge or of significant influence.

The main outcomes underscore an evident asymmetry in holding individuals like Putin, Heads of State still in power, accountable, seemingly an insurmountable challenge. The Arrest Warrant issued by the ICC necessitates collaboration from States Parties to become effective.

Consequently, other natural questions may come up to the reader's mind: Who, and which state, would assume the responsibility of arresting Putin or Al Bashir? For example, in recent times, despite global expectations, South Africa did not arrest President Putin. If other states do not collaborate with the Court, and it cannot proceed *in absence*, how can these individuals be brought before the ICC? Identifying a country willing to arrest or detain Putin in its prisons adds another layer of complexity to this dilemma.

Moreover, is this arrest warrant feasible, or is it primarily a strong signal to the global community, emphasizing the need to halt Russia's actions? Those are the questions I asked myself while drafting my dissertation. There is no single answer to all these question marks, only valid reflections. The reality is that the International Criminal Court, particularly the judges of the Pre-Trial Chamber guided by R.S. Aitala went to great lengths, navigating the inherent constraints within the Rome Statute. They addressed crucial aspects such as the deportation of children, ultimately succeeding in issuing an arrest warrant, something many deemed impossible. This act provided a new glimmer of hope to the world.

Moving to the heart of the dissertation, it lies in the findings and proposals of the fourth chapter. The idea of a special tribunal, whether *ad hoc* or hybrid, unfolds as a focal point of contention. While scholars, like Carrie McDougall, see its pragmatic potential, critics, some figures expressed reservations about compromising core legal principles. The exploration of alternative models, exemplified by Kevin Jon Heller's Hybrid Tribunal concept, demonstrates the intricate balance required to deal with the complexities of justice in the aftermath of aggression.

Simultaneously, the prospect of amending the Statute of Rome, as suggested by Luis Moreno Ocampo, emerges as another potential avenue to enhance the International Criminal Court's effectiveness. However, this path is laden with historical precedents and the intricate challenges of achieving *consensus* among State parties.

The complicated nature of these proposed reforms underscores the delicate dance between accountability and the geopolitical realities shaping the international legal landscape. This critical evaluation recognizes gaps in actual legal frameworks. The chapter unfolds as a pragmatic approach to overcome hurdles associated with prosecuting leaders, drawing lessons from historical cases. The emphasis is on adaptive legal responses which should showcase the commitment to ensuring relevance and efficacy of international criminal law.

The potential amendments and alternative mechanisms discussed, might not be perfect or totally feasible, but carry significant implications for holding individuals, including high-profile figures, accountable for acts of aggression. Despite the acknowledged problems, the aim of this exploration is to underscore the importance of analyzing and considering the practical theories proposed for addressing a present conflict, while challenging, they represent earnest efforts by international criminal law experts.

The findings contribute to the ongoing debate on how the international community can best respond to atrocities committed, with an unwavering commitment to justice, accountability, and the prevention of new international crimes. The purpose of this research has been to illuminate the complexities and the urgency to bridge the accountability gap, emphasizing the need for holistic approaches.

As the conflict in Ukraine persists, and with an eye on future challenges, it is also important to advocate for sustained attention to the violations of international law occurring in Ukraine on both sides, urging the international community to actively support ongoing efforts to address crimes committed during the conflict. This includes endorsing measures aimed at mitigating the immediate humanitarian crisis, facilitating the safe return of displaced populations, and promoting long-term reconciliation and justice in the region.

Lastly, as stated before, this thesis represents a small attempt (mine) to recall the attention of the academia to continue exploring and proposing innovative solutions to enhance the effectiveness of international criminal law. As conflicts evolve and present new battles ignite our world, it is crucial to maintain a proactive and adaptive approach to ensure that legal frameworks remain resilient and capable of delivering justice in an ever-changing global landscape. It underscores the pressing need for global actors, including legal scholars, policymakers, and practitioners, to actively engage in dialogue and take concrete steps toward implementing the proposed amendments to the ICC Statute since there is not so much doctrine and debate about it.

In the words of Japanese Philosopher Daisaku Ikeda, «If we cannot feel hope, it is time to create some. » This dissertation emphasizes the need to create hope and find effective ways to prosecute all those who commit grave breaches of international criminal law. It calls for a constructive, positive approach, analyzing the actual situation and looking for practical legal remedies.

History teaches us that acts of atrocity are committed by individuals, not monstrous entities. Individuals must be held responsible for their actions. Rosario Salvatore Aitala poignantly remarked, «A particular collective declination of evil demands the capital letter. It is the absolute Evil of mass atrocities. » This absolute Evil challenges the very essence of humanity. It is not a distant concept confined only to Russia and Ukraine or to the Middle-West; numerous conflicts mar our times. In this world yearning for peace, victims everywhere await justice. The shared duty lies in creating conditions conducive to both. The shared duty lies in creating the conditions conducive to both.

May our collective efforts be guided by the imperative to create a world where justice, founded on resilience and hope, but based on International Law, prevails over the shadows of atrocity.

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