

**Testing viable legal mechanisms to address questions
of accountability emanating from the Russia/Ukraine
conflict**

By

IRENE MARANGELLIS
(Student number: 2015004308)

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STUDY LEADER: Dr A NELL

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ABSTRACT

Russia invaded Ukraine on 24 February 2022. Several atrocities have occurred in the ongoing Russia-Ukraine conflict. We have seen some of the challenges in bringing perpetrators to account. Whilst legal accountability is not necessarily the only form of accountability that could be involved in this conflict, it is necessary to systematically investigate possible legal mechanisms to address accountability in this context. This study purports to analyse and evaluate the feasibility of extant international legal mechanisms available including the United Nations; the International Criminal Court and the International Court of Justice. The study also evaluates the extant mechanisms available on the domestic level, including Ukrainian and Russian Courts, and whether third states could utilise the principle of universal jurisdiction. Lastly, the study will test the feasibility of non-extant alternative transitional justice measures specifically the creation of an *ad hoc* tribunal.

INTRODUCTION

On 24 February 2022, Ukraine was invaded by Russia. Severe consequences emanated from this conflict which have led to numerous casualties, including the destruction of property and infrastructure. Surveying some of these ramifications is vital to justify the necessity and urgency of identifying what the most salient responses required from the international community towards this conflict and the atrocities committed therein should be.

The rippling effects of the conflict have not only affected the combating states, but have been felt globally. The repercussions of this conflict have led to humanitarian crises, socio-economic problems, and geopolitical tension.

Due to the invasion of 24 February 2022, millions of Ukrainian citizens have been forced to flee their homes for safety, which has led to a large refugee crisis. Over 8 million citizens have been displaced within Ukraine.¹ Apart from this displacement, the invasion has also cost the lives of innocent Ukrainian citizens. By attacking infrastructure, including energy infrastructure and water sources, Russian forces have left Ukrainian citizens without the supply of electricity, access to food, clean drinking water or sanitation.² It also left Ukrainian citizens to face starvation, and increased the spread of disease.³

The Russia-Ukraine conflict has not only affected food security in Ukraine but has negatively impacted global food security.⁴ Russia and Ukraine are important exporters of major grains like barley, corn, wheat and vegetable oil.⁵ As countries actively divested from the import of Russian goods, the need to seek new sources of oil, petroleum products and natural gas has caused a surge in energy prices.⁶ The ongoing conflict has further disturbed and affected global food supply and systems, as many countries rely on Russia and Ukraine for food import needs.⁷ Thus, not only has

¹ Nyekwere & Duson 2022: 46-62.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Admin "What you need to Know about the Russian and Ukrainian Conflict", <https://giveuao.org/2023/05/24/what-you-need-to-know-about-the-russian-and-ukrainian-conflict/?gclid=CjwKCAjwwb6lBhBJEiwAbuVUSugMWw7nDzZOXDPisMvIZLmORY3paCy-> (accessed on 14 July 2023).

⁷ Nyekwere & Duson 2022: 46-62.

the ongoing conflict triggered a humanitarian crisis in Ukraine, but it could also cause humanitarian issues in countries that rely on these imports. It further caused disruptions of marine logistics and infrastructure, influencing global food supplies, fuelling instability and price increases, resulting in food insecurity, which may lead to poverty and hunger.⁸

The increase in geopolitical tension and diplomatic shifts can be seen from countries that are realigning and choosing sides. To illustrate this point, some examples will suffice. The effects of the geopolitical tension can be seen in South Africa, for one. South Africa has been allegedly providing arms to Moscow, which has caused distress amongst investors and the markets, causing the South African currency to decline.⁹ Further, the tension emanating from the ongoing conflict has led to the expansion of NATO, where countries that have been exercising their neutrality for years, like Sweden and Finland, are now seeking membership.¹⁰ Further, the geopolitical tension is evident where other countries have strengthened their allegiance to Russia. An example is Turkey, a NATO member, that has objected to Sweden and Finland's alliance to NATO, and has increased its trade with Russia from the outset of the conflict.¹¹

In turn, multiple countries, including the notoriously neutral Switzerland have imposed financial and trade sanctions on Russia, which directly affect international trade, as a response to the ongoing conflict.¹²

From the above ramifications, three main responses are required: first, the war needs to be stopped; second, mechanisms that can mete out criminal responsibility, bring about justice to victims and prevent any future violations; and third, alternative non-

⁸ *Ibid.*

⁹ Investec "BRICS Fallout Knocks Rand", https://www.investec.com/en_za/focus/no-ordinary-wednesday-with-jeremy-maggs/brics-fallout-knocks-rand.html?medium=paid-social&source=linkedin&campaign=sa-icib-randoutlook&position=cibpage&postid=300000518771122&linkId=300000005974663 (accessed on 13 July 2023).

¹⁰ Neuman & Hurt "The ripple effects of Russia's war in Ukraine continue to change the world", <https://www.npr.org/2023/02/22/1157106172/ukraine-russia-war-refugees-food-prices> (accessed on 14 July 2023).

¹¹ *Ibid.*

¹² Admin "What you need to Know about the Russian and Ukrainian Conflict", <https://giveuao.org/2023/05/24/what-you-need-to-know-about-the-russian-and-ukrainian-conflict/?gclid=CjwKCAjwwb6lBhBJEiwAbuVUSugMWw7nDzZOXDPisMvIZLmORy3paCy->, (accessed on 14 July 2023).

legal mechanisms that provide victims the opportunity for reconciliation. While being aware of the importance of all three responses, this thesis will focus on the second response. The second response, which can be justified from the aforementioned ramifications and that they should not occur without any form of responsibility, necessitates the evaluation of possible responsibility mechanisms that might be involved. The ramifications of the ongoing conflict serve as a glaring representation of the urgent need for legal accountability, a just and peaceful resolution, and to restore order and control.

The purpose of this thesis is therefore to evaluate the feasibility of various extant international and domestic legal mechanisms as well as certain non-extant transitional justice measures that could address the crimes and atrocities that emanate from the current Ukraine-Russia conflict. Due to the complex nature of the ongoing conflict, the evaluation of a single mechanism would not be feasible, and it would be prudent to evaluate the feasibility of various mechanisms. For one, the UN has failed to prevent the Russia-Ukraine conflict. Furthermore, courts are struggling to arraign the wrongdoers for the crime of aggression. As mentioned above, socio-economic and political ties between countries and Russia or Ukraine has made it difficult to mobilise the required political will to respond to the ongoing Russia-Ukraine conflict.

This thesis delves into the evaluation of various legal mechanisms available to pursue justice for the crimes emanating from the Russia-Ukraine conflict. The chapters in this study evaluate the feasibility of specific legal and non-legal mechanisms to mete out either individual criminal responsibility or state responsibility. The first three chapters will consider extant international legal mechanisms. The first chapter will investigate the mechanisms available to the United Nations (UN), inclusive of the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC), that might be viable to warrant state accountability for the violations and protect and promote human rights. The second chapter will evaluate whether the International Criminal Court (ICC) is a feasible option to bring alleged perpetrators of international crimes that have been committed on Ukrainian territory to justice. The third chapter evaluates whether the International Court of Justice (ICJ) is a viable option to address the ongoing conflict between Russia and Ukraine by imposing responsibility on either State. The fourth chapter shifts the focus to the avenues available on a domestic level. This chapter evaluates the extant domestic legal mechanisms inclusive of the

Ukrainian Courts; the controversial trials *in absentia*; Russian courts; and trials held in third states based on the principle of universal jurisdiction to respond to the violations of international laws within the ongoing conflict. The fifth chapter will look at the feasibility of implementing non-existent transitional justice measures specifically the establishment of an *ad hoc* tribunal.

This study aims to contribute to legal scholarship by evaluating the feasibility of the different legal and other transitional justice mechanisms that might apply to the current Russia-Ukraine conflict, including existing legal mechanisms (whether domestic or international), and potential new mechanisms (such as the proposed *ad hoc* tribunal).

CHAPTER 1

Evaluation of the feasibility of the mechanisms available to the United Nations to address the current Russia-Ukraine conflict

As the focus of this study is to investigate feasible instruments to address the current Russia-Ukraine conflict, this chapter will start by addressing the viability of the legal and non-legal mechanisms that are available to the UN, of which Ukraine and Russia are Party States. These legal and non-legal mechanisms are based on the foundational treaty, the *United Nations Charter* (UN Charter). The *UN Charter* contains the purpose and principle of the UN, inclusive of obligations of the member states.¹³ The purpose of the UN is to maintain peace and security.¹⁴ Any disputes that could lead to a breach of peace therefore need to be settled by the UN through "... peaceful means, and in conformity with the principles of justice and international law".¹⁵ Furthermore the UN has "... to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...".¹⁶ The UNGA, the UNSC and the United Nations Secretary-General (UNSG) are the organs that are responsible for this task.¹⁷ In order to evaluate the feasibility of the mechanisms available to the UN, to impose state responsibility, this chapter will be subdivided into two main sections. The first section will present a brief theoretical exposition of the UNGA and the UNSC. In particular, the focus will be on the structure and the legal and non-legal mechanisms that emanate from the UNGA, such as the adoption of resolutions. Following from this, the section will delve into the legal and non-legal mechanisms that emanate from the UNSC, namely the passing of resolutions, sanctions, and military action. The second section will apply the theoretical discussion to the Russia-Ukraine context and evaluate the UN's response to the conflict. Thus, in order to protect and promote human rights and warrant accountability for the violations emanating from the ongoing Russia-Ukraine

¹³ Article 1 - Charter of the United Nations.

¹⁴ Dugard *et al* 2018:701.

¹⁵ Article 1 (1) - Charter of the United Nations.

¹⁶ *Ibid.*

¹⁷ Dugard *et al* 2018:701. Article 7 – Charter of the United Nations. The other bodies and organs established by the UN Charter are the following: an Economic and Social Council, a Trusteeship Council, and an International Court of Justice.

conflict, this chapter will conclude by evaluating the feasibility of the legal and non-legal mechanisms available to the UN.

1.1 Theoretical exposition of the UNGA and the UNSC

1.1.1 The UNGA and its Functions and Abilities

The focus in this section will be on the UNGA as a “...plenary body of the UN, with secondary responsibility for the maintenance of international peace and security”.¹⁸ In particular, this section will start off with a brief discussion of the UNGA’s structure, followed by its functions and abilities, which include the adoption of resolutions and special emergency meetings. The second part of this chapter addresses how this relates to the Russia-Ukraine conflict.

The UNGA encompasses 193 member states, of which there are no more than five representatives of each state, holding one vote each.¹⁹ Art 10 of the *UN Charter* sets out the powers and functions of the UNGA within the *UN Charter*, including the provision of limitations that are stipulated in Art 12 of the *UN Charter*.²⁰ Briefly, Art 12(1) of the *UN Charter* stipulates that the UNGA does not have the power to make recommendations on a matter that is before the UNSC, if the UNSC is exercising its duties as stated within the *UN Charter*.²¹ For purposes of this study, the focus will only be on the UNGA’s powers and functions that are relevant to the ongoing Russia-Ukraine conflict. The UNGA makes recommendations on any matter within the scope of the *UN Charter* and international problems (relating to human rights, sustainable development, international peace and security, promoting adherence to international law, global health, disarmament and non-proliferation, economic and social development) within its capabilities through resolutions, and are known as the UNGA Resolutions (UNGAR).²² In general, the UNGA echoes the common goal of member states by addressing the international problems and in turn, furthering the objectives and the principles of the UN. Accordingly, certain disputes can be brought to the attention of the UNGA by member and non-member states and the UNSC, and the

¹⁸ Dugard *et al* 2018:702.

¹⁹ Article 9 and 18 - Charter of the United Nations.

²⁰ Chapter IV, Article 10 - Charter of the United Nations.

²¹ *Ibid*, at Art 12(1).

²² *Ibid*, at Art 13.

UNGA can "... recommend measures for the peaceful adjustment of any situation ... which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the ... Charter setting forth the Purposes and Principles of the United Nations".²³ Further, Art 11(2) of the *UN Charter* precludes the UNGA from imposing enforcement action, and directs the UNGA to refer the matter to the UNSC.²⁴

As mentioned, each member state holds one vote.²⁵ According to Art 18(2) of the *UN Charter*, decisions "on important questions" are made by "... two thirds majority of the members present and voting".²⁶ "Important question" decisions relate to recommendations of "the maintenance of international peace and security", the election, admission, suspension and expulsion of members, "... questions relating to the operation of the trusteeship system, and budgetary questions".²⁷ In turn, Art 18(3) of the *UN Charter* states that decisions "on other questions" that include "...the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting".²⁸

So, are all UNGAR binding? Looking at the binding nature of UNGAR, we can note two categories: resolutions that are binding and resolutions that are not binding. UNGAR that relate to "internal management" are binding, and these include: "... the admission, suspension and expulsion of members and to the budget...".²⁹ UNGAR that are directed to "...member states on matters affecting the maintenance of international peace and the settlement of disputes are not legally binding on states."³⁰ Bringing this discussion into the scope of this chapter, this does not mean that UNGAR have no value. UNGAR bear political weight, especially if they accumulate over the years.³¹ The discussion on the value of UNGAR will be presented in section 1.3 below.

²³ *Ibid*, at Art 14.

²⁴ *Ibid*, at Art 11(2).

²⁵ *Ibid*, at Art 18(1).

²⁶ *Ibid*, at Art 18(2).

²⁷ *Ibid*. Dugard *et al* 2018:703.

²⁸ *Ibid*, at Art 18(3).

²⁹ Dugard *et al* 2018:703.

³⁰ *Ibid*.

³¹ *Ibid*.

Another important function of the UNGA is to call and hold special emergency sessions in terms of resolution 377A(V), known as “Uniting for Peace”.³² Such a special emergency session is convened in cases where the UNSC (discussed in section 1.1.2 below) is barred from exercising its primary responsibilities (the maintenance of international peace and security where it emerges that there is a threat or breach of peace or aggression) due to disparity between the five permanent members.³³ Formerly, the “Uniting for Peace” resolution was implemented in 1950 in response to the vetoes by the Soviet Socialist Republics in the UNSC for measures to protect the Republic of Korea against an aggression that was launched by the military forces of North Korea.³⁴ The matter shall be considered by the UNGA immediately, with the aim of recommending collective measures to Members which can include the use of armed forces, if deemed necessary, in cases of acts of aggression or breaches of peace, with the aim of maintaining or restoring security or peace.³⁵ If it is not in session, the UNGA will meet within twenty-four hours upon request.³⁶ The emergency special session may only be called upon, if requested by the UNSC, on the vote of seven members or the majority of the members of the UN.³⁷ For this special resolution to be adopted, an affirmative vote by two-thirds of the members that are present and voting is required.³⁸ As stated above, however, the UNGAR, including special resolutions, are not binding in nature, they are merely recommendatory, although they could hold great political weight.

In conclusion, this section focused on the brief legal exposition of the UNGA, including its powers and functions to pass resolutions. Below, this discussion will be brought into the scope of this chapter by evaluating what the UNGA has done with regards to the ongoing Russia-Ukraine conflict. In turn, this chapter will conclude with an evaluation on the feasibility of the UNGA and its ability to respond to the ongoing conflict. Before moving onto the application and the evaluation of feasibility, the next section will delve into the legal mechanism that is the UNSC.

³² Resolution A/RES/377(V).

³³ *Ibid.*

³⁴ Scharf 2023: 217-250.

³⁵ Resolution A/RES/377(V).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Congressional Research Service “United Nations Security Council and General Assembly Responses to the Russian Invasion of Ukraine”, [IN11876 \(congress.gov\)](https://www.congress.gov/IN11876) (accessed on 13 April 2024).

1.1.2 The structure of the UNSC and its Legal Mechanisms

The “executive body” of the UN is the UNSC, with its core responsibility being the “maintenance of international peace and security” as noted in Art 24 of the *UN Charter*.³⁹ Specifically, this section will present a legal exposition of its structure, followed by its functions and abilities. The discussion includes the responsibility and structure of the UNSC as stipulated in Chapter V; the power of the UNSC to resolve disputes through peaceful means in terms of Chapter VI; and the power of the UNSC to implement firm action such as sanctions and military action in terms of Chapter VII of the *UN Charter*. All these aspects will be discussed below, followed in section 1.2 by their applicability to the ongoing Russia-Ukraine conflict.

1.1.2.1 Chapter V of the *UN Charter*:

The UNSC consist of 15 members, of which Russia, China, France, the United States of America (USA) and the United Kingdom (UK) are the five permanent members.⁴⁰ There are 10 non–permanent members, and they are elected by the UNGA, for a period of two years, on condition of their contribution “to the maintenance of international peace and security and to the purpose of the Organisation...”.⁴¹ Accordingly, in terms of Art 27(1) of the *UN Charter*, all members are granted one vote each.⁴² The five permanent members are granted the veto power embodied in Art 27 of the *UN Charter*.⁴³ Any decision of the UNSC on procedural matters requires nine member votes and are not subject to a veto by any of the permanent members.⁴⁴ Therefore, when a permanent member vetoes a procedural matter, the decision still stands, as long as there has been nine affirmative votes.⁴⁵ With regards to decisions on any other matter, “... an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Art 52, a party to a dispute shall abstain from voting” is required.⁴⁶

³⁹ Dugard *et al* 2018:708. Chapter V, Article 24 - Charter of the United Nations.

⁴⁰ Chapter V, Article 23 - Charter of the United Nations.

⁴¹ *Ibid*.

⁴² *Ibid*, at Art 27(1).

⁴³ *Ibid*, at Art 27.

⁴⁴ *Ibid*, at Art 27(2).

⁴⁵ Security Council Report “In Hindsight: Procedural Votes”, https://www.securitycouncilreport.org/monthly-forecast/2018-3/in_hindsight_procedural_votes.php (accessed on 13 April 2024).

⁴⁶ Chapter V, Article 27(3) – Charter of the United Nations.

This means that a party to a dispute that falls within Chapter VI or paragraph 3 of Art 52, shall abstain from voting. This does not apply to Chapter VII of the *UN Charter*.⁴⁷ Briefly, let us look at what an abstention from voting entails: "... abstention from voting may be regarded as a concurring vote, as the permanent member is present in the Security Council and able to make a considered choice on whether to vote or to abstain from voting".⁴⁸ Therefore, should a permanent member abstain from voting, the resolution being voted on can be passed on the basis of nine favourable votes.⁴⁹ In turn, "... it is more difficult to treat the absence of a permanent member from the Council as a concurring vote, despite the fact that permanent members are required to be present at the headquarters of the UN at all times."⁵⁰

Where a dispute or a situation would probably risk the maintenance of international peace and security, Art 35 of the *UN Charter* sets out the member and non-member states that can bring these disputes to the attention of the UNSC.⁵¹ In terms of Art 99 of the *UN Charter*, the UNSG can also bring such a dispute to the attention of the UNSC.⁵² In turn, the UNSC could respond by implementing measures under "Chapter VI (section 1.1.2.2 below), Chapter VII (section 1.1.2.3 below), or the general powers contained in Art 24".⁵³ The resolutions that are passed by the UNSC are legally binding.⁵⁴ However, recommendations made in terms of Chapter VI of the *UN Charter* are not legally binding.⁵⁵ These resolutions are referred to as UNSC Resolutions (UNSCR) and require Party States to either take action or refrain from action.⁵⁶

1.1.2.2 Chapter VI of the *UN Charter*:

In terms of Chapter VI of the *UN Charter*, the UNSC has the power to respond to disputes that to its discretion does not "threaten international peace, within the meaning of Chapter VII," but the continuation of the dispute is "likely to endanger the

⁴⁷ *Ibid.*

⁴⁸ Dugard *et al* 2018:709-710.

⁴⁹ Chapter V, Article 27 - Charter of the United Nations.

⁵⁰ *Ibid.*, at Art 28. Dugard *et al* 2018:710.

⁵¹ Chapter VI, Article 35 (1), (2), (3) - Charter of the United Nations.

⁵² Article 99 - Charter of the United Nations.

⁵³ Dugard *et al* 2018:710.

⁵⁴ *Ibid.* Chapter V, Article 25 – Charter of the United Nations.

⁵⁵ Article 36(1) - Charter of the United Nations.

⁵⁶ *Ibid.*, at Art 24, 34, 39, 41-42.

maintenance of international peace and security”.⁵⁷ As specified in Art 33 of the *UN Charter*, the UNSC can call on the parties to the dispute to find a solution, either through “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice”.⁵⁸ In this case the UNSC may “recommend appropriate procedures or methods of adjustment”.⁵⁹ Art 36(3) of the *UN Charter* states that as a “general rule”, legal disputes should be “referred by the parties to the International Court of Justice...”.⁶⁰ As mentioned above, recommendations that emanate from the UNSC under Chapter VI are not legally binding, although they carry political weight due to the nature of the authority of the UNSC.⁶¹

1.1.2.3 Chapter VII of the *UN Charter*:

Where more firm action is required from the UNSC in order to “maintain or restore international peace and security”, Chapter VII of the *UN Charter* allows the UNSC to impose sanctions or to authorise the use of force through military action.⁶² Unlike Chapter VI resolutions, measures imposed under Chapter VII of the *UN Charter* are legally binding.⁶³ Due to the serious effects of these measures, the permanent members often use their veto power to prevent such measures in cases where their interests are at stake.⁶⁴

In order to trigger a Chapter VII action, the UNSC has to determine whether there is an “... existence of any threat to the peace, breach of the peace, or act of aggression...”.⁶⁵ Thus, to restore or maintain international peace and security, the UNSC can make recommendations, or impose measures as set forth in Art 41 and 42 of the *UN Charter*.⁶⁶

⁵⁷ Chapter VI, Article 33 - Charter of the United Nations. Dugard *et al* 2018:710.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, at Art 36(1).

⁶⁰ *Ibid.* at Art 36(3).

⁶¹ Dugard *et al* 2018:710.

⁶² CFR.org Editors “The UN Security Council”, <https://www.cfr.org/background/un-security-council> (accessed on 20 October 2024).

⁶³ Article 25 - Charter of the United Nations.

⁶⁴ Dugard *et al* 2018:712.

⁶⁵ Chapter VII, Article 39 - Charter of the United Nations.

⁶⁶ *Ibid.*

The *UN Charter* makes provision for three types of responses to “threats to the peace”, namely provisional measures (Art 40); non-forcible measures (Art 41), and forcible measures (Art 42).⁶⁷ Below we will briefly touch on each of these responses.

Before enforcement action is recommended, provisional measures under Art 40 of the *UN Charter* can be adopted to avoid a situation from intensifying.⁶⁸ Provisional measures include “a cease-fire or withdrawal of forces”.⁶⁹ Practically, provisional measures are imposed analogous to Art 41 and 42 measures.⁷⁰

In terms of Art 41 of the *UN Charter*, the UNSC can decide on non-forcible measures to execute its decisions and can “...call upon the Members of the UN to apply such measures”.⁷¹ “These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”⁷²

In cases where non-forcible measures are insufficient, or have shown to be insufficient, forcible measures can be imposed by the UNSC in terms of Art 42 of the *UN Charter*.⁷³ The UNSC can “... take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of Members of the UN.”⁷⁴ Under Art 42, the only forcible action that has been taken against states, is the action that “has been authorised by the UN and not the action taken by the UN itself”.⁷⁵

It is opportune, at this stage, to briefly note the availability of sanctions in this context. Sanctions that are imposed by the UNSC are known as collective sanctions, while sanctions imposed on states by another state is known as unilateral sanctions.⁷⁶ Sanctions oblige states to comply with UNSC decisions, endorse international law, or

⁶⁷ *Ibid*, at Art 40-42. Dugard *et al* 2018:715-720.

⁶⁸ Chapter VII, Article 40 - Charter of the United Nations.

⁶⁹ Dugard *et al* 2018:715.

⁷⁰ *Ibid*.

⁷¹ Chapter VII, Article 41 - Charter of the United Nations.

⁷² *Ibid*.

⁷³ *Ibid*, at Art 42.

⁷⁴ *Ibid*.

⁷⁵ Dugard *et al* 2018:718.

⁷⁶ Françoise “The Practical Guide to Humanitarian Law”, <https://guide-humanitarian-law.org/content/article/3/sanctions-diplomatic-economic-or-military/> (accessed on 17 March 2024).

alter behaviour that threatens peace and security.⁷⁷ The different types of sanctions that can be imposed are diplomatic,⁷⁸ economic⁷⁹ and military sanctions⁸⁰ (which is the forcible measure under Art 42).

We have now examined the structure and power of the UNSC under Chapter V of the *UN Charter*, including the measures available to the UNSC under Chapter VI (peaceful measures) and Chapter VII (provisional measures in terms of Art 40, non-forcible measures in terms of Art 41 and forcible measures under Art 42) of the *UN Charter*. The next section will touch on the application of these considerations within the Russia-Ukraine context.

1.2 The UN's Ability to Respond to the Russia-Ukraine Conflict

This section will provide a feasibility analysis of the UN's efforts to respond to the ongoing Russia-Ukraine conflict. The military offensive launched by Russia in Ukraine on 24 February 2022 is ostensibly contrary to the principles laid down in the *UN Charter*, including violations of territorial integrity, sovereignty, and the political independence of Ukraine.⁸¹ As stated above, Russia is a permanent member of the UNSC, thus holding the veto power. Nevertheless, the UN has since responded to the ongoing Russia-Ukraine conflict.⁸² This section will address these responses from the UN. To address these responses, this section will look at the organs of which the UN is composed of. First the section will address the responses from the UNSG as an organ of the UN, followed by the resolutions passed by the UNSC and the UNGA, as organs of the UN.

1.2.1 The Responses from the UNSG to the Russia-Ukraine Conflict

⁷⁷ Chapter VII, Article 41 - Charter of the United Nations.

⁷⁸ Françoise "The Practical Guide to Humanitarian Law", <https://guide-humanitarian-law.org/content/article/3/sanctions-diplomatic-economic-or-military/> (accessed on 17 March 2024).

⁷⁹ Masters "What Are Economic Sanctions?", <https://www.cfr.org/background/what-are-economic-sanctions#chapter-title-0-7> (accessed on 17 March 2024).

Resolution S/Res/1718 (2006). Turk "Impact of sanctions", <https://www.ohchr.org/en/statements-and-speeches/2023/09/impact-sanctions> (accessed on 17 March 2024).

⁸⁰ Chapter VII - Charter of the United Nations.

⁸¹ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 7 July 2023).

Article 2(3) and 2(4) – United Nations Charter.

⁸² *Ibid.*

This section will start by looking at how the UNSG as an organ of the UN has responded to the Russian invasion into Ukraine. Before the invasion, the UNSG held a strong moral position.⁸³ The UNSG spoke to the UNGA the day before Russia invaded Ukraine, about Russia's recognition of decentralising the Donetsk and Luhansk regions of Ukraine.⁸⁴ The UNSG António Guterres (Guterres) stated the following: "the decision of the Russian Federation to recognize the so-called 'independence' of Donetsk and Luhansk regions – and the follow-up – are violations of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations".⁸⁵ He requested that "it is time for restraint, reason, and de-escalation".⁸⁶ Guterres further stated that he urged "all parties to make full use of Article 33 of the Charter and its diverse instruments of pacific settlement of disputes", stating his commitment "to support all efforts to resolve this crisis without further bloodshed".⁸⁷ On the day of the invasion, Guterres stated that "It is wrong. It is against the Charter. It is unacceptable. But it is not irreversible".⁸⁸ He urged President Vladimir Putin of Russia (President Putin) to "stop the military operation. Bring the troops back to Russia".⁸⁹ The UNSG expressed its support by allocating "\$20 million from the Central Emergency Response Fund to meet urgent needs... committed to staying and delivering, to support people in Ukraine in their time of need" and to be "guided by the humanitarian principles of neutrality, impartiality, humanity and independence", noting that "international humanitarian and human rights law must be upheld".⁹⁰

From the above the position of the UNSG before and during the invasion into Ukraine by Russia is clear. The position has been one based on the core principles of the *UN Charter*, and "operationalized through humanitarian lenses".⁹¹ However, one might ask

⁸³ Mihr A *et al.* 2024:383-395.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Guterres "Secretary-General's remarks to the General Assembly on Ukraine", [Secretary-General's remarks to the General Assembly on Ukraine | United Nations Secretary-General](#) (accessed on 20 October 2024).

⁸⁸ Guterres "Statement by the Secretary-General on Ukraine", [Statement by the Secretary-General on Ukraine | United Nations Secretary-General](#) (accessed on 20 October 2024).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Mihr A *et al.* 2024:383-395.

whether this is enough for a situation that involves a forceful invasion by a state that is a permanent member of the UNSC against its neighbouring state.⁹²

More than 200 former UN staff addressed a letter to the UNSG in April 2022, to “implore” the UNSG “to intensify your personal efforts, deploying all capabilities at your disposal and acting upon lessons learnt from previous conflicts, for the cessation of hostilities and conflict resolution through peaceful means”.⁹³ In turn, the UNSG Guterres visited Moscow and Ukraine in hopes for a “diplomatic end to the conflict”.⁹⁴ Ever since the UNSG’s visits, throughout the time including high-level meetings, the main theme of Guterres’ “speeches has remained tough messaging to Russia with appeals for an end to the hostilities and peaceful resolution of the conflict without any concrete initiative to advance that”.⁹⁵

However, the UN and the UNSG achieved some form of success when a deal was made in July 2022 that allowed for fertiliser and food exports to recommence from three Ukrainian Black Sea Ports.⁹⁶ This deal, with the support of the Turkish government, helped alleviate the global food emergency by increasing availability and decreasing prices, which is key for developing countries.⁹⁷ Accordingly, a corresponding Memorandum of Understanding (MoU) was signed by both the UN and Russia and “extended for four months till mid-November”, which allowed for the “full access to Russian food and fertilizer products, including ammonia, to global markets”.⁹⁸

Further, the UNSG support to the International Atomic Energy Agency (IAEA) and Assistance Mission to Zaporizhzhya (ISAMZ) by establishing a Nuclear Safety and Security Protection Zone can be noted.⁹⁹ The Zaporizhzhya nuclear power plant, located in an area that was occupied by Russian forces in the early days of the

⁹² *Ibid.*

⁹³ Wintour “António Guterres urged to take lead in securing peace in Ukraine or risk future of UN”, [António Guterres urged to take lead in securing peace in Ukraine or risk future of UN | United Nations | The Guardian](#) (accessed on 20 October 2024).

⁹⁴ Lynch “The Reluctant Peacemaker”, [U.N. Secretary-General Guterres Wades Into Diplomatic Role in Ukraine-Russia War](#) (accessed on 20 October 2024).

⁹⁵ Mihr A *et al.* 2024:383-395.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

invasion, has been badly shelled.¹⁰⁰ In response, after the UNSG visited the power plant on 1 September 2022, a permanent group was established to observe the situation.¹⁰¹ The IAEA Director General Rafael Mariano Grossi (Grossi) stated that without establishing a safety and security zone for the nuclear power plant, it could lead to “a nuclear accident”.¹⁰² Upon Grossi’s request, the consultations commenced in September between Ukraine and Russia, to create a Nuclear Safety and Security Protection Zone surrounding the plant.¹⁰³ Further, IAEA experts have been present around all the nuclear plants in Ukraine, as from early 2023, to prevent a nuclear accident.¹⁰⁴

As stated above, UN humanitarian assistance has been an essential factor in alleviating the suffering in Ukraine.¹⁰⁵ In response, the UNSG appointed Amin Awad as the UN Crisis Coordinator for Ukraine, after the UNSC attempted to pass a resolution that demanded Russia’s immediate withdrawal from Ukraine (this resolution will be discussed in the next section).¹⁰⁶ On 1 March 2022, the UN and its humanitarian partners launched an emergency appeal of \$1.7 billion, in order to provide assistance to people in Ukraine and the refugees in neighbouring countries.¹⁰⁷ By April 2022, the appeal was 70% funded.¹⁰⁸ By 26 April 2022, the crisis in Ukraine deteriorated and in turn the UN doubled the emergency appeal to \$2.24 billion, and at present this appeal is 86% funded.¹⁰⁹ The funds are used to provide, amongst others, supplies to areas that have experienced severe fighting; and multipurpose cash to Ukrainian citizens.¹¹⁰ The funds also support “the health and nutrition services, education, livelihoods and

¹⁰⁰ IAEA “UN Security Council: IAEA Grossi Calls for Establishment of Nuclear Safety and Security Protection Zone at Zaporizhzhya NPP”, [UN Security Council: IAEA Grossi Calls for Establishment of Nuclear Safety and Security Protection Zone at Zaporizhzhya NPP | IAEA](#) (accessed on 20 October 2024).

¹⁰¹ Mihr A *et al.* 2024:383-395.

¹⁰² IAEA “UN Security Council: IAEA Grossi Calls for Establishment of Nuclear Safety and Security Protection Zone at Zaporizhzhya NPP”, [UN Security Council: IAEA Grossi Calls for Establishment of Nuclear Safety and Security Protection Zone at Zaporizhzhya NPP | IAEA](#) (accessed on 20 October 2024).

¹⁰³ IAEA “Update 141 – IAEA Director General Statement on Situation in Ukraine”, [Update 141 – IAEA Director General Statement on Situation in Ukraine | IAEA](#) (accessed on 20 October 2024).

¹⁰⁴ *Ibid.*

¹⁰⁵ Mihr A *et al.* 2024:383-395.

¹⁰⁶ UN News “Russia blocks Security Council action on Ukraine” [Russia blocks Security Council action on Ukraine | UN News](#) (accessed on 20 October 2024).

¹⁰⁷ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 7 July 2023).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ UN “Ukraine: UN appeals for \$5.6 billion to help millions affected by relentless conflict”, Ukraine (22 October 2024).

temporary protection”.¹¹¹ We can clearly note that the Office of the UN High Commissioner for Refugees has played a critical role in providing support to Ukrainian citizens as well as to the Ukrainian refugees who have fled Ukraine, in an attempt to counter the consequences of the invasion.¹¹²

Further to this, the UN Human Rights Council (UNHRC) adopted Resolution A/HRC/49/L.1 to establish a commission of inquiry in Ukraine, to investigate violations committed during Russia’s military attack on Ukraine on 4 March 2022. Thirty-two countries voted in favour, three against, and 13 abstained.¹¹³ On 5 March 2022, the UNHRC decided to rather appoint an independent international commission of inquiry, called the UN Human Rights Monitoring Mission in Ukraine (HRMMU).¹¹⁴ Subsequently, on 12 May 2022, the UNHRC, adopted Resolution A/HRC/S-34/L.1, which called for an investigation by the Independent International Commission of Inquiry regarding alleged atrocities against Russian troops, in which 33 voted in favour, two against and 12 abstained.¹¹⁵ Since the resolution has been passed, the HRMMU has been actively monitoring and documenting the violations that have been occurring to date in Ukraine.¹¹⁶ The aim of this resolution is to hold those responsible for the violations accountable.¹¹⁷

From the above, we can clearly see the efforts that the UN and the UNSG have made in an attempt to respond to the ongoing conflict in Ukraine, since before the invasion. The UNSG Guterres urged Ukraine and Russia to utilise Art 33 for a peaceful settlement of the dispute, before the invasion, even offering help from the UN. However, Russia has not complied with these statements as the conflict is still continuing. So, is the UN and its UNSG feasible in responding to the ongoing Russia-Ukraine conflict? The UN and its UNSG have not been able to hold Russia accountable and prevent the invasion into Ukraine. Does this mean that the UN and its UNSG is not a feasible mechanism? The UN has played a critical role and sought alternative ways to respond to the invasion into Ukraine by utilising its available resources to

¹¹¹ *Ibid.*

¹¹² Mihr A *et al.* 2024:383-395.

¹¹³ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 27 April 2023).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* For a full list of all the documentations, please refer to the source.

¹¹⁷ *Ibid.*

counter the consequences that emanated from the invasion. The UN and its UNSG reached a deal to resume trade export from three Ukrainian Black Sea Ports. Further, the UN signed a MoU with Russia to allow the global market full access to Russian food and fertiliser. This has helped to alleviate the pressures on the global market by reducing food and fuel prices. The UN further took action to support the IAEA in order to prevent a nuclear accident. Moreover, the UN and its humanitarian partners have provided key assistance to alleviate the suffering of the Ukrainian citizens. The UN humanitarian partners have raised funds to support Ukrainian people and refugees that have fled to neighbouring countries. The UNHRC has established a HRMMU to document the violations of international humanitarian and human rights laws. This indicates that the UN and its UNSG is able to seek alternative ways to respond to the ongoing Russia-Ukraine conflict. It has, however, not been successful in pressurising Russia to withdraw from the territory of Ukraine.

The next section will focus on the responses from the UNSC and the UNGA to the Russia-Ukraine conflict.

1.2.2 The UNSC and UNGA Response to the Russia-Ukraine conflict

This section will evaluate the responses from the UNSC and the UNGA, as organs of the UN, in an attempt to address the ongoing Russia-Ukraine conflict. As mentioned above, Russia as one of the permanent members of the UNSC, holds a veto power. Russia used this power as soon as the UNSC attempted to pass a draft resolution that was submitted by Albania and the US on 25 February 2022. The draft resolution determined that Russia's invasion into Ukraine was an illegal act of aggression, and that Russia should cease the use of force against Ukraine and withdraw from the area.¹¹⁸ On 25 February 2022, the UNSC voted on this resolution (Resolution S/2022/155), wherein 11 members were in favour, three members abstained, and Russia vetoed the resolution.¹¹⁹ This constituted a substantive resolution (as mentioned in section 1.1.2.1), and required an affirmative vote of nine members of the Council and the concurrent vote, or abstention of all five permanent members, to be

¹¹⁸ Resolution S/2022/155, 25 February 2022.

¹¹⁹ *Ibid.* Congressional Research Service "United Nations Security Council and General Assembly Responses to the Russian Invasion of Ukraine", [IN11876 \(congress.gov\)](https://www.congress.gov/117/records/2023/11/18/IN11876) (accessed on 18 November 2023).

adopted. If this resolution had been passed it "... would have deplored Russia's aggression against Ukraine and demanded its immediate and unconditional withdrawal from the territory of Ukraine...".¹²⁰ It is evident that in this instance the UNSC was prevented from "exercising its primary responsibility for the maintenance of international peace and security".¹²¹ In such cases where the UNSC is barred from exercising its primary responsibilities (and where it emerges that there is a threat or breach of peace or aggression) due to the lack of unanimity of the five permanent members, a special emergency session can be convened by the UNGA in terms of resolution 377A(V), known as "Uniting for Peace", as discussed in section 1.1.1.¹²²

Therefore, responding to the veto by Russia on 25 February 2022, the UNSC adopted a procedural resolution S/RES/2623, in order to pass the matter to the UNGA.¹²³ As mentioned in section 1.1.2, this type of resolution is procedural in nature, and therefore it is not subject to the veto of any permanent member.¹²⁴ In turn, an emergency special session by the UNGA was called because the UNSC was prevented from "exercising its primary responsibility for the maintenance of international peace and security".¹²⁵ Resolution S/RES/2623 was subsequently passed, in which 11 of the members voted affirmatively, three members abstained and Russia vetoed.¹²⁶

Consequently, on 27 February 2022, "the 11th Emergency Special Session of the UNGA was opened...and since then, convening on and off...", adopting several resolutions.¹²⁷ Subsequently, the UNGA convened a special emergency service under the UNGAR 377A(V) on 28 February 2022.¹²⁸ Resolution A/RES/ES-11/1 was adopted on 3 March 2022 by the UNGA, in which 141 votes were in favour, five opposed and 35 abstained.¹²⁹ This resolution considered that the aggression of Russia against

¹²⁰ Mihr A *et al.* 2024:383-395.

¹²¹ Resolution S/2022/155, 25 February 2022. Congressional Research Service "United Nations Security Council and General Assembly Responses to the Russian Invasion of Ukraine", [IN11876 \(congress.gov\)](#) (accessed on 18 November 2023).

¹²² Resolution A/RES/377(V).

¹²³ Congressional Research Service "United Nations Security Council and General Assembly Responses to the Russian Invasion of Ukraine", [IN11876 \(congress.gov\)](#) (accessed on 13 April 2024).

¹²⁴ Resolution S/RES/2623 (2022). Congressional Research Service "United Nations Security Council and General Assembly Responses to the Russian Invasion of Ukraine", [IN11876 \(congress.gov\)](#) (accessed on 18 November 2023).

¹²⁵ *Ibid.*

¹²⁶ Resolution S/RES/2623 (2022).

¹²⁷ Mihr A *et al.* 2024:383-395.

¹²⁸ Resolution S/RES/2623 (2022).

¹²⁹ Resolution A/ES-11/L.1, 3 March 2022, [N2227227.pdf \(un.org\)](#) (accessed on 18 November

Ukraine is in violation of Art 2(4) of the *UN Charter*, and further demanded the immediate cessation of the use of force against Ukraine.¹³⁰ Through this the UNGA declared the invasion into Ukraine by Russia as an act of aggression.¹³¹ Resolution A/RES/ES-11/1 further demanded that Russia immediately withdraw its military forces from Ukraine.¹³² This resolution also condemned all violations of International Humanitarian Law (IHL), violations and abuses of human rights, and requested that the parties to the conflict comply with their obligations under IHL.¹³³ It was the first time in 30 years that the “Uniting for Peace” procedure was utilised by the UNSC and the UNGA – a process to circumvent the UNSC veto power.¹³⁴

The following resolutions flowed from Resolution S/RES/2623: Resolution A/RES/ES-11/2; Resolution A/RES/ES-11/3 and Resolution A/RES/ES-11/4, all of which will be discussed below. On 24 March 2022, the UNGA adopted Resolution A/RES/ES-11/2 on civilian protection along with humanitarian access in Ukraine.¹³⁵ This Resolution condemned any attacks that were directed against other protected persons, civilians and civilian objects, demanding “an immediate cessation of the hostilities” by Russia.¹³⁶ This resolution further noted that all civilians who are fleeing the conflict were to be protected, and that safe access of humanitarian personnel had to be ensured.¹³⁷ This Resolution passed with 140 votes in favour, five against and 38 abstained.¹³⁸

Following this, there has been an obvious increase in the negative votes. On 7 April 2022, the UNGA adopted Resolution A/RES/ES-11/3, which suspended the rights of membership of Russia in the Human Rights Council.¹³⁹ In this resolution, 93 voted in favour, 24 voted against and 58 abstained.¹⁴⁰ In turn, on 26 April 2022, the UNGA adopted Resolution A/RES/76/262 with immediate effect, based on consensus. This

2023).

130

Ibid.

131

Ibid.

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Ibid.

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Ibid.

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Scharf 2023: 217-250.

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The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 7 July 2023).

136

Ibid.

137

Ibid.

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Ibid.

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Ibid.

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Ibid.

Resolution A/RES/76/262 provides that whenever the UNSC permanent members utilise the veto vote, a UNGA meeting will be triggered and held within 10 working days, to explain the reasons for the use of the veto, “provided that the Assembly does not meet in an emergency special session on the same situation”.¹⁴¹ Under this resolution, the UNGA invited the UNSC “to submit a special report on the use of the veto in question... at least 72 hours before the relevant discussion in the Assembly”.¹⁴² This resolution was invoked for the first time on 26 May, where Russia and China cast a veto vote in the UNSC.¹⁴³ The draft resolution before the UNSC would have condemned international ballistic missile launches by North Korea from 24 March 2024 and others that were launched earlier.¹⁴⁴ The draft resolution would further increase the current sanctions against North Korea.¹⁴⁵ In turn, the UNGA held a meeting on 8 June 2022, and heard statements from both China and Russia.¹⁴⁶

On 30 September 2022 the UNSC voted on draft Resolution S/2022/720 that condemned the attempted annexation of Ukrainian regions.¹⁴⁷ This Resolution was voted in favour by 10 members, in which four abstained and Russia vetoed.¹⁴⁸ As set out in Resolution A/RES/76/262, the veto vote cast by Russia triggered a meeting to be held by the UNGA. Subsequently, a meeting was held on 10 October 2022, where the UNGA stated that “the *UN Charter*, the Secretary-General, and the Assembly itself had been clear Russia's invasion and attempted annexation of Ukrainian territory by force, is illegal”.¹⁴⁹ In turn the UNGA adopted Resolution A/RES/ES-11/4, which rejected the sham referenda and the illegal annexation of the territory of Eastern Ukraine.¹⁵⁰ This Resolution ordered Russia to “immediately, completely, and unconditionally withdraw all of its military forces from the territory of Ukraine within its

¹⁴¹ *Ibid.* Resolution A/RES/76/262, 26 April 2022.

¹⁴² *Ibid.*

¹⁴³ Nanda 2023: 287-320.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 1 May 2024).

¹⁴⁸ UN “Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions”, [Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions | UN News](#) (accessed on 20 October 2024).

¹⁴⁹ Nanda 2023: 287-320.

¹⁵⁰ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 1 May 2024).

internationally recognized borders”.¹⁵¹ This resolution further “call[ed] on all States, the UN and international organisations not to recognize any of Russia's annexation claims and demand[ed] the immediate reversal of its annexation declaration”.¹⁵² This Resolution was passed with 143 votes in favour, five opposed votes and 35 abstained votes.¹⁵³

On 7 November 2022, the permanent representatives of Ukraine, Guatemala, Canada and the Kingdom of the Netherlands (Netherlands) addressed a letter to the President of the General Assembly.¹⁵⁴ The permanent members requested the UNGA to resume its 11th emergency special session, “to take action on the draft resolution entitled ‘Furtherance of remedy and reparation for aggression against Ukraine’”.¹⁵⁵ Thus, on 14 November 2022, the UNGA adopted Resolution A/RES/ES-11/5 that called upon member states to create a claims register in The Hague to record the evidence and allegations against Russia.¹⁵⁶ This resolution stated that Russia “must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts”.¹⁵⁷ This resolution was passed with 94 votes in favour, 14 against while 73 abstained.¹⁵⁸ The Ukraine UN Ambassador Sergiy Kslylytsya stated that “Ukraine is committed to a transparent, impartial and objective process that will be managed and overseen by the international community in order to avoid even the slightest perception of bias”.¹⁵⁹

On 23 February 2023, the UNGA, adopted Resolution A/RES/ES-11/7 in which the UNGA called for an immediate end to the war in Ukraine, and demanded that Russia immediately withdraw from Ukraine.¹⁶⁰ This resolution was passed with 141 votes in

¹⁵¹ *Ibid.* Resolution A/RES/ES-11/4, 12 October 2022.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Resolution A/ES-11/10, 7 November 2022. [n2267920.pdf](#) (accessed on 25 October 2024).

¹⁵⁵ *Ibid.*

¹⁵⁶ Resolution A/RES/ES-11/5, 14 November 2022. The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 1 May 2024).

¹⁵⁷ *Ibid.*

¹⁵⁸ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 7 July 2023).

¹⁵⁹ Lederer “UN General Assembly calls for Russian reparations to Ukraine”, [UN General Assembly calls for Russian reparations to Ukraine | AP News](#) (accessed on 25 October 2024).

¹⁶⁰ Resolution A/RES/ES-11/7, 23 February 2023. The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 1 May 2024).

favour, seven against while 32 abstained.¹⁶¹ It goes without saying that Russia has not responded to this resolution, and the ongoing conflict has to date not ended.

More recently, on 11 July 2024, the UNGA adopted Resolution A/78/L.90 for the “Safety and security of nuclear facilities of Ukraine, including the Zaporizhzhia nuclear power plant”.¹⁶² This resolution was adopted as 99 countries voted in favour, 60 abstained and nine opposed.¹⁶³ The representative of Russia responded to this resolution and stated that Russia “regularly provides the international community with data on the actual situation around the Plant”.¹⁶⁴ To date Russia has not complied with this resolution.

Looking at all the abstention votes and the non-votes above, while considering the fact that India, China, South Africa and Pakistan have been amongst the abstaining states, it “...becomes evident that those sitting on the fence and refusing to take sides in this conflict represent some of the leading powers of the Global South, and more than half of the world’s population in total”.¹⁶⁵ Additionally, as a point of reiteration, the UNGA resolutions do not carry the same enforcement weight as the UNSC resolutions under Chapter VII of the *UN Charter*. Despite the UNGA’s mandate to hold a meeting after a veto vote has been cast, this has clearly not hindered Russia. However, this mandate does “promote transparency and accountability as a P5 member casting a veto explains its rationale”.¹⁶⁶

In conclusion, the UNSC has power to make binding resolutions on the condition that the five permanent members do not make use of their veto power. As Russia is a permanent member, any resolutions that are to be passed against Russia by the UNSC will be vetoed. Since the UNSC is prevented from acting due to a lack of agreement between the five permanent members, the UNGA can consider matters that involve international peace and security, and pass recommendatory resolutions. Even though these resolutions have no binding consequences, they do hold political

¹⁶¹ *Ibid.*

¹⁶² Resolution A/78/L.90, 11 July 2024, [n2419781.pdf](#).

¹⁶³ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 7 October 2024).

¹⁶⁴ Resolution A/78/L.90, 11 July 2024, <https://press.un.org/en/2024/ga12614.doc.htm> (accessed 8 October 2021).

¹⁶⁵ Mihr A *et al.* 2024:383-395.

¹⁶⁶ Nanda 2023: 287-320.

weight and indicate the will of the UN member states. Various resolutions were discussed above that have been passed by the UNGA. The UNGA has filled the gap due to the inability of the UNSC to impose measures against Russia. A rather important development was reached by the UNGA on 26 April 2022, that places permanent members who cast a veto vote in the spotlight. Since 26 April 2022, any permanent member who casts a veto vote, is called upon by the UNGA to provide its reasoning behind the veto vote. This initiative “strengthens the role of the General Assembly as a check on the most powerful states”.¹⁶⁷

Resolution A/RES/ES-11/1 passed by the UNGA on 3 March 2022 can be regarded as the key to a “variety of possible collective actions” passed by the UNGA.¹⁶⁸ Let us briefly explore these possibilities:

- The rights and benefits of membership of a UN member state entails *bona fide* obligations. The findings in Resolution A/RES/ES-11/1 could in future provide a basis for claims that Russia has acted *mala fide* according to the expectations of an obligatory UN member state.¹⁶⁹
- As stated in section 1.1.1, the UNGA does not have the power to unilaterally suspend Russia from the UN by relying on Art 5. Nevertheless, the UNGA can rely on the findings of Resolution A/RES/ES-11/1 to reject Russia’s credentials and in turn bar Russia from participating in the UN.¹⁷⁰ Typically, credential challenges concern claims from opposing governments to represent the State.¹⁷¹ There has however been cases where the UNGA weighed in on a State’s adherence to the UN Charter in determining whether to reject or accept credentials.¹⁷²
- Another way the UNGA could assist the international community in responding to the invasion into Ukraine is by supporting the legal defences and merging the political will for the reinforcement and continuation of

¹⁶⁷ Hathaway “How Russia’s invasion of Ukraine tested the international legal order”, <https://www.brookings.edu/articles/how-russias-invasion-of-ukraine-tested-the-international-legal-order/> (accessed on 22 October 2024).

¹⁶⁸ Scharf 2023: 217-250.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* Article 5 - Charter of the United Nations. Resolution A/RES/ES-11/1, 3 March 2022.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

sanctions against Russia.¹⁷³ It has been noted that “the United States, European Union, and several other States have imposed the most comprehensive economic sanctions ever levelled on a major world power” against Russia.¹⁷⁴ In addition, the UNGA has in the past, while acting under the Uniting for Peace Agreement, called upon members “to induce compliance with international law by a law-breaking State”.¹⁷⁵ This could be an effective alternative, as the UNSC is deadlocked and unable to act under Chapter VII of the *UN Charter*, due to Russia’s veto power.

- Further, the UNGA could establish a hybrid tribunal. The possibility of creating a hybrid tribunal will be explored in Chapter 5.

Clearly, all the resolutions passed and yet to be passed were done in an attempt to curtail the conflict and prompt other states to get involved, thereby further strengthening the international community’s stance in search of other feasible legal mechanisms to mete out criminal responsibility. The resort to the Uniting for Peace Agreement by the UNSC and the UNGA reflects the inability of the UNSC “to fulfil its responsibility to respond to threats to international peace and security in the context of a major world crisis”.¹⁷⁶ As a result of the deadlock faced by the UNSC, the power has thus shifted from the UNSC to the UNGA.

Are the UNSC and the UNGA therefore feasible mechanisms to respond to the ongoing Russia-Ukraine conflict? As mentioned in this section, the UNSC is deadlocked or “paralysed” due to the veto power held by Russia as a permanent member of the UNSC. However, the UNSC has played a critical role in calling upon the UNGA to hold special emergency sessions under resolution 377A(V).¹⁷⁷ Such a meeting is held when the UNSC is barred from exercising its main responsibilities as stated in the *UN Charter*. Therefore, we have seen the UNGA step up in a time of need, where the UNSC has been deadlocked from fulfilling its functions. Even though the resolutions that are passed by the UNGA do not bear the same enforcement authority as the UNSCR, they do hold great political weight. The UNGA has therefore

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Resolution A/RES/377(V).

responded to the current Russia-Ukraine conflict, but has not yet been successful in pressurising Russia to withdraw from the territory of Ukraine.

1.3 The Viability of the Mechanisms Available to the United Nations as Instruments to Address the Current Russia-Ukraine Conflict

As the invasion into Ukraine continues, the powerlessness of the UN to prevent this conflict, including the inability of the UNSC to handle an armed conflict involving Russia as one of its permanent members, is quite concerning. The responses from the UNGA and the UNHRC have attempted to make up for the lack of power of the UNSC. Even the UNSG, who holds the highest position linked to global peace making, has been unable to initiate peacekeeping settlements above “statements of principle and humanitarian action”.¹⁷⁸ This chapter evaluated the legal and non-legal mechanisms available to the UN, specifically focusing on the UNSG, UNGA and the UNSC, and their feasibility to respond to the current ongoing Russia-Ukraine conflict. This chapter looked at the responses from the UN and its UNSG as the highest official linked to global peace making, as well as the resolutions passed under both the UNGA and the UNSC. The section below will provide a comprehensive analysis of the feasibility findings that have been evaluated in this chapter.

From the above, the UN system has, from the start, made clear efforts in an attempt to respond to the ongoing conflict in Ukraine. However, as discussed in section 1.2.1, the UNSG has been unable to prevent the invasion into Ukraine. The UNSG has urged Russia and Ukraine to engage in a peaceful settlement in terms of Art 33, with no success. Despite this, the UN and its UNSG has played a critical role and sought alternative ways to respond to the invasion by utilising the UN’s available resources to counter the consequences that emanated from the invasion. The UNSG successfully reached a deal that resumed trade export from the Ukrainian Black Sea Ports. Russia also signed an MoU that allowed full global access to Russian food and fertiliser. This alleviated global markets by reducing food and fuel prices. Another deal worth mentioning is the support of the IAEA and establishment of a permanent council to supervise the nuclear plants in Ukraine, in an attempt to prevent a nuclear accident. Further, the UNHRC established the HRMMU to document violations that emanated

¹⁷⁸ Mihr A *et al.* 2024:383-395.

from the invasion into Ukraine. The HRMMU found evidence of crimes against humanity and other war crimes.¹⁷⁹ Further, the UN and its humanitarian partners have provided vital assistance to Ukrainian citizens and Ukrainian refugees, to alleviate the suffering caused by the invasion.

As mentioned in section 1.1.2, one might question the relevance of the UNGAR if they are not legally binding on questions of maintenance of international peace. This is a valid question. UNGAR have political weight, especially if the UNGAR accumulate over the years.¹⁸⁰ For example we can refer to South Africa's (SA) history and "...position in the international community during the apartheid era...".¹⁸¹ Here we can also note the legal consequences of the UNGAR, as seen in the past, and its relevance to the current situation at hand. UNGAR could allow states to take action that could be "of questionable legality."¹⁸² For example, despite the fact that economic sanctions could be considered as unlawful, numerous states imposed economic sanctions against SA, based on the number of UNGAR that necessitated action against apartheid in SA.¹⁸³ Looking at the Russia-Ukraine situation, the European Union (EU) noted that the sanctions imposed against Russia are purported to "cripple the Kremlin's ability to finance the war; impose clear economic and political costs on Russia's political elite responsible for invasion; and diminish its economic base".¹⁸⁴ If UNGAR are regularly repeated, the UNGAR can attain "...the force of a customary rule".¹⁸⁵ When implementing the UNGAR, they must be considered *bona fide*.¹⁸⁶ Here we can refer to the statement of Judge Lauterpacht:

... which consistently sets itself above the solemnly and repeatedly expressed judgement of the (United Nations) Organisation, in particular in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.¹⁸⁷

¹⁷⁹ The UN and the war in Ukraine: key information, <https://unric.org/en/the-un-and-the-war-in-ukraine-key-information/> (accessed on 27 April 2023). For a full list of all the documentations, please refer to the source.

¹⁸⁰ Dugard *et al.* 2018:703.

¹⁸¹ *Ibid.*

¹⁸² *Ibid* at 704.

¹⁸³ *Ibid.*

¹⁸⁴ Cover 2023:441-476.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Voting Procedure on Questions relating to Reports and Petitions Concerning the Territory of South West Africa, 1955 ICJ Rep 67.

The refusal or failure of SA to abandon its apartheid norms, led to sanctions being imposed against SA. Thus, the UNGA can again follow a similar course of action to respond to the ongoing violations emanating from the Russia-Ukraine conflict. As mentioned in section 1.2.2, several UNGAR have been passed to date against Russia.

From the above it is clear that the UNSC has been deadlocked and unable to exercise its primary responsibilities, due to the veto power held by Russia. In response, the UNGAR A/RES/76/262 demanded that permanent members who cast a veto vote appear before the UNGA to explain the rationale behind the use of the veto. This is a simple yet symbolic step “towards greater accountability and restraint”.¹⁸⁸ As elaborated in section 1.2.2, we have further seen that the UNGA has easily passed resolutions, despite lacking authoritative power.

It can therefore be noted that the UNSC is not feasible in directly responding to the ongoing Russia-Ukraine conflict, due to the veto power held by Russia. However, the UNSC has played a critical role in triggering UNGA special emergency sessions, under resolution 377A(V). This has led to multiple resolutions being passed by the UNGA. The responses emanating from the UNGA, the UNHRC including the UN and its UNSG is therefore feasible in responding to the ongoing Russia-Ukraine conflict. However, the UN and its system has been unsuccessful in pressurising Russia to withdraw from Ukraine and end the hostilities. It is safe to say that focussing solely on the UN to address questions of accountability that emanate from the Russia-Ukraine invasion, is not sufficient. Nevertheless, the responses from the UN and its systems could be used as a basis for seeking other legal avenues that could better address the questions of accountability. For all intents and purposes of this study, other feasible avenues will be explored to fully address the questions of accountability. The next chapter of this study will evaluate the feasibility of the ICC, as an international legal mechanism, to address the misdeeds emanating from the current Russia-Ukraine conflict.

¹⁸⁸ Mihr A *et al.* 2024:383-395.

CHAPTER 2

The International Criminal Court's jurisdiction to adjudicate the cases emanating from the current (2022 - present) Ukraine – Russia conflict

This chapter evaluates whether the ICC is a feasible option to bring alleged perpetrators of international crimes, committed within Ukrainian borders, to justice. To test the feasibility of the ICC, the chapter will be subdivided into two main sections. The first section will establish the ICC's theoretical position on the pre-requisites of jurisdiction, referral mechanisms and material crimes. The second section will apply the theory in the context of Ukraine, as discussed in the first section. The ICC was established by the *Rome Statute* as a permanent institution dispensing international criminal law.¹⁸⁹ The ICC exercises jurisdiction, complementary to national criminal jurisdiction, over individuals for serious crimes of international concern which are limited to crimes of genocide, crimes against humanity, crimes of aggression and war crimes.¹⁹⁰ The principle of complementarity means that the ICC will not supersede national jurisdiction, but will complement it and only act when national courts are unable or unwilling to perform the task.¹⁹¹ In Chapter 4 of this study, the feasibility of national jurisdictions (including that of Russia and Ukraine) in addressing the alleged violations from the Russia-Ukraine conflict will also be considered.

2.1 Theory

2.1.1 The Pre-Requisites of the ICC Exercising Jurisdiction over Crimes, including the Referral Mechanisms

This section will investigate the pre-requisites of the ICC, specifically Art 12 of the *Rome Statute* special regime for states to sign up, as well as the trigger mechanisms which can allow the ICC to exercise jurisdiction. The referral mechanisms of the ICC discussed will include state referrals, security council referrals and prosecutorial referrals. However, in the context of Ukraine, the discussion will focus on state referrals because of Ukraine's Art 12(3) acceptance. All of these aspects will be discussed

¹⁸⁹ Article 1 – Rome Statute of the International Criminal Court.

¹⁹⁰ *Ibid*, at Art 5.

¹⁹¹ *Ibid*, at Art 17 and 53. Lee 1999:1-698.

below, beginning with the legal exposition at the ICC, followed by the applicability to Ukraine.

Before a matter can be brought before the ICC, certain pre-requisites need to be proved.¹⁹² The ICC will be able to exercise jurisdiction if the crimes have been committed by nationals of a state party (nationality), or on the territory (territoriality) of a state party to the *Rome Statute* or a state that has accepted the jurisdiction of the ICC.¹⁹³

The court exercises jurisdiction in terms of Art 12(2) in the case of the crime being committed by nationals or on the territory of a state party to the *Rome Statute*, or when a non-state party accepts the court's jurisdiction in terms of an Art 12(3) declaration.¹⁹⁴ Art 12(3) of the *Rome Statute* allows for the provision of non-state parties to accept the jurisdiction of the ICC on an *ad hoc* basis by submitting a declaration with the Registrar.¹⁹⁵ An additional important aspect to note pertains to referral mechanisms. In terms of state referrals, the ICC can exercise jurisdiction if it appears that any of the crimes within the jurisdiction of the ICC have been committed, is referred by a State Party to the Prosecutor for investigation.¹⁹⁶ The second possibility is where the UNSC acting under Chapter VII of the *UN Charter*, can refer a situation to the Prosecutor of the ICC irrespective of whether the state or nationals of a state, is a non-state party to the *Rome Statute*.¹⁹⁷ This occurs when the UNSC establishes a threat to international peace and security. This also means that a UNSC referral is binding in terms of the *UN Charter*, which enjoys almost universal ratification, as opposed to the *Rome Statute*, which is ratified by about 120 countries. Unlike the state party referrals and investigation *proprio motu* (discussed below), the requirement of Art 12(2) of the *Rome Statute* is not applicable to UNSC referrals.¹⁹⁸ One of the difficulties that can be faced with the UNSC referring a situation to the ICC, is that permanent member states,

¹⁹² *Ibid*, at Art 12.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*, at Art 12(2).

¹⁹⁵ *Ibid*, at Art 12(3).

¹⁹⁶ *Ibid*, at Art 13(a) and Art 14(1).

¹⁹⁷ *Ibid*, at Art 13(b).

¹⁹⁸ *Ibid*, at Art 12(2).

such as Russia, are granted a special Art 27 veto power, that can block any such referral (as discussed in Chapter 1 of this study).¹⁹⁹

The third referral mechanism is where a prosecutor has initiated investigations based on information received from a reliable source (referred to as *proprio motu* power), bearing in mind that even in such a case, the *proprio motu* power is not unfettered as it still needs to go to the Pre-Trial Chamber for approval.²⁰⁰ If this is the case, the State has to accept the jurisdiction of the Court.²⁰¹

Before delving into a discussion of the application of the above to the context of Russia and Ukraine, which will follow in section 2.2 of this chapter, it is crucial to first examine the ICC's material jurisdiction.

2.1.2 Material jurisdiction

Definitions of the serious crimes that the ICC has jurisdiction over will be briefly mentioned. The first crime over which the ICC has jurisdiction is the crime of genocide. Art 6 defines genocide as any of the listed acts (the killing of members of a group, causing serious mental or bodily harm to members of a group, the deliberate act of bringing about conditions of life on the group to cause physical destruction in part or whole, enforcing measures that intend to avert birth in the group, the forceful transfer of children from the group to another) "...committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".²⁰²

The second crime over which the ICC has jurisdiction is the crime against humanity. A crime against humanity in terms of Art 7 is any of the various acts committed (extermination, murder, enslavement, deportation or the forceful transfer of population, torture, imprisonment or similar limitation of physical freedom, any form of sexual violence, imposed disappearance of persons, apartheid, maltreatment against any group or collective on grounds such as race, gender, culture, and any other act of inhumanity that may cause mental and physical suffering or serious injuries) as part of a systematic or widespread attack, against any civilian population "with the

¹⁹⁹ Article 27 – United Nations Charter.

²⁰⁰ Article 13 (c) and Article 15 - Rome Statute of the International Criminal Court.

²⁰¹ *Ibid.*

²⁰² Article 6 - Rome Statute of the International Criminal Court.

knowledge of the attack”.²⁰³ Thus, the acts are not isolated nor sporadic but part of governmental policy that is condoned by the state. There are three requirements to this. First, the attack must be systematic or widespread, and the state or organisation actively promotes such attacks against the population.²⁰⁴ Second, the attacks have to be directed against a civilian population.²⁰⁵ Therefore, to constitute as a crime against humanity under the *Rome Statute*, the primary aim of the attacks is directed at the civilian population, and any attacks directed at the military is excluded. Third, crimes against humanity are only committed if there is a certain form of intent present, namely that the perpetrator should have known that the conduct intended to be or was part of a systematic or widespread attack against the civilian population.²⁰⁶ This excludes a situation where an attack has not yet occurred, so knowledge of it is impossible, in cases of an “emerging widespread or systematic attack”.²⁰⁷

The third crime over which the ICC has jurisdiction is war crimes. Art 8(2)(a) of the *Rome Statute* defines war crimes as any grave breach (as listed in the Art 8(2)(a)) that is committed in an international armed conflict (IAC) against any property or person “protected under the relevant *Geneva Convention*”.²⁰⁸ The purpose of Art 8(2)(a) is to protect victims of war.²⁰⁹ Art 8(2)(b) focuses on the combatants, prohibiting attacks against places that are undefended, the civilian population, objects, and attacks that would violate the proportionality principle.²¹⁰ This Art also protects civilians against misuse.²¹¹ Art 8(2)(c) relates to non-international armed conflict (NIAC), which is in violation of common Art 3 of the *Geneva Conventions of 12 August 1949* (1949 Geneva Conventions).²¹² The violations of common Art 3 relates to:²¹³

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

²⁰³ The Prosecutor v Jean –Pierre Bemba Gombo – ICC-01/05—01/08-3343 – 21 March 2016

²⁰⁴ Article 7(2) – Rome Statute of the International Criminal Court. Dugard *et al* 2018:257.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, at Art 7(1).

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, at Art 8(2)(a). Dugard *et al* 2018:260.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*, at Art 8(2)(b). Dugard *et al* 2018:261.

²¹² *Ibid.*, at Art 8(2)(c).

²¹³ Article 3 – Geneva Convention 12 August 1949.

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The breaches that are mentioned in Art 8(2)(c) are acts that have been committed against protected persons, similar to Art 8(2)(a).²¹⁴ Protected persons are described in Art 8(2)(c) as persons that are not taking part in the hostilities, including armed force members that have surrendered and those who are placed *hors de combat* due to wounds, detention or illness.²¹⁵ Those that participate in hostilities, whether in an IAC or NIAC, should respect these standards, as a representation of the core human rights.²¹⁶

The fourth crime over which the ICC has jurisdiction is the crime of aggression. Until the *Rome Statute* was amended on 15 December 2017, and on 17 July 2018, when a resolution was passed which activated the jurisdiction of the Court over the crime of aggression, the court was unable to exercise jurisdiction over crimes of aggression, as the *Rome Statute* did not provide a definition nor were there any jurisdictional conditions set out.²¹⁷ Art 8bis(1) defines the crime of aggression as the “planning, preparation, initiation or the execution of an act of aggression that by its nature, scale and gravity, constitutes a manifest violation of the Charter of the United Nations”.²¹⁸ To qualify as an act of aggression, the act “must be performed by a person in a position to effectively exercise control over or direct the political or military action of a state”.²¹⁹ Art 8bis(2) lists the acts that qualify as acts of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

²¹⁴ Article 8 - Rome Statute of the International Criminal Court. Dugard *et al* 2018:262-263.

²¹⁵ *Ibid.*

²¹⁶ Dugard *et al* 2018:263.

²¹⁷ Article 5 – Rome Statute of the International Criminal Court. Dugard *et al* 2018:266. Resolution: ICC-ASP/16/Res.5.

²¹⁸ Article 8bis (1) – Rome Statute of the International Criminal Court. Dugard *et al* 2018:266.

²¹⁹ *Ibid.*

- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²²⁰

The section above investigated the referral mechanisms and the definitions of material crimes contained in the *Rome Statute*. The following section will consider the application of these considerations within the Ukraine-Russia context.

2.2 Application of Theory to Ukraine

Having established the theoretical position on the ICC pre-requisites, referral mechanisms and crimes, this section will discuss the application of the theory to the conflict at hand. This section will be subdivided into two subsections below. The first will consider the application of the pre-requisites and referral mechanisms regarding Ukraine. This will be followed by the limitations that the ICC faces with its jurisdiction over the crime of aggression and its application to Ukraine.

2.2.1 The Application of the Pre-requisites and Referral Mechanisms to Ukraine

This section discusses the respective positions of Russia and Ukraine before the ICC. Russia has not accepted the jurisdiction of the ICC, and is not party to the *Rome Statute*. Ukraine, on the other hand, is not a permanent member state of the ICC, so it seemingly cannot self-refer the situation to the office of the Prosecutor. However, Ukraine is an *ad hoc* party to the *Rome Statute*. Ukraine has issued two retroactive declarations under Art 12(3) accepting the court's jurisdiction on an *ad hoc* basis.²²¹ The first was in 2014, and was temporally limited to alleged crimes that were committed on its territory from 21 November 2013 to 22 February 2014.²²² The second one is open-ended, and covers alleged crimes committed on its territory from 20 February 2014, including the ongoing conflict.²²³

The *ad hoc* declarations under Art 12(3) submitted by Ukraine, acceding to the jurisdiction of the ICC, allowed the Prosecutor on 24 April 2014 to start with preliminary

²²⁰ *Ibid*, at Art 8*bis* (2).

²²¹ *Ibid*, at Art 12(3).

²²² ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed 19 May 2024).

²²³ Marchuk & Wanigasuriya 2022: 1-6. ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed 19 May 2024).

investigations into the Ukraine situation.²²⁴ On December 2020, the office of the ICC's Prosecutor (OTP) concluded its preliminary investigation of the situation in Ukraine.²²⁵ The ICC Prosecutor has confirmed that the criteria for opening an investigation was met, which includes admissibility, the interests of justice, and jurisdiction.²²⁶ The next step, as noted by the ICC Prosecutor Fatou Bensouda, is to approach the Pre-Trial Chamber of the court to open investigations.²²⁷

Once again it is important to reiterate that the second declaration filed by Ukraine is open ended. In terms of the ongoing conflict, on 28 February 2022 the current ICC Prosecutor Karim Khan noted that after reviewing the conclusions on the preliminary investigation, there is a reasonable basis to proceed with opening an investigation.²²⁸ In relation to the assessed events during the preliminary investigation, Khan confirmed that there is reason to believe that alleged crimes against humanity and war crimes have been committed in Ukraine.²²⁹ In light of the recent escalation of the conflict from 28 February 2022, Khan confirmed that the investigation will include any new alleged crimes within the jurisdiction of the ICC that have been committed by any party in relation to the conflict on the territory of Ukraine.²³⁰ The next step as noted by Khan is to approach the Pre-Trial Chamber of the court to open investigations.²³¹

Alternatively, to expedite the matter in accordance with the *Rome Statute* as noted by Khan, ICC State Parties can also refer the matter to the OTP.²³² Taking the alternative approach would allow the OTP to instantly and actively proceed with an independent investigation by the Prosecutor's Office.²³³ On 1 March 2022, the OTP received a state

²²⁴ Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, December 11, 2020, ICC Statements - <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (accessed on 20 May 2024).

²²⁵ *Ibid.*

²²⁶ Marchuk & Wanigasuriya 2021: 735-769.

²²⁷ Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, December 11, 2020, ICC Statements - <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (accessed on 20 May 2024).

²²⁸ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation." <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (accessed 1 July 2024).

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

party referral from the Republic of Lithuania on the current conflict.²³⁴ Following from this, on 2 March 2022 a group of state parties submitted a joint referral,²³⁵ and on the same day the Prosecutor announced that an investigation has been opened, based on the received referrals.²³⁶ Taking into account the jurisdictional parameters, the scope will be inclusive of allegations of war crimes, genocide, and crimes against humanity committed by any person from 21 November 2013 in Ukraine.²³⁷ On 11 March 2022, a further two states referred the situation to the office, and on 1 April 2022 the Republic of Chile joined the referral.²³⁸

Regarding the situation in Ukraine, the Pre-Trial Chamber II has to date issued arrest warrants to four individuals. On 17 March 2023, arrest warrants were issued to both President Putin and Ms Lvova-Belova, the Commissioner for Children’s Rights in the Office of President Putin.²³⁹ Predicated on the application of the Prosecutor of 22 February 2023, the Pre-Trial Chamber II, believed there to be reasonable grounds that the suspects were accountable for war crimes relating to the unlawful deportation of children (population) and the unlawful transfer of children (population) from areas occupied by Ukraine to Russia.²⁴⁰ On 5 March 2024, Mr Segei Kobylash, who was the Commander of the Long-Range Aviation of the Aerospace Force and is the Lieutenant General of the Russian Armed Forces, and Mr Viktor Sokolov, who was the Commander of the Black Sea Fleet and is an Admiral of the Russian Navy, were both issued arrest warrants.²⁴¹ Based on the Prosecutor’s application of 2 February 2024,

²³⁴ Ukraine Investigation – ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed on 1 July 2024).

²³⁵ Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. “[Ukraine | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/situations/ukraine)” (accessed on 21 November 2023).

²³⁶ Ukraine Investigation – ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed on 1 July 2024).

²³⁷ *Ibid.*

²³⁸ Japan and Macedonia. ICC-01/22 Investigation, “[Ukraine | International Criminal Court \(icc-cpi.int\)](https://www.icc-cpi.int/situations/ukraine)” (accessed on 21 November 2023).

²³⁹ Ukraine Investigation – ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed on 1 July 2024).

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

the Pre-Trial Chamber II believed there to be reasonable grounds on which the suspects were responsible for crimes against humanity and war crimes relating to directing attacks on civilian objects, and causing extensive related harm to civilians or damage to civilian objects.²⁴²

While none of these individuals have been arrested yet, it is important to note the international restrictions that the warrants of arrest have brought about with regards to travelling to territories of State Parties who are signatories to the *Rome Statute*. This is evidenced in the case where President Putin intended to attend the BRICS Summit in South Africa that was due to take place in August 2023.²⁴³ Importantly, South Africa is an *amicus curiae* of the ICC and a signatory to the *Rome Statute* since 27 November 2022.²⁴⁴ This means that there is an obligation for state parties to the *Rome Statute* to enforce, within their territories, warrants of arrest that have been issued by the ICC.²⁴⁵ In terms of Art 88 of the *Rome Statute*, “State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part”. Therefore, there is a legal obligation on South Africa to arrest President Putin should he enter the country.²⁴⁶ This shows that, in addition to the aim of exercising criminal jurisdiction over President Putin, the arrest warrants have, to some extent at least, succeeded in limiting his ability to travel freely to countries of his choice. While executing the warrants might be difficult due to a lack of political will in some cases, it is evident that these warrants do exert pressure in that any State signatory of the ICC is obliged to act in terms of the warrants as issued by the ICC.

Next, similar matters that have emanated from Sudan and Libya will be mentioned. Even though these cases are not strictly part of this study, they may offer valuable insights. Just like Ukraine and Russia, Sudan and Libya are not parties to the *Rome Statute*, nor have they consented to the ICC trying their nationals for committed acts.

²⁴² *Ibid.*

²⁴³ Owuor “Can South Africa arrest President Putin pursuant to ICC warrant of arrest?”, <https://www.derebus.org.za/can-south-africa-arrest-president-putin-pursuant-to-icc-warrant-of-arrest/> (accessed on 22 September 2024).

²⁴⁴ *Ibid.*

²⁴⁵ Article 89(1) - Rome Statute of the International Criminal Court.

²⁴⁶ *Ibid.*

The UNSC, however, referred the atrocities to the ICC in 2005 (Sudan) and 2011 (Libya) respectively, for investigation.²⁴⁷

Briefly looking at the *Sudanese* matter. In 2005, the UNSC adopted Resolution 1593 and referred the situation in Darfur, Sudan to the ICC.²⁴⁸ This was as a result of a widespread violations of human rights by the government of Sudan and its militias, which resulted in state instability.²⁴⁹ In turn, the ICC issued arrest warrants for the former President Omar al-Bashir and several Sudanese officials.²⁵⁰ In turn, the ICC was faced with backlash as Sudan denied the allegations. The ICC faced many challenges in pursuing justice in this regard, ranging from a lack of cooperation from the Sudanese authorities (which made it difficult to arrest key suspects), to some African states and the Sudanese government viewing the actions of the ICC as politically motivated, to the limited international support regarding the enforcement of ICC warrants.²⁵¹

Now, moving to the situation that emanated from *Libya* in 2011. Following the outbreak of a civil war in Libya between the Muammar Gaddafi forces and opposition groups in favour of his removal, the UNSC adopted Resolution 1970 and referred the matter to the ICC.²⁵² The ICC issued warrants of arrest for Gaddafi, including a warrant of arrest for his son Saif al-Islam and Abdullah al-Senussi, the chief intelligence officer (CIO), for crimes against humanity.²⁵³ The arrest warrants, however, could not be executed as Gaddafi was killed by rebel forces in October 2011, and the CIO and his son were in turn captured by Libyan factions.²⁵⁴ The ICC again faced challenges in prosecuting the remaining suspects, ranging from a lack of cooperation from Libyan authorities, that included a jurisdictional dispute in which Libya argued that the domestic courts would prosecute key individuals, to a lack of international support, which included resource constrains.

²⁴⁷ Galand 2019:1-278.

²⁴⁸ Elhag "The Sudanese Role in Libya 2011", [The Sudanese Role in Libya 2011 - Reinventing PeaceReinventing Peace \(tufts.edu\)](#) (accessed on 21 November 2023).

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ Ueki 2023: 31-44.

²⁵² Whiting 2013:391-422.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

The two stated examples were not related to the crime of aggression. Linking the matters of Sudan and Libya to the current conflict between Russia and Ukraine, it is evident that in all three cases (Sudan, Libya and Russia-Ukraine), there are jurisdictional challenges. These include the fact that Russia has not accepted the jurisdiction of the ICC, and is not party to the *Rome Statute*, although Ukraine is an *ad hoc* party to the *Rome Statute*. Political resistance is evident in the current situation as well, as Russia believed the investigations by the ICC to be biased and motivated politically.²⁵⁵ The ICC, as mentioned, has only established jurisdiction over war crimes, crimes against humanity and genocide in the context of the Russia-Ukraine conflict. Therefore, it is quite evident that it would be rather challenging charging those accountable, let alone the President of Russia, with the crime of aggression. Despite this, the President of Russia has been charged based on the other crimes under the ICC's jurisdiction, as discussed above. The following can be taken note of to bolster the accountability of the President:²⁵⁶

- The investigation into the crimes of genocide, war crimes and crimes against humanity by the ICC Prosecutor. These investigations not only aided in documenting these offences, but could also expose the hierarchy of command leading up to the Russian President. The ICC is empowered to investigate the individual criminal liabilities of a political leader for as long as that individual is alive.
- The evidence of the ICC's jurisdictional crimes, collected by the Commission of Inquiry, which was established by the Human Rights Council, can be shared with the ICC.
- Should the President of Russia lose his power in Russia and a new government takes over, the ICC could request the new government to hand over Putin for prosecution. In this instance, the new government would also have had to accept the *Rome Statute*.

²⁵⁵ Ramani "How has the Ukraine war affected Russia's ties with Libya and Sudan?", [How has the Ukraine war affected Russia's ties with Libya and Sudan? | Middle East Institute \(mei.edu\)](#) (accessed on 11 August 2024).

²⁵⁶ Ueki 2023: 31-44.

Obviously, it is important to keep in mind whether it is feasible to hope for any of these events.

The ICC faced certain challenges in the past, and is likely to face new challenges that will have to be overcome to bring individuals accountable for crimes linked to the invasion before the court. The ICC is dependent on the cooperation of states to execute arrest warrants and surrender suspects to the ICC. However, executing arrest warrants are difficult due to a lack of political will in some cases. Further, it is safe to say that the chances of Russia cooperating with the ICC and surrendering her suspects is highly unlikely, unless President Putin and the other suspects travel outside of Russia to a country that is friendly to the ICC, which again is highly unlikely. However as discussed, the arrest warrants do not fall foul of execution, as State signatories to the *Rome Statute* have a legal obligation to cooperate with the ICC. Therefore, State Parties must act accordingly in terms of ICC arrest warrants. Any signatory State to the *Rome Statute* therefore has the responsibility to arrest any such perpetrator should that perpetrator enter their country. In this way the arrest warrants exert pressure on state signatories to the ICC. This clearly suggests that the perpetrators have limited freedom to travel internationally. Does this mean that the issued arrest warrants bear no value? No, the warrant against President Putin prevented him from freely travelling to South Africa. It can be noted that, unlike the Sudanese and Libyan matters mentioned above, which lacked international support, the current conflict at hand has received widespread support from the international community in seeking justice. Through utilising the ICC, the global community strives to ensure that those who are accountable for committing war crimes, crimes against humanity and genocide are held liable on an international level. Bearing that in mind, the ICC has already established jurisdiction to adjudicate war crimes, crimes against humanity and genocide, in Ukraine. This indicates that the ICC is a feasible mechanism to be utilised for prosecuting those accountable for the crimes recognised by the ICC. The likelihood of success of such prosecutions, as mentioned, will depend on the cooperation of the state parties to the *Rome Statute*, to execute the arrest warrants and surrender the suspects to the ICC.

Thus this section established that the ICC has jurisdiction over war crimes, crimes against humanity and genocide in Ukraine. The next section will discuss the limitations

of the ICC's jurisdiction over the crime of aggression in the context of the ongoing conflict.

2.2.2 The Limitation on the International Criminal Court's Jurisdiction over the crime of aggression

The ICC's jurisdiction over the crime of aggression is regulated by Art 15bis, which allows for the trigger of prosecution of aggression by states and the ICC prosecutor.²⁵⁷ Art 15ter allows for UNSC referrals.²⁵⁸ Art 15bis(4) states that the ICC has jurisdiction over an act of aggression that has been committed by a state party, provided that a declaration has not been previously lodged to the Registrar noting that the state party does not accept the jurisdiction.²⁵⁹ Nonetheless, state parties are protected against acts of aggression committed against them by state parties that have not submitted such a declaration.²⁶⁰ According to Art 15bis(5), the ICC does not exercise jurisdiction over the crime of aggression when it is committed by a national of or on the territory of a state that is not a party to the *Rome Statute*.²⁶¹ A noteworthy loophole is identified in the Kampala amendments, which mention that in states that are not a party to the *Rome Statute*, and have not ratified its amendments, the ICC is expressly barred from exercising jurisdiction over the crime of aggression.²⁶² Before the prosecutor may proceed with an investigation, the prosecutor has to confirm whether the UNSC has determined the presence of an act of aggression.²⁶³ Alternatively, if the UNSC has not formally recognised the occurrence of an act of aggression within six months of the incident, the Pre-Trial Chamber of the ICC can grant the commencement of an investigation.²⁶⁴

However, looking at UNSC referrals, Art 15ter states that the ICC has jurisdiction over the crime of aggression, in line with Art 13(b), which entitles the ICC to exercise jurisdiction over states and nationals of states that are not party to the *Rome Statute*.²⁶⁵

²⁵⁷ *Ibid*, at Art 15bis and Art 15ter.

²⁵⁸ *Ibid*.

²⁵⁹ Dugard *et al* 2018:268. Article 15bis (4) – Rome Statute of the International Criminal Court.

²⁶⁰ *Ibid*. Article 15bis – Rome Statute of the International Criminal Court.

²⁶¹ *Ibid*, at Art 15bis (5).

²⁶² A New Court to Prosecute Russia's Illegal War, "[A New Court to Prosecute Russia's Illegal War? | Crisis Group](#)" (accessed on 20 November 2023).

²⁶³ Article 15bis (6) – Rome Statute of the International Criminal Court.

²⁶⁴ *Ibid*, at Art 15bis (8).

²⁶⁵ *Ibid*, at Art 13 (b) and Art 15ter.

Thus, the authority for the UNSC to refer an act of aggression matter to the ICC is no different to that of other crimes.²⁶⁶ Further, the UNSC, acting under Chapter VII of the *UN Charter*, may even refer crimes that include aggression to the Prosecutor for investigation in terms of Art 13(b) of the *Rome Statute*.²⁶⁷

Taking the above into account, it is important to note that, for the ICC to have jurisdiction over the crime of aggression without a UNSC referral, the “offending state” must be a State Party to the *Rome Statute* and have ratified its amendments.²⁶⁸ With that said, Russia has not ratified the amendments and is not an ICC state party. On the other hand, Ukraine lodged two declarations (as mentioned in section 2.2.1) in terms of Art 12 respectively, accepting the ICC’s jurisdiction. However, the ICC only has jurisdiction over war crimes, crimes against humanity and genocide taking place on Ukrainian soil. Since Russia, the aggressor is not a party to the *Rome Statute*, and Ukraine, the victim state is an *ad hoc* party to the *Rome Statute* in terms of Art 12(3), and neither state have ratified the amendments, including the fact that the UNSC is blocked from referring the matter, the ICC does not have jurisdiction over the crime of aggression in this conflict.²⁶⁹

Therefore, an alternative here, as described earlier, would be for the UNSC, acting under Chapter VII of the *UN Charter*, to refer an act of aggression to the ICC Prosecutor.²⁷⁰ As stated in Chapter 1 and section 2.1.1, such a referral will once again fall short, as Russia would make use of her veto right. Additionally, the UNSC holds the power to create an *ad hoc* tribunal, as concluded in the appeals chamber decision of the *Tadic* case.²⁷¹ However, as noted, the UNSC is deadlocked, so the UNGA will in this case have to recommend the establishment of an *ad hoc* tribunal for the crime of aggression. The viability of creating an *ad hoc* tribunal will be discussed in Chapter 5 of this study.

It is clear from the above that there are potential roadblocks with regards to the ability of the ICC to exercise jurisdiction over the crime of aggression in Ukraine. However,

²⁶⁶ Dugard *et al* 2018:269.

²⁶⁷ *Ibid*, at page 270. Article 13(b) – Rome Statute of the International Criminal Court. Chapter VII – United Nations Charter.

²⁶⁸ Dugard *et al* 2018:269.

²⁶⁹ Article 15*bis* (2) – Rome Statute of the International Criminal Court.

²⁷⁰ *Ibid*, at Art 13(b) and Art 15*ter*.

²⁷¹ Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, 1999.

the ICC has jurisdiction over the alleged war crimes, crimes against humanity and genocide committed in Ukrainian territory, in terms of the Art 12(3) declaration submitted by Ukraine. For the purposes of this study, it would be wise to explore alternative routes for the prosecution of the crime of aggression. As mentioned, other feasible avenues such as the ICJ, domestic avenues, as well establishing an *ad hoc* tribunal for aggression, will be explored, to fully address the misdeeds emanating from the invasion.

2.2.3 Conclusion

In conclusion, Russia is not a State Party to the *Rome Statute*, nor has Russia ratified the Kampala amendments. On the other hand, Ukraine has lodged two declarations (as mentioned in section 2.1.1) in terms of Art 12(3), accepting the ICC's jurisdiction, but has not ratified the Kampala amendments. Thus, the ICC has jurisdiction over the war crimes, crimes against humanity and genocide committed in the territory of Ukraine. The exception would be in relation to the crime of aggression. Since Russia is not a party to the *Rome Statute*, and Ukraine is an *ad hoc* party to the *Rome Statute* in terms of Art 12(3), and neither state have ratified the amendments, the ICC does not have jurisdiction over the crime of aggression in this conflict.²⁷² Even though there is an alternative approach available to the UNSC acting under Chapter VII of the *UN Charter* to refer an act of aggression to the ICC Prosecutor, this would fall foul as Russia would exercise the veto right.²⁷³ The ICC's ability to exercise jurisdiction over the crime of aggression in Ukraine is severely curtailed. However, with this said, it should be kept in mind that the ICC remains a feasible mechanism to establish jurisdiction over war crimes, crimes against humanity and genocide committed on the territory of Ukraine due to the Art 12(3) open ended declaration submitted by Ukraine.

The ICC faces certain challenges to bring individuals accountable for crimes linked to the invasion before the court. There is clear widespread international support regarding the current conflict in seeking justice, as can be seen from the numerous state referrals that the OTP received since 1 March 2022. The ICC is dependent on the cooperation of states to execute arrest warrants and surrender suspects to the ICC. Despite the fact that Russia's compliance with the ICC is highly unlikely, the state

²⁷² Article 15*bis* (2) – Rome Statute of the International Criminal Court.

²⁷³ *Ibid*, at Art 13(b) and 15*ter*.

signatories to the *Rome Statute* are legally obliged to cooperate with the ICC. Warrants would be executed if President Putin and those accused travel to a country that is friendly to the ICC, which again is unlikely. Signatories to the *Rome Statute* have the responsibility to arrest any perpetrator should that perpetrator enter their country. This severely limits their freedom to travel internationally, due to fear of being arrested and handed over to the ICC. This was evident in the case when President Putin decided not to travel to South Africa. Even though the arrest warrants have not physically been executed, they have succeeded in limiting President Putin's ability to travel freely. Through the use of the ICC, the global community strives to ensure that those who are accountable for international crimes are held liable on an international level. Whether the curtailment of movement rights suffices against international criminal responsibility is another matter.

Taking the above into consideration, it can be noted that the ICC has established jurisdiction in Ukraine over the ICC's recognised crimes, except the crime of aggression. Arrest warrants have also been issued. It is therefore safe to say that the ICC is a feasible mechanism to be utilised for prosecuting those accountable for the crimes as recognised by the ICC. However, for the intent of this study, other feasible avenues will be explored for the prosecution of the crime of aggression, such as the establishment of an *ad hoc* tribunal. In the next chapter, the feasibility of the ICJ will be discussed to fully explore the mechanisms available on an international level, and their ability to address the crimes emanating from the invasion.

CHAPTER 3

Evaluating the feasibility of the International Court of Justice as mechanism for imposing responsibility in the Russia-Ukraine conflict

3.1 Introduction

This chapter will investigate whether the ICJ can be a viable option to settle the ongoing dispute between Russia and Ukraine by imposing responsibility on either Russia or Ukraine. In order to test for the feasibility of the ICJ, this chapter will start by providing an introduction to the main functions of the ICJ, namely the contentious proceedings and advisory opinions. In the next section of this chapter, a brief theoretical explanation of the ICJ's power to grant provisional measures in terms of Art 41 of the *Statute of the International Court of Justice (SICJ)*, followed by its application to the Ukraine-Russia case before the ICJ, will be discussed. The next section will focus on Art 63 of the *SICJ* regarding non-party interventions, including its application to the ongoing conflict. Lastly, the chapter will conclude by evaluating the viability of the ICJ in imposing responsibility on either Russia or Ukraine for the conflict, or any actions committed therein.

By way of brief introduction, the ICJ is the principal judicial organ of the UN,²⁷⁴ established by the *UN Charter*.²⁷⁵ The function of this court is twofold: first, to settle legal disputes submitted to it by States in line with international law.²⁷⁶ These proceedings are known as contentious proceedings.²⁷⁷ In contentious proceedings the only entities that can be parties to disputes before the court are states.²⁷⁸ The second function is to give advisory opinions on request of specialised agencies or designated organs of the UN.²⁷⁹ Advisory opinions are authorised by the *UN Charter* and the *SICJ* and given by the Court upon request of either the UNGA, UNSC and other organs of the UN, along with specialised agencies authorised by the UNGA.²⁸⁰ No state or individual may request an advisory opinion.²⁸¹ The Court refuses to provide opinions

²⁷⁴ Article 92 – United Nations Charter.

²⁷⁵ Article 1 – Statute of the International Court of Justice.

²⁷⁶ *Ibid*, at Art 34. Dugard *et al.* 2018:671.

²⁷⁷ *Ibid*.

²⁷⁸ *Ibid*.

²⁷⁹ *Ibid*, at Art 65.

²⁸⁰ *Ibid*. Article 96 - United Nations Charter.

²⁸¹ *Ibid*.

where it would result in a dispute between states.²⁸² This chapter will not examine advisory opinions, as it is only concerned with states and state responsibility, as opposed to the mentioned requests from various non-state organs.²⁸³

A significant illustration of the use of contentious proceedings and state responsibility can be seen from the *Nicaragua v United States of America* case. A case against the USA was brought by Nicaragua by filing an application with the ICJ.²⁸⁴ Briefly, Nicaragua alleged that the USA used force against Nicaragua by training and supporting rebel groups who were responsible for armed attacks and for placing mines in Nicaragua's sea ports.²⁸⁵ The court had to determine whether the USA could be held accountable for the actions of the rebel groups.²⁸⁶ It was found that the court had jurisdiction to hear the case after rejecting a declaration of intervention under Art 63 *SICJ*, filed by El Salvador.²⁸⁷ Linking this to the current conflict at hand, between Russia and Ukraine, it will be investigated whether there is a possibility for a contentious proceeding to be heard before the ICJ, including the use of Art 63 interventions as in the case of *Nicaragua v United States of America*.

Looking at Art 41 of the *SICJ*, there is a third avenue, namely provisional measures that can be opted for in the interim should the circumstances require them, to preserve the rights of either party, pending the final decision, with the purpose of preventing irreparable prejudice to the claimed rights.²⁸⁸ As long as there is an adequate *prima facie* basis for exercising jurisdiction to hear the case, the court will grant provisional measures.²⁸⁹ The Court does not need to first establish " ... that it has jurisdiction to hear the..." matter.²⁹⁰ In the current matter between Russia and Ukraine, the contentious proceedings are still ongoing to date (which will be discussed below), but the provisional measures requested in this case have been decided on 16 March 2022,

²⁸² Dugard *et al.* 2018:691.

²⁸³ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). ICJ Reports 1986, p.14.

²⁸⁴ *Ibid.*

²⁸⁵ Strydom & Gevers 2016:115.

²⁸⁶ *Ibid.*, at 147.

²⁸⁷ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). ICJ Reports 1986, p.14.

²⁸⁸ Article 41 – Statute of the International Court of Justice.

²⁸⁹ Dugard *et al.* 2018:686.

²⁹⁰ *Ibid.*

and will be the main focus of this chapter. Provisional matters will be discussed further in section 3.1 below.

In addition to the different proceedings, the ICJ has to be able to exercise jurisdiction over states, and this is regulated by Art 35 of the *S/CJ*. In terms of Art 35, the ICJ is available to states that are parties to its statute, including those states that are permitted to use the ICJ based on provisions laid down by the UNSC.²⁹¹ The ICJ does not have compulsory jurisdiction over all states or all international disputes between states, meaning that even though a state is permitted to use the ICJ, they are not obliged to do so.²⁹² The ICJ has jurisdiction over states that “consent to the Court’s jurisdiction and only in respect of those disputes which such states consent to be heard by the Court”.²⁹³ In terms of Art 36, consent is provided in six ways, which will be briefly discussed.²⁹⁴ The court has jurisdiction over disputes between states, including legal questions referred by the UN organs and specialised agencies.²⁹⁵ Or, states can sign a declaration to recognise the jurisdiction of the court as compulsory, which can either be made unconditionally or on condition of reciprocity between two or more states, and can be limited to a time period.²⁹⁶ This occurs in matters concerning the interpretation of treaties, “any question of international law, existence of any fact which, if established, would constitute a breach of an international obligation, the nature or extent of the reparation to be made for the breach of an international obligation”.²⁹⁷ The other option would be to submit a dispute to the court by special agreement if the states have not recognised the compulsory jurisdiction of the court. Proceedings are instituted in two ways, either through special agreement notification, which is bilateral in nature lodged to the Court by either State, or secondly by application, submitted by one State against another, this option is unilateral in nature.²⁹⁸ As will be discussed in section 3.1.2, the study will focus on the unilateral option, as Russia and Ukraine will not likely bilaterally agree on a special agreement

²⁹¹ Article 35 - Statute of the International Court of Justice.

²⁹² Dugard *et al.* 2018:672.

²⁹³ *Ibid.*

²⁹⁴ Article 36 - Statute of the International Court of Justice.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*, Art 36(2)(a-d).

²⁹⁸ *Ibid.*, at Art 36(2).

notification to institute proceedings, given the realities of the armed conflict between them, rendering the first approach irrelevant.

3.1 Article 41 - Provisional Measures

3.1.1 Legal exposition of Article 41 – Provisional Measures

This section will present a discussion on the legal exposition of the ICJ's power to grant provisional measures, followed by its application to the *Ukraine v Russia* case before the ICJ. As mentioned, the ICJ makes provision in Art 41 for provisional measures that are available in the interim that could be requested by Ukraine.²⁹⁹ The object of such provisional measures granted by the ICJ is to preserve the rights of the respective parties pending decision of the ICJ, with the purpose of preventing irreparable prejudice to the claimed rights.³⁰⁰ In the case of *Northern Cameroon*, it was stated that the provisional measures needed to have a connection between the measures that were ordered, the court's competence to adjudge on the merits, and the rights claimed.³⁰¹ Art 75 grants the ICJ the power to take provisional measures upon its own lead, and above what was requested by the parties. The provisional measures that are implemented by the ICJ are binding, and the non-adherence thereto is a violation of international law, and in turn triggers state responsibility.³⁰² In the case of *Gambia v Myanmar*, it is noted that for provisional measures to be implemented, there has to be a risk that the rights to be protected, would be substantially harmed without any further intervention, and that this harm would occur before the matter can be brought to finality.³⁰³ There are five conditions that need to be present for the court to grant interim relief.³⁰⁴ First, the court has to be satisfied that it has jurisdiction with

²⁹⁹ *Ibid*, at Art 41.

³⁰⁰ Fisheries Jurisdiction (United Kingdom v Iceland), Interim Measures, Order of 12 July 1972, ICJ Rep 1972, 12, 16; Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Interim Measures, Order of 12 July 1972, ICJ Rep 1972, 30, 34.

³⁰¹ Northern Cameroons (Cameroon v United Kingdom), Preliminary Objections, Judgment of 2 December 1963, Separate Opinion of Judge Fitzmaurice, ICJ Rep 1963, 15, 103.

³⁰² Anglo Iranian Oil (UK v Iran), Interim Relief [1951] ICJ Rep 89, 97 (Judges Winiarski & Badawi Pasha, diss). LaGrand (Germany v United States of America), Judgment of 27 June 2001, ICJ Rep 2001, 466, paras 99–109.

³⁰³ Gambia v Myanmar, paras 64, 65 CJ GL No 178, ICGJ 540 (ICJ 2020); 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). <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

³⁰⁴ Miles 2018: bry011.

respect to the claim, and should the claim be contested, the claim is admissible.³⁰⁵ Second, the merits of the case determine the type of protection sought for the right.³⁰⁶ Third, the right has to be plausible.³⁰⁷ Fourth, the right must be at risk of being irreparably prejudiced.³⁰⁸ Fifth, the possibility of the prejudice materialising before the final determination of the dispute needs to exist.³⁰⁹ Thus there are two tests that need to be applied, namely the plausibility and the link test.³¹⁰ There has to be a link or connection between the provisional measures requested and the rights that are subject to the proceedings and the merits of the case.³¹¹ In the case of *Belgium v Senegal*, in which the plausibility test came to light, the ICJ assessed that first, the alleged rights that were to be preserved were plausible and second, there was an existing link between the right and the requested measures.³¹² However in recent developments, the ICJ notes that due to the plausibility of the rights, there is an existing link between them and the measure that is requested.³¹³ As confirmed in the current *Ukraine v Russia* case, which will be dealt with in more detail below, there needs to be a link between the rights that are being claimed by Ukraine and the provisional measures that are being requested.³¹⁴

3.1.2 Russia and Ukraine before the ICJ and the Application of Provisional Measures

The previous section examined provisional measures in the abstract, while this section will focus on provisional measures in the context of Ukraine and Russia. This section will be subdivided under the following basic headings: the establishment of *prima facie*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ 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). <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

³¹⁰ Kulick 2022: 323-340. Link: since Pulp Mills on the River Uruguay (Argentina v Uruguay), Provisional Measures, Order of 23 January 2007, ICJ Rep 2007, 3, 10, para 27; plausibility: since Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Provisional Measures, Order of 28 May 2009, ICJ Rep 2009, 139, 151, para 57.

³¹¹ Ukraine v Russia 2022. ICJ GL No 182, ICGJ 559 (ICJ 2022) para 61.

³¹² Belgium v Senegal Provisional Measures, Order of 28 May 2009, ICJ Rep 2009, para 57.

³¹³ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia) (Int'l. Ct. Justice, 8 April 2022).

³¹⁴ Ukraine v Russia 2022. ICJ GL No 182.

jurisdiction, the application of the plausibility and link test, the measure of irreparable harm and urgency, followed by the provisional measures that were granted by the ICJ, and lastly the critique that emanated from the granted provisional measures.

Ukraine has approached the ICJ on two occasions, once in 2017 and a second time in 2022, which will be discussed in this section. The developments of the 2017 case will be briefly discussed. Ukraine approached the ICJ in 2017, filing a case against Russia.³¹⁵ Ukraine alleged that Russia, due to its actions in eastern Ukraine and Crimea, violated two international conventions, namely the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Convention for the Suppression of the Financing of Terrorism* (ICSFT).³¹⁶ Ukraine argued that Russia, during its occupation, had failed to properly prevent and counter terrorist financing.³¹⁷ Further, Russia was accused of providing weapons to proxy forces in the Donbas that targeted civilians and a commercial airliner.³¹⁸ Furthermore, Russia was accused of conducting a campaign of “*cultural erasure*” in Crimea, which included the suppression of the Ukrainian language and the Crimean Tatar, murders, and forced disappearances.³¹⁹ Provisional measures in this case was granted on 19 April 2017 against Russia.³²⁰ Furthermore, the ICJ rejected the preliminary objection filed by Russia and assumed jurisdiction.³²¹ The judgement on the merits of this case was delivered on 31 January 2024.³²²

Referring to the conflict between Ukraine and Russia in an address on 21 February 2022, President Putin referred to “genocide and horror” allegedly suffered by the Donbas community.³²³ President Putin’s interest of the Donbas community stems from the fact that the people in these areas are predominantly of Russian descent. During President Putin’s address, he accused Ukraine of committing genocide in Donetsk and

³¹⁵ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation) Application to institute Proceedings. Filed in the Registry of the Court on 16 January 2017. General list No. 166.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, p. 104.

³²¹ *Ibid.*, Order of 17 September 2018, I.C.J. Reports 2018, p. 504.

³²² *Ibid.*, Int’l. Ct. Justice, Judgement, 31 January 2024. General list No. 166.

³²³ Kulick 2022: 323-340.

Luhansk oblast in Eastern Ukraine.³²⁴ Based on this, Russia justified the call for a special military operation on 24 February 2022, by referring to Art 51 (Chapter VII of the *UN Charter*) and Customary International Law (CIL).³²⁵ Russia stated that the purpose of the operation was to stop the genocide and protect the people subjected to eight years of abuse.³²⁶ In turn, Ukraine responded and approached the ICJ on 26 February 2022, for indication of provisional measures, based on Art IX of the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention).³²⁷ Art IX of the *Genocide Convention* allows for disputes between contracting parties, at the behest of a party to the dispute, to be brought before the ICJ in relation to interpretation, fulfilment or application of the *Genocide Convention*, which includes a State's responsibility for genocide or any act mentioned in Art III.³²⁸

In its application to the ICJ, Ukraine requested the ICJ to hold an urgent hearing during the week of 28 February 2022.³²⁹ Subsequently, in this application, Ukraine sought the following relief to be adjudged and declared: that the Russian claims of acts of genocide as defined in Art III of the *Genocide Convention*, committed in Ukraine were false; that Russia could not, based on false claims of genocide, take any action under the *Genocide Convention* in or against Ukraine, to punish or prevent alleged genocide; that the claim of independence of the Donbas people was based on false claims of genocide; that the military operation on 24 February 2022 was based on false claims of genocide, in turn having no basis on the *Genocide Convention*; that Russia, based on the false claims of genocide, would provide assurance and guarantee of non-recurrence of any unlawful measures including the use of force in and around Ukraine;

³²⁴ Ibid.

³²⁵ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, para 32.

³²⁶ *Ibid*, at paras 38 and 39.

³²⁷ 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) General list No. 182. <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

³²⁸ Article IX - Convention on the Prevention and Punishment of the Crime of Genocide.

³²⁹ 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) General list No. 182. <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

and to order Russia to pay reparation for the damages that have been caused based on the false claim of genocide.³³⁰

In addition to the above relief sought from the ICJ, Ukraine requested the ICJ to indicate the following provisional measure, *inter alia*: first, that Russia immediately halt the military operations that commenced on 24 February 2022, based on false claims of genocide allegedly committed by Ukraine.³³¹ Second, that Russia must ensure that any armed units, including organisations or individuals, do not take any steps furthering the military operations to punish Ukraine for committing genocide.³³² Third, that Russia was to provide assurances that they would not aggravate or prolong the dispute, including making it difficult to resolve the dispute. Fourth, Russia was to make a report to the Court on the measures that it has taken to implement the Order of provisional measures a week after the order has been granted, including on a fixed basis as determined by the Court.³³³

It is important to note that on 5 March 2022, Russia indicated that she would not participate in the oral proceedings.³³⁴ Further, on 7 March 2022, the Ambassador of Russia in the Netherlands read to the Court that the ICJ had no jurisdiction to hear the case, hence the Court could not indicate any provisional measures and should remove the case from the roll.³³⁵ Before getting to the point of whether the ICJ can or cannot indicate provisional measures (discussed in subsection 3.1.2.4), the next subsection will first determine whether the ICJ can establish *prima facie* jurisdiction.

3.1.2.1 *Prima facie* Jurisdiction

This subsection deals with the first part alluded to above, dealing with *prima facie* jurisdiction. To reiterate, in order for the court to grant provisional measures, the ICJ

³³⁰ 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) para 30(a-f). <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf>.

³³¹ Ukraine v Russia 2022. Request For The Indication Of Provisional Measures Submitted By Ukraine. [Microsoft Word - ICJ Genocide Convention PM Request FINAL.docx \(icj-cij.org\)](#) (accessed on 21 July 2024).

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

has to establish *prima facie* jurisdiction. It has been confirmed by the ICJ that it does have *prima facie* jurisdiction in this dispute.³³⁶ This is because Russia's justification for the use of force was the claim of alleged genocide committed by Ukraine, which Ukraine denied. Ukraine based its jurisdiction to approach the court on Art 36(1) of the *SICJ* and Art IX of the *Genocide Convention*.³³⁷ As mentioned, both Russia and Ukraine are parties to the *Genocide Convention*.³³⁸ At this stage, for the court to make an order on provisional measures, it only has to determine whether the acts complained of by Ukraine, fall within the provision of the *Genocide Convention*.³³⁹ Further, it is not necessary for states to refer to a specific treaty in its exchanges with other States, but the exchanges have to clearly refer to the subject-matter of the treaty, which enables the State against which the claim is made, to establish, whether there is a dispute relating to the subject-matter.³⁴⁰ The ICJ notes in this case that, on face value, the statements in the evidence on file, which have been made by the parties, refer to the subject-matter of the *Genocide Convention*.³⁴¹ This allows Ukraine to rely on the compromissory clause of the *Genocide Convention*, for its basis for jurisdiction of the ICJ.³⁴² Russia's reliance on Art 51 of the *UN Charter* was deemed harmless, considering that "certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty".³⁴³ The ICJ was satisfied that a dispute existed relating to interpretation, fulfilment or application of Art IX of the *Genocide Convention*.³⁴⁴ Based on the above, it is clear that the ICJ has established *prima facie* jurisdiction. The next subsection will focus on the ICJ's application of the plausibility and link test in relation to provisional measures requested in the context of the Russia-Ukraine conflict.

3.1.2.2 Provisional Measures: the Plausibility and Link Test

³³⁶ Kulick 2022: 323-340. Article 41 - Statute of the International Court of Justice.

³³⁷ Ukraine v Russia 2022. Request For The Indication Of Provisional Measures Submitted By Ukraine. [Microsoft Word - ICJ Genocide Convention PM Request FINAL.docx \(icj-cij.org\)](#) (accessed on 21 July 2024).

³³⁸ *Ibid.*

³³⁹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation 2022). Summary 2022/2, 16 March 2022. [Summary of the Order on provisional measures \(icj-cij.org\)](#) (accessed on 21 July 2024).

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, para 46.

³⁴⁴ *Ibid.*

Following from the establishment of *prima facie* jurisdiction, the court considered the plausibility and link test. To reiterate the plausibility and link test: the rights being claimed by the party requesting provisional measures should be plausible; and there must be a link between the provisional measures and the rights sought to be protected. As noted by the ICJ, Ukraine sought provisional measures to “protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State’s military operations on its territory based on a brazen abuse of Art I of the *Genocide Convention*”.³⁴⁵ Ukraine further stated that Russia has not acted in line with the duties and obligations as set out in Art I and IV of the *Genocide Convention*.³⁴⁶ The ICJ noted that Art I of the *Genocide Convention* requires all parties to the *Genocide Convention* to prevent and punish acts of genocide.³⁴⁷ However, the measures to “prevent and punish act of genocide” are not specified in Art I of the *Genocide Convention*.³⁴⁸ As stated by the ICJ, however, the states fulfilling this obligation should act *bona fide*, considering other sections of the *Genocide Convention*, specifically the preamble and Art VIII and IX.³⁴⁹ Bearing this in mind, the ICJ held that to discharge the duty of preventing genocide, states are required to act within the parameters of international law.³⁵⁰ This means that any action to prevent genocide has to be conducted in a manner that conforms with the principles and the purpose of the *UN Charter*, specifically on the prohibition of the use of force.³⁵¹ For a decision to be reached by the ICJ on the claims made by Ukraine, the case needs to proceed to the merit stage. It has been mentioned that:

At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.³⁵²

³⁴⁵ *Ibid*, Summary 2022/2, 16 March 2022. [Summary of the Order on provisional measures \(icj-cij.org\)](https://www.icj-cij.org/summary) (accessed on 21 July 2024).

³⁴⁶ *Ibid*.

³⁴⁷ *Ibid*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, paras 56.

³⁴⁸ *Ibid*.

³⁴⁹ *Ibid*.

³⁵⁰ *Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, ICJ Rep 2007 (I) 221, para 430.

³⁵¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, para 58.

³⁵² *Ibid*, at para 59.

Based on the above, the ICJ observed that "...Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine."³⁵³ Thus, the ICJ satisfied itself with the plausibility test of the rights in the request for provisional measures by Ukraine.

The ICJ noted the link test being the other leg of the provisional measures test. Since the ICJ found the first two rights (briefly: first, that Russia halt the military operations, based on the false claims of genocide allegedly committed by Ukraine; second, Russia is to ensure that any armed units or individuals not further any military operations) claimed by Ukraine plausible under the *Genocide Convention*, the ICJ stated that the nature of the request to suspend the military operations, is in itself aimed at the preservation of Ukraine's right, and is found to be plausible, thus satisfying the link test.³⁵⁴ With regards to the last two rights (briefly: third, Russia is to provide assurance not to aggravate or prolong the dispute; fourth, Russia is to provide a report to the ICJ on the measures taken to implement the provisional court order) there is no correlation of their link and the plausible rights, as these measures are directed to prevent actions that would aggravate or prolong the dispute or make it difficult to resolve, and the provision of information for complying with specific provisional measures directed by the court.³⁵⁵ In summary, the court found that there is a link between the plausible rights of Ukraine based on the *Genocide Convention* and the first two requested provisional measures that exist in the case.³⁵⁶ Before moving onto the outcome of the provisional measures order, discussed in section 3.1.2.4, the risk of irreparable harm and or consequences that can be caused to the rights claimed if provisional measures are not granted first need to be evaluated, which will be done in the next subsection.

3.1.2.3 Evaluation of Irreparable Harm and Urgency

This subsection will evaluate the urgency and irreparable harm that may be caused if provisional measures are not granted. In addition to Art 41, as mentioned, the ICJ has the power to grant provisional measures where irreparable harm or consequences can

³⁵³ *Ibid*, at para 60.

³⁵⁴ *Ibid*, at para 63.

³⁵⁵ *Ibid*, Summary 2022/2, 16 March 2022. [Summary of the Order on provisional measures \(icj-cij.org\)](https://www.icj-cij.org/summary-of-the-order-on-provisional-measures) (accessed on 21 July 2024).

³⁵⁶ Kulick 2022: 323-340.

be caused, or alternatively disregarded, to the rights subject to the judicial proceedings.³⁵⁷ Such power is only exercised when there is urgency, in that there is a real and impending risk that irreparable harm will ensue before the matter reaches finality.³⁵⁸ The ICJ noted that, should the provisional measures (mentioned above) not be indicated by the court, there is a real and imminent risk of prejudice that can be caused, pending a final decision.³⁵⁹ This is because the large-scale military operations launched by Russia in Ukraine has and will result in loss of life, bodily and mental harm, and damage to property and the environment.³⁶⁰ The ICJ further took into account *Resolution A/RES/ES-11/1* of 2 March 2022, made by the UNGA, noting the following:

[e]xpress[es] grave concern at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children”, “[r]ecogniz[es] that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war”, “[c]ondemn[s] the decision of the Russian Federation to increase the readiness of its nuclear forces” and “[e]xpress[es] grave concern at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance.³⁶¹

Flowing from this, the ICJ concluded that should the plausible rights be disregarded, it could end up causing irreparable harm to its rights.³⁶² The other factor considered here by the ICJ is that of urgency, in that there will be a “real and imminent risk” that harm will be caused before the ICJ reaches its final decision.³⁶³ The next section will therefore discuss the provisional measures granted by the ICJ.

3.1.2.4 Provisional Measures Granted by the International Court of Justice

On 16 March 2022, the court followed suit. Firstly, “the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine.”³⁶⁴ Secondly, “the Russian Federation must also ensure that

³⁵⁷ Article 41 - Statute of the International Court of Justice.

³⁵⁸ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation 2022). Summary 2022/2, 16 March 2022. [Summary of the Order on provisional measures \(icj-cij.org\)](#) (accessed on 21 July 2024).

³⁵⁹ *Ibid*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, paras 74,75 and 77.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*, at para 76.

³⁶² *Ibid*, at para 77.

³⁶³ *Ibid*.

³⁶⁴ *Ibid*, at para 86.

any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.”³⁶⁵ Lastly, the court directed that both parties are to ensure that they do not aggravate the dispute.³⁶⁶ The court, however, declined the last provisional measure.³⁶⁷ The first two provisional measures were voted in favour by 13 votes to two, and the last provisional measure was rejected unanimously.³⁶⁸ The final subsection to the provisional measures section will focus on the critique directed at the provisional measures that have been granted, along with some concluding remarks. The subsection thereafter will focus on the contentious proceedings before the ICJ.

3.1.2.5 Critique Emanating from the Provisional Measures Granted

This section will scrutinise certain points that need to be brought to light regarding the plausibility test. Looking at the order in paragraph 86(1), Russia is obliged to suspend military operations in Ukraine until the final decision on the merits.³⁶⁹ It is without a doubt that Art 2(4) of the *UN Charter* has been violated, as the use of force is prohibited and falls outside the ambit of the *Genocide Convention*.³⁷⁰ As a reiteration of the above, the ICJ noted that Russia’s reliance on Art 51 of the *UN Charter* and CIL, does not hinder a *prima facie* finding by the ICJ, that the dispute in the Application relates to the interpretation, fulfilment or application of the *Genocide Convention*.³⁷¹ Art I of the *Genocide Convention* concerns itself only with the prevention and punishment of acts of genocide in war and peace time, but there is no clarity as to whether armed conflict may be commenced or ceased.³⁷² This was implied in the *Yugoslavia case* (also known as the *Legality of Use of Force case*), where the ICJ did not grant provisional measures at the request of Yugoslavia, to prohibit NATO countries’ airstrike (use of force) against Serbia as a reaction to the Kosovo crisis, because it fell

³⁶⁵ *Ibid*, Summary 2022/2, 16 March 2022. [Summary of the Order on provisional measures \(icj-cij.org\)](https://www.icj-cij.org) (accessed on 21 July 2024).

³⁶⁶ *Ibid*.

³⁶⁷ *Ibid*.

³⁶⁸ *Ibid*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, para 86.

³⁶⁹ Ukraine v Russia 2022. ICJ GL No 182.

³⁷⁰ Article 2(4) - United Nations Charter.

³⁷¹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211, paras 46, 47.

³⁷² Article 1 – Convention on the Prevention and Punishment of the Crime of Genocide.

outside of the parameters of the *Genocide Convention*.³⁷³ In the *Ukraine v Russia* matter a Russian Judge, Vice-President Gevorgian, voted against the first two provisional measures.³⁷⁴ He cited from a 1999 case, that the use of force is not regulated by the *Genocide Convention*, nor does the use of force amount to an act of genocide, thus stressing that the ICJ does not have jurisdiction and cannot indicate provisional measures.³⁷⁵ Another Judge, Judge Xue, also reserved her position with regards to the first two provisional measures granted by the ICJ.³⁷⁶ Judge Xue stated that there is no link between the provisional measures and the rights sought by Ukraine, in that the rights claimed are not plausible under the *Genocide Convention*.³⁷⁷ Judge Xue further stated that Russia based its justification on Art 51 of the *UN Charter* and custom, being the application of self-defence, rather than relying on the obligation to prevent and punish the alleged acts of genocide allegedly committed by Ukraine.³⁷⁸ However, as mentioned by the ICJ in its order, Russia did rely on genocide allegedly committed by Ukraine as the basis for the armed attack. There are clearly divergent opinions on the interpretation and application of the *Genocide Convention*. Judge Nolte states that, in the *Yugoslavia* case, the subject-matter was that the intervening states' use of force amounted to genocide.³⁷⁹ The subject-matter in the present case is whether the allegations made by Russia, that Ukraine was committing genocide and that the military operations that have been commenced by Russia was to prevent and punish genocide, conforms with the *Genocide Convention*.³⁸⁰ Noting the difference here between the *Yugoslavia* case and the *Ukraine* case, is that, in the *Yugoslavia* case, the acts of the Respondent state were not of a concern to come within the provisions of the *Genocide Convention*.³⁸¹ Unlike in the *Ukraine* case, the Respondent (Russia), by making the allegation of genocide and undertaking military action to

³⁷³ Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999, ICJ Rep 1999, paras 34, 35.

³⁷⁴ *Ibid*, at paras 40, 41. Ukraine v Russia 2022, Declaration of Vice-President Gevorgian p 232-235 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-01-en.pdf> (accessed on 21 July 2024).

³⁷⁵ *Ibid*.

³⁷⁶ Ukraine v Russia 2022, Declaration of Judge Xue p239-241 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-03-en.pdf> (accessed on 21 July 2024).

³⁷⁷ *Ibid*.

³⁷⁸ *Ibid*.

³⁷⁹ Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999, ICJ Rep 1999, paras 34, 35.

³⁸⁰ Ukraine v Russia 2022, Declaration of Judge Nolte, p 254-255 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-05-en.pdf> (accessed on 21 July 2024).

³⁸¹ Kulick 2022: 323-340.

prevent genocide, the Applicant (Ukraine) was able to show that the Respondent (Russia) acted in a way that comes within the provisions of the *Genocide Convention*.³⁸²

What makes the provisional measures sought by Ukraine rather profound, is the fact that Ukraine requested the halt of the military operation. However, based on the merits of the application, Ukraine sought a declaratory judgement, declaring that Ukraine has not committed any acts of genocide, and that Russia cannot base the reason for the invasion on the alleged genocide claims.³⁸³ What needs to be noted here is that the relief that is sought, and the provisional measures requested by Ukraine differ, in that the interim relief being sought relates to the suspension of the use of force. Clearly, indicating the power of the ICJ in granting provisional measures, goes beyond its purview of jurisdiction, and in turn, goes beyond what is requested in the merits. So even though provisional measures have been granted, it does not mean that it was the only reason for approaching the court. It would be of importance to Ukraine to await the final decision on the merits, to officially note that no acts of genocide have been committed. Looking to the future, the declaratory judgement could have a significant effect, by removing the false claim, in preventing any grounds for future justification of dispute between Ukraine and Russia.³⁸⁴ Further, a final pronouncement that Russia's justification for the use of force, by referring to the *Genocide Convention*, is unjustified, could bear significant value to any future dispute between Russia or any international state.³⁸⁵ It is safe to say that the *Ukraine v Russia* case before the ICJ lays down great precedence for interim relief being sought, for any future matter being brought before the ICJ.

The *Ukraine v Russia* case has paved the way for international law and future matters that would like to approach the ICJ for an interim award. The decision in this court case can be interpreted as follows: should a state justify the use of force against another state based on humanitarian reasons, then the attacked state has the right to request the ICJ for an order of suspension of the conflict, until final judgement is

³⁸² Ukraine v Russia 2022, Declaration of Judge Nolte, p 254-255 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ord-01-05-en.pdf> (accessed on 21 July 2024).

³⁸³ The contentious proceedings will be discussed next.

³⁸⁴ Kulick 2022: 323-340.

³⁸⁵ *Ibid.*

delivered. By way of analogy, we can note a more recent matter in which the ICJ ruled on provisional matters in the *SA v Israel* case, following from the precedent laid down in the *Ukraine v Russia* case.³⁸⁶ Both the Ukraine matter and the Israel matter, respectively, dealt with allegations of genocide under the *Genocide Convention*. The court in the *SA v Israel* case was consistent with the ruling of the provisional matters of *Ukraine v Russia* in determining that there was a dispute under Art IX of the *Genocide Convention*.³⁸⁷ However, unlike in the *Ukraine v Russia* matter, the ICJ did not order a ceasefire, as that would then prevent Israel from engaging in its defensive military action.³⁸⁸ Instead, the ICJ noted in paragraph 86 that Israel “must take all measures within its power to prevent and punish the direct and public incitement to commit genocide”.³⁸⁹

The fact of the matter, however, remains whether Russia will follow suit and comply with the interim order. To date Russia has not followed suit, indicating the limitations of the judgment on provisional measures of the ICJ. According to the Ukraine Support Tracker, most of the world is in support of Ukraine.³⁹⁰ Russia’s non-compliance with the international order could potentially fuel the international community to impose and uphold more sanctions, as discussed in Chapter 1 of this study. The non-support and pressure from the international community could further damage the Russian economy.

3.2 Article 63 - Non-party intervention

The sections above discussed the provisional measures in the *Ukraine v Russia* case. The focus now shifts to the development of the contentious proceedings of the *Ukraine v Russia* case before the ICJ. This section will present a brief discussion on the legal

³⁸⁶ Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide In The Gaza Strip (South Africa V. Israel) 2024 No. 192.

³⁸⁷ Sterio, “The ICJ’s Provisional Measures Order in the South Africa v. Israel Case: Unsurprising; Politically and Legally Significant” <https://opiniojuris.org/2024/01/27/the-icjs-provisional-measures-order-in-the-south-africa-v-israel-case-unsurprising-politically-and-legally-significant/> (accessed on 2 September 2024).

³⁸⁸ Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide In The Gaza Strip (South Africa V. Israel) 2024 No. 192.

³⁸⁹ *Ibid.*

³⁹⁰ Ukraine Support Tracker - <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> (accessed on 2 September 2024).

exposition of Art 63 non-party interventions, followed by the development of the proceedings before the ICJ.

3.2.1 Legal exposition of Article 63 – Non-party intervention

As noted, there is another possibility to take note of, and this is one in which another State (not a directly party to the armed conflict) requests permission to intervene in the dispute involving other States before the ICJ.³⁹¹ This occurs when there is a legal interest in the case that could affect the decision of the court.³⁹² Largely to date the jurisprudence regarding non-party intervention centres around maritime cases.³⁹³ However, the Russia-Ukraine war makes the topic more significant, as will be discussed below.³⁹⁴ Art 63 is essentially the mechanism holding a binding effect.³⁹⁵ Art 63(1) allows state parties to a convention to intervene when the interpretation of such a convention is questioned in a pending dispute, through the notification of the Registrar.³⁹⁶ Art 63(2) states that if the state uses the right to intervene, the judgement will be legally binding on them.³⁹⁷ The purpose of Art 63 was to enable the amicable interpretation of multilateral treaties, but this has developed to becoming a means for states to jointly condemn any breach of international obligation.³⁹⁸

Art 63 interventions are incidental proceedings that are governed under Art 81-86 of the *Rules of Court 1978* (“Rules of Court”).³⁹⁹ With incidental proceedings, consent from the original parties to admit the intervening parties is not required.⁴⁰⁰ It should be noted that Art 62 states that it is irrelevant if the original parties oppose the intervention, as it is for the Court to decide on the request.⁴⁰¹ The same principle is extended to Art

³⁹¹ Article 62 - Statute of the International Court of Justice. Land and Maritime Boundary (Cameroon v Nigeria) 1999 ICJ Reports 1029.

³⁹² *Ibid.*

³⁹³ Avayiwoe 2023: 110-125.

³⁹⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia Federation) (pending, instituted 27 February 2022).

³⁹⁵ Article 63 - Statute of the International Court of Justice.

³⁹⁶ *Ibid*, at Art 63(1).

³⁹⁷ *Ibid*, at Art 63(2).

³⁹⁸ McIntyre *et al* 2023: 305-327.

³⁹⁹ Article 81-86 – Rules of Court 1978.

⁴⁰⁰ Article 62 - Statute of the International Court of Justice.

⁴⁰¹ *Ibid.*

63, as lies within the court's power to decide if it is satisfied that the conditions of Art 63 are met and, in turn, whether the intervention is admissible.⁴⁰²

The section above looked at the legal exposition of Article 63 non-party intervention. The section below will discuss the development of the contentious proceedings of the *Ukraine v Russia case* before the ICJ.

3.2.2 The Ukraine v Russia Case Before the International Court of Justice

In the pending case before the ICJ of *Ukraine v Russia*, the UK, New Zealand, Latvia and Lithuania resorted to an Art 63 intervention in support of Ukraine.⁴⁰³ An additional 41 states intend to also intervene, leading to a mass intervention in support of Ukraine.⁴⁰⁴ It is safe to say that the intervening states in *Ukraine v Russia* have accentuated their right to intervene and make their submissions on jurisdiction.⁴⁰⁵ The interventions herein cover both queries on the merits and jurisdiction.⁴⁰⁶ For example, the declaration made by Latvia, correlated to “the jurisdiction granted to the Court by Art IX includes disputes in which a State alleges that another State has committed genocide”.⁴⁰⁷ Further, it was noted by Latvia that Art 1 of the *Genocide Convention* has to be read *bona fide* in accordance with the provisions of the *Genocide Convention*.⁴⁰⁸

⁴⁰² McIntyre *et al* 2023: 305-327.

Keeping in mind that Article 59 provides the third states with protection, in that the decision of the court will have no binding force, besides between the parties. Article 62 provides for the mechanism to intervene, should there be an interest of a legal nature that can be affected by the court's decision. - Article 59 and 62 - Statute of the International Court of Justice.

Two possibilities are therefore available under this provision being the non-party that alerts the court of its legal interest and a party intervention that becomes a party to the case and is bound by the court's judgement. - Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999 (1999) ICJ Reports 1999, 1029.

⁴⁰³ Avayiwoe 2023: 110-125.

⁴⁰⁴ Ukraine's Application Against Russia at the International Court of Justice: Joint Statement, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4509 (accessed 12 December 2023). The 41 states are: Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Marshall Islands, Moldova, Monaco, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, UK, USA and the European Union.

⁴⁰⁵ McIntyre 2023: 1-10.

⁴⁰⁶ Declaration Of Intervention Under Article 63 Of The Principality Of Liechtenstein. [Declaration of Intervention Liechtenstein \(icj-cij.org\)](https://www.icj-cij.org/sites/default/files/case-related/182/182-20220719-WRI-01-00-EN.pdf), (accessed on 4 August 2024).

⁴⁰⁷ Declaration Of Intervention of The Republic of Latvia. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220719-WRI-01-00-EN.pdf>, (accessed on 4 August 2024).

⁴⁰⁸ Alexandar, “International Court Of Justice And Provisional Measures Under The Genocide Convention:

States also included the humanitarian nature of the *Genocide Convention* in their declarations.⁴⁰⁹ In the declaration of Liechtenstein, it was stated that:

“Convention's object and purpose also include a common interest for all Contracting Parties to find out whether specific acts indeed qualify as genocide as defined in Art II of the Convention to be in a position at all to accomplish the ‘humanitarian and civilising purpose’ to prevent and punish this crime.”⁴¹⁰

In the declaration submitted by Slovenia, it was noted that abusing the *Genocide Convention* without the possibility of the victim state to seek recourse from the Court, the *Genocide Convention* would be undermined as an international instrument to outlaw the crime of genocide.⁴¹¹ States such as Slovakia, Malta and jointly Canada and the Netherlands, noted that the *Genocide Convention* mirrors the *jus cogens* norms and *erga omnes* obligations.⁴¹² Norway stated in their declaration that “the prevention of genocide is a worldwide task for the benefit of humankind, not a matter for the protection of national interests”.⁴¹³ Seeing as there has been such an unprecedented mass intervention, it would be difficult for the court to deny the intervening states the right to intervene and declare the interventions inadmissible and premature. However, it has happened where the court has denied an Art 63 declaration of El Salvador in the *Nicaragua v United States of America* case, on the basis that the application was made early during the jurisdictional phase of the proceedings.⁴¹⁴ There was one previous occasion in which the court dealt with multiple state interventions,

Curious Case Of Ukraine V. Russian Federation”

<https://revistaselectronicas.ujae.es/index.php/TAHRJ/article/view/7781/7898#info> (accessed on 4 August 2024).

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Ibid.

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Declaration Of Intervention Under Article 63 Of The Principality Of Liechtenstein. [Declaration of Intervention Liechtenstein \(icj-cij.org\)](https://www.icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-02-00-EN.pdf), (accessed on 4 August 2024).

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Declaration Of Intervention Of The Republic Of Slovenia. [icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-02-00-EN.pdf](https://www.icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-02-00-EN.pdf), (accessed on 4 August 2024).

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Declaration Of Intervention Of The Slovak Republic.

<https://www.icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-01-00-EN.pdf>.

Declaration of Intervention submitted by Malta. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221124-WRI-01-00-EN.pdf>. Joint Declaration of Intervention Pursuant to Article 63 of the Statute of the Court By the Governments of Canada and the Kingdom of the Netherlands. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221207-WRI-02-00-EN.pdf>. (accessed on 4 August 2024).

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Declaration Of Intervention Of The Republic Of Norway. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221124-WRI-02-00-EN.pdf>, (accessed on 4 August 2024).

Declaration Of Intervention Of The Republic Of Bulgaria. [182-20221118-WRI-01-00-EN.pdf \(icj-cij.org\)](https://www.icj-cij.org/sites/default/files/case-related/182/182-20221118-WRI-01-00-EN.pdf).

Declaration Of Intervention Of The Republic Of Croatia. [182-20221019-WRI-01-00-EN.pdf \(icj-cij.org\)](https://www.icj-cij.org/sites/default/files/case-related/182/182-20221019-WRI-01-00-EN.pdf).

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Declaration of Intervention of the Republic of El Salvador (Article 63 of the Statute), 15 August 1984. *Nicaragua v. United States of America* 1984 ICJ Rep 392.

in the case of *New Zealand v France*.⁴¹⁵ In this case, identically phrased interventions based on Art 62 and 63 were made by the Federated States of Micronesia, the Marshall Islands, Solomon Islands and Samoa.⁴¹⁶ The observations made in this case was that the states could have rather made a single observation during the oral proceedings.⁴¹⁷ The court took no action with respect to the interventions before the case was dismissed.⁴¹⁸

There has been no precedent to date for the ICJ dealing with multiple intervenors during the oral phase of the proceedings. Should the court not dismiss the multiple state interventions that have taken place in the *Ukraine v Russia* case, we can refer to the *Rules of Court* as the basis. Looking at Art 60(1), it states that the oral statements that are to be made by each party must be concise and within the limits of what is required to make their claims sufficient.⁴¹⁹ This is strengthened by the Practice Directions of the ICJ, in particular Practice Direction VI, which requests “full compliance” of the concise claims of Art 60(1) of the *Rules of Court*.⁴²⁰ This, is applicable to the parties of the case, but it would make sense that it should extend to the intervening states as well.⁴²¹ Despite the necessity of brevity, there are rules that govern the right of intervening states, being Art 84(2) and 86(2).⁴²² It is worth mentioning that Art 84(2) necessitates an entirely different set of hearings to be held, regarding the admissibility of the intervention where an objection has been filed.⁴²³ Art 86(2) states that the intervening state, during the oral proceedings, is permitted to submit its remarks with respect to the subject-matter of the intervention.⁴²⁴ Therefore, it is safe to say that during oral submissions, the intervening states have the right to make submissions. The court holds a minimum of four rounds of oral proceedings: two for the merits of the case, should the court reach the stage of holding oral proceedings, and two for the question of admission of the declaration.⁴²⁵ More rounds are held if

⁴¹⁵ Nuclear Tests (New Zealand v. France 1974 ICJ Rep 457).

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.* McIntyre 2023: 1-10.

⁴¹⁸ *Ibid.*

⁴¹⁹ Article 60 - Rules of Court 1978.

⁴²⁰ Practice Directions VI - Amendment promulgated on 30 January 2009. <https://www.icj-cij.org/practice-directions> (accessed on 12 December 2023).

⁴²¹ McIntyre 2023: 1-10.

⁴²² Article 84(2) and 86(2) - Rules of Court 1978.

⁴²³ *Ibid.*, at Art 84(2).

⁴²⁴ *Ibid.*, at Art 86(2).

⁴²⁵ McIntyre 2023: 1-10.

any questions from the bench have to be answered.⁴²⁶ Arguments by each of the parties are followed by a round of oral arguments from the intervening parties, and another round by the parties and their observations on the intervening submissions. It is safe to say that, should the court reach the oral stages of the hearing, it could take several months to years to reach an order. The final court order from the ICJ is binding, as stated in Art 94(1) of the *SICJ* and Art 59 of the *UN Charter*, and may be one of reparation or declaratory judgement.⁴²⁷ What could the outcome of all the interventions be in this case? One can note that the intervening states' declarations mainly pertain to the *bona fide* interpretation and application of the *Genocide Convention*. For now, it is unclear how the interventions can aid in holding Russia accountable for acting *mala fide* in terms of the *Genocide Convention*. It is, however, important to note that, based on the mass interventions received from the various states in support of Ukraine, no state will simply observe a case before the ICJ in which the misconduct of fundamental legal issues is in question.

Although advisory opinions fall outside the scope of this study, briefly perusing them here assists the subsequent investigation into contentious proceedings by analogy. In advisory opinions, the ICJ has in the past dealt with numerous states in hearings, as is evident in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* in 1965.⁴²⁸ In this hearing, 22 states were present, including delegates from the AU.⁴²⁹ The standard practice in advisory opinion proceedings is a single round of hearings.⁴³⁰ One possibility that the court could consider for the *Ukraine v Russia* case is that, as this is a contentious proceeding between two main parties (Art 63 allows for states to intervene if they are a party to a multilateral treaty that will be interpreted in the judgement), the court could restrict the intervenors to a round of oral arguments, while the parties hold a second round of hearings to address the opponent's arguments. In this way the administration of justice of the original parties is protected. In advisory opinions it is easier to treat all states equally, as there are no

⁴²⁶ *Ibid.*

⁴²⁷ Article 94 (1) - Statute of the International Court of Justice.
Article 59 – United Nations Charter.

⁴²⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.
[INTERNATIONAL COURT OF JUSTICE \(icj-cij.org\)](https://www.icj-cij.org/), (accessed on 4 August 2024).

⁴²⁹ *Ibid.*

⁴³⁰ McIntyre 2023: 1-10.

parties involved. The other possibility, in which Spain, Sweden, Denmark, Poland and Germany have showed an inclination, is to make submissions in concert.⁴³¹

Looking at the effect of this case, the court must take caution to ensure equality and procedural fairness between the parties, as all of the intervening states are in support of Ukraine and not Russia. The basis of all the declarations is that the ICJ has the jurisdiction to declare that Ukraine has not committed any act of genocide. Others go further and note arguments on the merits of the case, including the fact that the *Genocide Convention* does not grant Russia the permission to use force to punish and prevent genocide.⁴³²

Previously, in *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening),⁴³³ the court had noted that an Art 63 intervention should not affect the equality of parties in the dispute, as the intervenor is just that – an intervenor and not a party to the dispute.

The *Ukraine v Russia* case might give the impression that an Art 63 intervention is a mechanism for picking a side, but it is rather a way for states to jointly criticize breaches of an international obligation that is of great importance.

On 2 February 2024, the ICJ ruled on the preliminary objections encompassing the Allegations of Genocide, with 32 states intervening.⁴³⁴ The ICJ found that on 1 July 2022 a memorial was filed by Ukraine, in turn on 3 October, Russia raised preliminary objections on the jurisdiction of the ICJ and to the admissibility of the Application.⁴³⁵ During the period of 21 July 2022 to 15 December 2022, 33 states had filed their declarations, under Art 63.⁴³⁶ Once again Russia objected to the admissibility of the intervening declarations filed.⁴³⁷ However on 5 June 2023, the ICJ ruled that the declarations filed by the intervening parties (in terms of Art 63, as discussed) were

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ Australia v. Japan: New Zealand 2010. <https://www.icj-cij.org/case/148/intervention>, (accessed on 13 December 2023).

⁴³⁴ Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation: 32 States Intervening) 2 February 2024 General list No. 182. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf> (accessed on 4 August 2024).

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

admissible at the preliminary objection phase, provided that they related to Art IX of the *Genocide Convention*, relating to the determination of jurisdiction.⁴³⁸

Russia raised six preliminary objections. First, that the ICJ has no jurisdiction as there was no dispute between the Parties under the *Genocide Convention* when the application was filed; second, that the ICJ has no jurisdiction on the subject-matter; third, that the new claims made in the Memorial by Ukraine should be inadmissible; fourth, that the claims made by Ukraine are inadmissible as the possible judgement of the ICJ would be futile; fifth, that the declaration by Ukraine that it had not breached the obligations under the *Genocide Convention* is inadmissible; and sixth, that the application made by Ukraine is inadmissible, because it encompasses abuse of procedure.⁴³⁹

In the Memorial of Ukraine, Ukraine requested the ICJ to declare and adjudge the following: (a) the ICJ does have jurisdiction; (b) there is no probable evidence that Ukraine violated the *Genocide Convention* by committing genocide in the Donbas; (c) the use of force by Russia against Ukraine from 24 February 2022 violates Art I and IV of the *Genocide Convention*; (d) the recognition of independence of the Donbas, made on 21 February 2022, is in violation of Art I and IV of the *Genocide Convention*; and (e) by failing to comply with the Provisional Order made by the ICJ on 16 March 2022, it violated its obligations under the Order.⁴⁴⁰

The ICJ ruled on 2 February 2024 that it does have jurisdiction to proceed on the merits, based on Art IX of the *Genocide Convention*, as “submission (b)” requested by Ukraine in the Memorial is admissible.⁴⁴¹ The ICJ further contends that it does not have jurisdiction to adjudge on the submission (c) and (d) of the requests made in the Memorial of Ukraine.⁴⁴² This is elaborated in more detail in the paragraph below.

On 2 February 2024 the ICJ ruled on the preliminary objections (as listed above) as follows: The first (relating to lack of jurisdiction due to the lack of a case under the *Genocide Convention*), third (relating to the new submission (b) made by Ukraine in

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

the Memorial), fourth (relating to the claims made by Ukraine being inadmissible, rendering the possible ICJ judgement futile), fifth (relating to the inadmissibility of the declaration made by Ukraine, that Ukraine has not breached obligations under the *Genocide Convention*) and sixth (application made by Ukraine is inadmissible) preliminary objections were rejected.⁴⁴³ The second preliminary objection (relating to (c – use of force) and (d – recognition of independence) of the requests made by Ukraine in the Memorial), was upheld.⁴⁴⁴ By rejecting (c) and (d), the ICJ limited its scope of jurisdiction in this case, where the ICJ could have also examined whether the alleged acts committed by Russia under the Genocide Convention were or are internationally wrongful.⁴⁴⁵

From the preliminary objection hearing held, the ICJ confirmed its jurisdiction in the *Ukraine v Russia* case. It is noted that submission (b) in Ukraine’s Memorial (relating to no probable evidence that Ukraine committed genocide in the Donbas) is admissible.⁴⁴⁶ From this, the ICJ can proceed to examining this claim in the merits stage of the case. On 18 June 2024 the Registrar of the ICJ invited the states who filed an Art 63 declaration, to note whether they would like to file an amended or new declaration, or keep their original declaration, by 2 August 2024.⁴⁴⁷ Hereafter, in terms of Art 83 of the *Rules of Court*, Russia and Ukraine could both file their written observations on the admissibility of the declarations for purposes of the merits.⁴⁴⁸ Should any party (Russia or Ukraine) object to the admissibility of the declarations, in terms of Art 84(2) of the *Rules of Court*, there will be another round of written observations.⁴⁴⁹ After this the ICJ shall decide on the admissibility of the declarations at the merit stage of the proceedings.⁴⁵⁰

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

⁴⁴⁵ Murchuk *et al* “The Curious Fate of the False Claim of Genocide: On the ICJ’s Preliminary Objections Judgment in Ukraine v. Russia and Beyond”, 2024/2/24, <https://verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide/>, DOI: [10.59704/e2c707d41bd8eab0](https://doi.org/10.59704/e2c707d41bd8eab0) (accessed on 29 September 2024).

⁴⁴⁶ *Ibid.*, at para 149.

⁴⁴⁷ Press Release No.2024/59, “Declarations of intervention under Article 63 of the Statute of the Court for the purposes of the merits stage of the proceeding” [182-20240806-PRE-01-00-EN \(icj-cij.org\)](https://www.icj-cij.org/press/2024/059) (accessed on 2 September 2024).

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

The ICJ has procedural flexibility that can be applied in the *Ukraine v Russia* case. In doing so, the court will need to ensure that the standards of fairness are upheld between the parties, despite the mass intervention. It should be noted that, even if it takes long to reach finality in the case, the impact of the mass intervention and the precedent that this case is to set for the international community, is profound. This reiterates the international support regarding the prevention of atrocities, and the desire for accountability. Interventions carry the weight of legitimising the trial, as the order of the court potentially outweighs and decreases the chances of similar future conflicts. Thus, should the matter of *Ukraine v Russia* come to finality, the unprecedented support of the intervening states will aid in holding Russia accountable.

3.3 The viability of the ICJ in imposing responsibility

Presently, the ICJ held the first oral arguments between 18-20 September 2023, and the second oral arguments on 25 and 27 September 2023, for the determination of jurisdiction.⁴⁵¹ The ICJ, as mentioned, has already established *prima facie* jurisdiction and granted provisional measures to Ukraine on 16 March 2022. In terms of the provisional order granted, this amplifies the limitless potential of what parties to an international proceeding can request (as discussed in section 3.1.2.2, if there is a link between the measures requested and the rights that are claimed), and in turn what such an international court can order. After the hearings held in September 2023, the court must decide whether it has jurisdiction to proceed with the case. Should the court accept any one of Russia's arguments, the case would fall moot. However, this is not the case, as the ICJ upheld one of Ukraine's arguments on 2 February 2024, confirming that the ICJ has jurisdiction to proceed to the merits.

With this said it is important to reiterate that in the merit stage the ICJ will examine the claim (b – referring to the lack of probable evidence that Ukraine committed genocide in the Donbas) submitted by Ukraine in its Memorial. As alluded to by the ICJ on 2 February 2024, this kind of request made by Ukraine "... does not seek to invoke ...

⁴⁵¹ Acquis, "ICJ holds first arguments in the case Ukraine v Russia" <https://acquislp.eu/2023/09/21/ici-holds-first-arguments-in-the-case-ukraine-v-russia/> (accessed on 17 December 2023). Press release No. 2023/45, 22 August 2023. The Court to hold public hearings on the preliminary objections raised by the Russian Federation from Monday 18 to Wednesday 27 September 2023. <https://www.icij.org/sites/default/files/case-related/182/182-20230822-pre-01-00-en.pdf> (accessed on 10 November 2024).

international responsibility of the Russian Federation for an internationally wrongful act attributable to that State; it seeks a judicial finding that it has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine's view, imputed to it in public statements."⁴⁵² Taking this into account, it is unclear at this stage what Ukraine would achieve if the ICJ finds that Ukraine has not committed genocide, as Russia has publicly stated. However, this declaratory order could effectively remove the false claim of genocide, and in turn prevent any grounds for future justification of dispute between Ukraine and Russia. If the ICJ does find in favour of Ukraine, based on this claim, an order of non-violation would not impose responsibility on Russia for the invasion. This could mean that Ukraine will not be in a position to request reparations in the form of compensation from Russia, resulting from the invasion into Ukraine.

However, there is another route available to Ukraine to impose responsibility on Russia. As mentioned, the ICJ has granted provisional measures order in favour of Ukraine on 16 March 2022, which Russia has violated. Ukraine could hope that in the judgement on the merits, the ICJ finds that Russia violated the order on 16 March 2022, creating an obligation for Russia "...to make reparation in an adequate form...".⁴⁵³ If the ICJ does follow this approach, it is not evident at this stage what the ICJ would consider as an appropriate form of satisfaction for Ukraine.

Alternatively, should the ICJ once again in its final findings grant a declaratory order, and Ukraine is unsatisfied with it, Ukraine could approach the ICJ on a different basis. Ukraine could bring a new case against Russia at the ICJ, focusing on the forcible deportation of children from Ukraine to Russia, in the hope that the ICJ imposes responsibility on Russia. As mentioned in the previous chapter, the ICC has already issued arrest warrants against President Putin and Ms Lvova-Belova for the transfer and deportation of children from Ukraine to Russia. The forcible transfer of children is

⁴⁵² Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation: 32 States Intervening) 2 February 2024 General list No. 182, at para 54. <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf> (accessed on 4 August 2024).

⁴⁵³ Application Of The International Convention For The Suppression Of The Financing Of Terrorism And Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Ukraine V. Russian Federation) 31 January 2024 General list No. 166, para 400. <https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf> accessed on 4 August 2024).

an act of genocide in terms of Art II(e) of the *Genocide Convention*. Should the ICJ not be convinced that Russia has committed genocide based on the forcible deportation of children, one could assume that the weight of this pending case could at least in some way force Russia to disclose the whereabouts or information on the children.⁴⁵⁴ This case could then “...be able to draw more attention to the ... Ukrainian children, and garner international support for their rescue and ... rehabilitation”.⁴⁵⁵

As a point of speculation, Ukraine can only hope that the ICJ does not merely grant a declaratory order without reparations, as was done previously in *Ukraine v Russia (Application of Financing of Terrorism)*.⁴⁵⁶ It would be hopeful that the ICJ could declare guarantees of non-repetition, legal consequences of cessation, or reparations of some sort.⁴⁵⁷ Alternatively, it could follow its previous judgement in the *DRC v Uganda* case, where the ICJ split the proceedings and held the proceedings on reparations to a future date.⁴⁵⁸

As mentioned above, Russia will probably not comply with the court order. The order will however be binding and could potentially be implemented on Russia in the future, so it is incorrect to say that the order will have no weight. It is important to also look at what the provisional measure order and the final order could disable rather than enable. Further, even though the ICJ cannot enforce its binding order, it can be considered as a possible feasible mechanism in holding Russia accountable in the future, noting the ruling on the preliminary objections on 2 February 2024 to proceed to the merit stage.

As stated, the ICJ cannot enforce its binding order.⁴⁵⁹ Art 94(1) of the *SICJ*, states that the UNSC is empowered to enforce the judgement should there be non-compliance, for example with economic sanctions.⁴⁶⁰ However, once again as discussed

⁴⁵⁴ Murchuk *et al* “The Curious Fate of the False Claim of Genocide: On the ICJ’s Preliminary Objections Judgment in Ukraine v. Russia and Beyond”, 2024/2/24, <https://verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide/>, DOI: [10.59704/e2c707d41bd8eab0](https://doi.org/10.59704/e2c707d41bd8eab0) (accessed on 29 September 2024).

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Article 94 (1) - Statute of the International Court of Justice.
Article 59 – United Nations Charter.

⁴⁶⁰ Dugard *et al.* 2018:687.

previously, the veto power will come into play, should the UNSC exert any pressure. In this event the UNGA can recommend that Member States enforce countermeasures in an effort to force Russia to comply with the judgement, as discussed in Chapter 1.⁴⁶¹ Taking this into account the ICJ can render judgement in this case, should the ICJ make its order of reparation (in the form of compensation, restitution or satisfaction), there is only a slim chance that Russia will comply with the judgement.

Since the ICJ cannot enforce its order through the UNSC, the UNGA and the use of countermeasures can be applied to enforce the order. A possible way of exerting pressure to comply with the order in the future, could be through pressure imposed from the international community. With the aid of the international community, as discussed earlier and in Chapter 1 of this study, enforcing sanctions (heightening economic sanctions as recommended by the UNGA for example), could eventually lead to Russia complying with the order. It is noted that about “300 billion USD of Russian Central Bank” assets (in the form of cash and securities) are currently frozen.⁴⁶² The G-7 countries, Australia and the EU are holding these assets, “with more than two thirds of those immobilised in the EU”.⁴⁶³ These states are permitted to legally enforce the economic sanctions against Russia in terms of Art 48(1)(b) (‘obligation breached is owed to the international community as a whole’) of the *Responsibility of States for Internationally Wrongful Acts (RSIWA)*.⁴⁶⁴ The economic sanctions under the *RSIWA* are legal, and used as a way to force Russia to comply with international law.⁴⁶⁵ In terms of the *RSIWA*, the countermeasures have to be proportional to the damage caused to Ukraine by Russia, and sufficient opportunity granted to Russia to comply with its obligation.⁴⁶⁶

⁴⁶¹ Article 10 – United Nations Charter.

⁴⁶² Olson “Sticker Shock: Why the ICJ can Order Russia to Pay Reparations Upwards of 300 Billion USD in the Aftermath of the Ukraine War and How the International Community can Enforce It”, <http://dx.doi.org/10.2139/ssrn.4850556> (accessed on 29 September 2024).

⁴⁶³ *Ibid.*

⁴⁶⁴ Article 48 - Responsibility of States for Internationally Wrongful Acts, G.A. Res. 62/61, U.N. Doc. A/RES/62/61 (2001).

⁴⁶⁵ Olson “Sticker Shock: Why the ICJ can Order Russia to Pay Reparations Upwards of 300 Billion USD in the Aftermath of the Ukraine War and How the International Community can Enforce It”, <http://dx.doi.org/10.2139/ssrn.4850556> (accessed on 29 September 2024).

⁴⁶⁶ Article 49 - Responsibility of States for Internationally Wrongful Acts, G.A. Res. 62/61, U.N. Doc. A/RES/62/61 (2001).

The countermeasures will terminate after Russia complies with its international obligation.⁴⁶⁷ Russia will remain in breach until the ICJ reparation order is paid, even if Russia complies with its international obligation.⁴⁶⁸ Thus, Russian assets will remain frozen until the invasion into the territory of Ukraine is stopped, the use of force in Ukraine has been refrained from, and the reparations for the violation have been paid. This clearly indicates that through the use of countermeasures the member states of the UN (as recommended by the UNGA) can aid in upholding the ICJ reparation order.

Should Russia however still refuse to pay the reparations, the international community as a whole will be required to "...financially support the rebuilding of Ukraine".⁴⁶⁹ This would incentivise states to heighten the economic sanctions against Russia, and hold onto the country's assets until reparations are paid to Ukraine. Failure to honour the reparation order by the ICJ is a violation of international law. In turn, the use of countermeasures creates a feasible enforcement mechanism addressing the ICJ's 'lack of enforcement power' in theory, but it would probably be difficult to execute in practice.⁴⁷⁰

Further, Russia's ability to freely engage with the international community has been significantly limited as a result. The non-compliance of Russia thus far has resulted in aggravation of the international community, resulting in heightened sanctions as discussed, and limited engagement with the international community. The support of the international community in imposing and upholding sanctions and providing support to Ukraine through financial and military assistance, will play a major role in limiting Russia's power. The development of this case in the ICJ, has set a profound precedent in the international community. Even though it might be difficult to hold a state accountable, the ICJ did not only shrug its shoulders and close the doors.

The first 3 chapters of this study focused on evaluating the feasibility of the legal mechanisms available on an international level (Chapter 1 - the mechanisms available to the UN; Chapter 2 - the ICC's ability to account for individual accountability; Chapter

⁴⁶⁷ *Ibid*, at Art 50-52.

⁴⁶⁸ Article 94 – United Nations Charter.

⁴⁶⁹ Olson "Sticker Shock: Why the ICJ can Order Russia to Pay Reparations Upwards of 300 Billion USD in the Aftermath of the Ukraine War and How the International Community can Enforce It", <http://dx.doi.org/10.2139/ssrn.4850556> (accessed on 29 September 2024).

⁴⁷⁰ *Ibid*.

3 - the ICJ's ability to hold either state accountable) to address the misdeeds emanating from the invasion. In the next chapter the focus shifts to the domestic legal framework (inclusive of both Russia and Ukraine as well as third states) to determine whether legal recourse can be sought on a domestic level to respond to violations of international criminal laws.

CHAPTER 4

Evaluating the domestic legal mechanisms available to respond to the violations of international criminal laws within the Ukraine-Russia conflict

The previous chapters in this study focused on the legal mechanisms available to respond to the Russia-Ukraine conflict on an international level. This chapter shifts to the legal mechanisms available on a domestic level. It will evaluate the ability of domestic courts to serve as a viable legal mechanism to deal with the violations, which have been caused by the ongoing conflict in Ukraine. The chapter will explore Ukrainian and Russian courts, including third states' exercise of universal jurisdiction, and the viability of each court respectively to prosecute those who committed international violations since the invasion of Ukraine by Russia in February 2022.

Domestic courts typically have jurisdiction to hold trials for crimes that have been committed within their territory, as well for crimes that involve its citizens, both domestically and internationally, or that affect the interests of the nation. Furthermore, in cases where grave crimes have been committed which might affect the international community as a whole, domestic courts can exercise jurisdiction, based on the principle of universal jurisdiction.

This chapter will be divided into four sections. The first section will evaluate whether the crimes emanating from the ongoing conflict can be tried by Ukrainian domestic courts, bearing in mind the ability of the Ukrainian courts to vest territorial jurisdiction. The second section will focus on the viability of holding trials *in absentia*. The third section will consider the viability of holding trials in Russian domestic courts based on personal jurisdiction. The fourth section of this chapter assesses the possibility of resorting to third party states (not directly involved in the armed conflict) to hold trials based on the principle of universal jurisdiction. Finally, this chapter will conclude with an evaluation of the feasibility of these domestic courts to respond to the violations of international criminal laws emanating from the current Ukraine-Russian conflict.

4.1 Territorial Jurisdiction

The primary mechanism of justice in a country is its domestic courts. Domestic courts are a powerful tool to ensure accountability in a country with a strong legal system which promises to uphold human rights. A state has jurisdiction over criminal conduct taking place on its territory, meaning that States assign themselves the right to exercise criminal jurisdiction over crimes committed on their territory, irrespective of whether the crime committed is of domestic or international nature. In turn, the territorial state does not need permission from the State of nationality of the perpetrator to try the perpetrator.⁴⁷¹ The main advantage of domestic courts is the availability of victims, evidence and witness. For a domestic court to be effective in the prosecution of international crimes, the country's laws must recognise and criminalise the crimes in accordance with international standards. International laws do not prohibit trials taking place during active hostilities, even though there are commentators who do advise against it.⁴⁷² If such a trial does take place in a domestic court, the *Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949 (Geneva Convention (III) on POW)* advises that military courts should try prisoners of war, unless existing laws state otherwise. Ukraine already abolished military courts in 2010.⁴⁷³ Under normal circumstances this study would have looked at the decisions of military courts, but as Ukraine's military courts were abolished, subsequent proceedings have taken place in civilian courts. The focus here, therefore, will be on Ukrainian civil courts, the decisions rendered by them, and the possibility of prosecuting those who have committed international violations since the outbreak of the Russia-Ukraine conflict, in February 2022, in domestic courts.

The outbreak of the Russia-Ukraine war has resulted in numerous verdicts being reached that relate to war crime trials, if compared to the period between 2014-2022.⁴⁷⁴ The slow increase in war crime trial verdicts can be as a result of specific factors: first, the lack of grey area in relation to the qualification of conflict-related crimes (the crimes are being committed in the framework of IAC that stems from the Russian invasion into Ukraine), and second, the training and educating of Ukrainian

⁴⁷¹ Cassese et al. 2002: 583-615.

⁴⁷² Goldman "War crimes trial of Russian soldier was perfectly legal – but that doesn't make it wise", <https://theconversation.com/war-crimes-trial-of-russian-soldier-was-perfectly-legal-but-that-doesnt-make-it-wise-183586> (5 December 2023).

⁴⁷³ *Ibid.*

⁴⁷⁴ Marchuk 2022: 787-803.

authorities, particularly prosecutorial services and the national police, in the investigation and prosecution of atrocity crimes.⁴⁷⁵

Ukrainian prosecutors are undergoing various training opportunities in relation to prosecuting atrocity crimes. Ukrainian prosecutors are part of the Joint Investigation Team under the auspices of Eurojust (used as a mechanism in international cooperation in criminal matters, with the purpose of carrying out criminal investigations) and the Atrocity Crimes Advisory Group (established for the provision of advice and operational assistance to the Ukrainian Prosecutorial Office, for the investigation and the prosecution of crimes of atrocities in Ukraine), which Slovakia, Latvia and Estonia have also joined.⁴⁷⁶ Ukrainian Judges are also advised to learn from experienced European judges that have adjudged crimes of atrocities in international law under the principles of universal jurisdiction.⁴⁷⁷ As the number of war crimes cases stemming from the Russian-Ukraine invasion increases, there is a duty on the judges to be better acquainted with applying international laws in a domestic context.

Before looking at the trials held in Ukrainian courts, it is pertinent to note that Ukrainian domestic laws (*Criminal Code of Ukraine (CCU)*) have codified a number of international crimes: war crimes (Art 438 of the *CCU*), crime of aggression (Art 437 of the *CCU*), and genocide (Art 442 of the *CCU*).⁴⁷⁸ However, the crime against humanity is not explicitly mentioned in the *CCU*, but is ratified by treaties that recognise the crime against humanity.⁴⁷⁹ With this said, Art 9 of the *Ukraine Constitution of 1996* states that “international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine”.⁴⁸⁰ Next the discussion turns to the trials held in Ukrainian Courts.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Eurojust. "Supporting judicial authorities in the use of joint investigation teams." [2020-06 JITs-Factsheet_EN.pdf \(europa.eu\)](#) (accessed on 5 November 2023).

⁴⁷⁷ Marchuk 2022: 787-803.

⁴⁷⁸ Art 437, 438 and 442 - Criminal Code of Ukraine.

⁴⁷⁹ Equipo Nizkor "National implementation of international criminal law" [Equipo Nizkor - National Implementation of International Criminal Law for Serious Crimes: Ukraine. \(derechos.org\)](#) (accessed on 11 October 2024).

⁴⁸⁰ *Ibid.* Article 9 - Ukraine Constitution of 1996.

4.1.1 Trials Held in Ukrainian Courts

The various war trials that have been dealt within Ukrainian courts to date, can be divided into two categories: first are the crimes committed against protected persons (for example rape, intentional killing), and second are attacks against civilians and civilian objects, and crimes against property (for example pillage).⁴⁸¹ With regards to crimes against property, cases have been brought to court and to the public's attention involving Russian soldiers looting homes and stealing household items.⁴⁸² Subsequently two cases in this regard, pertaining to Sergey Zakharov (Zakharov) and to Nikolai Filatov (Filatov), will briefly be discussed. On 3 August 2022, the Shevchenkivsky District Court of Kyiv delivered its first verdict relating to the war crime of pillage.⁴⁸³ A Russian soldier, Zakharov, was sentenced to 12 years imprisonment in the Shevchenkivsky District Court of Kyiv after pleading guilty to robbing jewels from a civilian's house that he kept in his possession.⁴⁸⁴ Zakharov informed the court that it was his instructions to go into civilian houses, search them and hand over all the looted items to the commander.⁴⁸⁵ The prosecutor, Yulia Rudnytska, noted in the indictment that Zakharov was in violation of the *Geneva Convention on the Protection of the Civilian Population in Time of War of August 12, 1949 (Fourth Geneva Convention of 1949)*, an international treaty that Ukraine had ratified, specifically in violation of Art 33 of the *Fourth Geneva Convention of 1949*, as the stolen items could not be utilised to achieve a military purpose.⁴⁸⁶ In a similar situation, Filatov, serving as a tank commander, forced a civilian to give him a golden necklace.⁴⁸⁷ After pleading guilty in the Novozavodsky District Court of Chernihiv, and showing remorse, Filatov was sentenced to eight years and six months imprisonment.⁴⁸⁸

⁴⁸¹ Marchuk 2022: 787-803.

⁴⁸² *Ibid.*

⁴⁸³ [Награбував жіночих прикрас: у Києві полоненого російського військового засудили до 12 років в'язниці | СУДОВИЙ РЕПОРТЕР \(sudreporter.org\)](#) (accessed on 22 October 2023).

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid.*

⁴⁸⁶ Article 33 - Geneva Convention of the Convention on the Protection of the Civilian Population in Time of War of August 12, 1949.

⁴⁸⁷ ["It's very embarrassing." How a downed Russian tanker was tried in Chernihiv region | COURT REPORTER \(sudreporter.org\)](#) (accessed on 22 October 2023).

⁴⁸⁸ *Ibid.*

In addition to the previously mentioned cases for war crimes against property, there has been further developments in the Solomyanskyy District City Court of Kyiv, dealing with war crimes against protected persons. On 23 May 2022, Vadim Shishimarin (Shishimarin), a tank-unit sergeant from the Russian army, pleaded guilty in the Solomyanskyy District City Court of Kyiv, to killing Oleksandr Shelipov (Shelipov) in the village of Chupakhivka, just four days after Russia invaded Ukraine on February 2022.⁴⁸⁹ Shishimarin explained during the trial that he shot Shelipov on the instruction of an unidentified soldier in the car, because Shelipov was talking on his cell-phone and they were afraid that Shelipov would report their location to the Ukrainian Armed Forces (UAF).⁴⁹⁰ Shishimarin testified that the unidentified soldier giving the instruction was not his immediate commander, but that he had no other choice as the unidentified soldier threatened him and ordered him to shoot the victim, screaming that their lives were in danger. This statement was corroborated by another soldier Maltisov, who was also present in the car.⁴⁹¹

Shishimarin stated that he shot the victim under duress, he showed remorse, and added that he had no intention to kill the civilian.⁴⁹² The Court dismissed the facts that Shishimarin did not act with intent. The fact that the gunshot wounds pointed to the direct intent to kill the victim, was confirmed on appeal.⁴⁹³ The court referred to Art 41(4) of the *CCU*, that states that a person is not relieved of their criminal responsibility if he carried out an unlawful order that he knew was manifestly unlawful, which is similar to Art 33 of the *Rome Statute*, which states that the order has to be manifestly unlawful for the defence of superior orders to fail.⁴⁹⁴ The judges further added that if Shishimarin had refused to carry out the order there would have been no serious consequences for him, and he could have resorted to alternative means like scaring the victim or taking the phone away.⁴⁹⁵ The court's viewpoint stands that Shishimarin had no legal obligation to fulfil the order of shooting the civilian, as he was aware that

⁴⁸⁹ Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

⁴⁹⁰ *Ibid.*

⁴⁹¹ Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ Article 41(4) - Criminal Code of Ukraine and Article 33 - Rome Statute of the International Criminal Court - Is applicable to all crimes in Ukraine and not only to war crimes.

⁴⁹⁵ *Ibid.* Marchuk 2022: 787-803.

the unlawful order did not come from his commander. This made the court doubt his remorse in relation to his intent to kill, as it seemed as though he was attempting to conceal his intent.

During Maltisov's testimony, Maltisov stated that a senior lieutenant who was present in the car questioned why Shishimarin "*had done it*" and ordered the soldiers to put their rifles in safety mode.⁴⁹⁶ This substantiated the illegality of the order.

It has been observed that in national legal systems the use of superior orders in relation to war crimes as a defence, is rarely successful, due to the serious nature of war crimes.⁴⁹⁷ With this said there are exceptional cases in which the mistake of fact or duress have been successfully pleaded, despite the illegality of the order.⁴⁹⁸ In this case the Ukrainian court reasonably concluded on the irrelevance of the defence of superior orders, by explaining that neither the mistake of fact nor duress could justify the unlawful order carried out by Shishimarin.⁴⁹⁹ This conclusion was also accepted on appeal.⁵⁰⁰ Shishimarin's cooperation during the proceedings was noted by the court as a mitigating factor.⁵⁰¹ However, as noted in the judgement, the court proceeded to impose the harshest penalty available, a life sentence, in terms of Art 438(2) of the *CCU*.⁵⁰² The aggravating factors taken into account included the age of the victim and the shared intent to commit the crime by a group of persons (Shishimarin and the commander).⁵⁰³ Additionally, the court noted that the criminal responsibility of Shishimarin was aggravated due to the fact that he was charged with a war crime, and that the circumstances of the war crime stemmed from the aggression of Russia against Ukraine.⁵⁰⁴ In combination, it was found that these factors warranted the harshest penalty. Nevertheless, it seemed unreasonable to count Russia's aggression

⁴⁹⁶ Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

⁴⁹⁷ Marchuk 2022: 787-803.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ Article 41(4) - Criminal Code of Ukraine. Article 33 - Rome Statute of International Criminal Court.

⁵⁰² Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

⁵⁰³ Article 67 – Criminal Code of Ukraine.

⁵⁰⁴ Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

as a factor to amplify the criminal responsibility of Shishimarin.⁵⁰⁵ As mentioned above, Shishimarin was convicted of a war crime by the court and sentenced to life in prison.⁵⁰⁶ However, on appeal, the life sentence was reduced to 15 years, as it was found that the court of first instance mistakenly considered aggravating factors for the purpose of sentencing, which were not initially pleaded in the indictment by the prosecution.⁵⁰⁷

The second war crimes trial had two defendants, namely Aleksandr Bobykin (Bobykin) and Aleksandr Ivanov (Ivanov). In this case, Bobykin was a gunner and driver loader of a “Grad” Multiple Launch Rocket System (MLRS), and Ivanov was from the 200th Motorized Rifle Brigade of the Russian Army.⁵⁰⁸ On 22 February 2022, both the defendants were made aware of the invasion into Ukraine, loaded the “Grad” launchers and placed them close to the Ukrainian border to be launched into Ukrainian settlements of the Kharkiv region.⁵⁰⁹ On 24 February 2022, they launched multiple “Grad” rockets from Russian territory, on military command.⁵¹⁰ The “Grads” are loaded with unguided rockets and allow up to 40 rockets to be simultaneously launched.⁵¹¹ Their use in densely populated areas would normally violate the IHL prohibition against indiscriminate attacks.⁵¹² The rocket launch resulted in damage to infrastructure, houses, schools and electricity sub-stations.⁵¹³ Later, the launchers were moved into Kharkiv, from where they were again fired.⁵¹⁴ The Ukrainian forces destroyed the Russian military column, and Bobykin was injured in the process.⁵¹⁵ He went into

⁵⁰⁵ Marchuk 2022: 787-803.

⁵⁰⁶ Case No. 760/ 5257/22, 23 May 2022, Case of Vadim Shishimarin, Solomyanskyy District City Court Kyiv.

⁵⁰⁷ *Ibid.* Hogue 2023: 108-112.

Sergey Vasiliev, notes that harsh sentences provide less incentive for victims to cooperate and admit guilt in forthcoming trials. Vasiliev “The Reckoning for War Crimes Has Begun”, <https://foreignpolicy.com/2022/06/17/war-crimes-trials-ukraine-russian-soldiers-shishimarin/> (visited 5 November 2023).

⁵⁰⁸ Case No. 535/244/22, 31 May 2022. Case of Aleksandr Bobykin and Aleksandr Ivanov, Kotelevskyy District Court in the Poltava Oblast.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

hiding for ten days.⁵¹⁶ Ivanov also went into hiding until he turned himself in.⁵¹⁷ As with Shishimarin, both defendants in this case admitted their guilt, cooperated with the proceedings and expressed remorse.⁵¹⁸ The Kotelevskyy District Court, as in the case of Shishimarin, did take the factors of cooperation during the proceedings and remorse into account as mitigating factors.⁵¹⁹ The court referred to Art 67 of the *CCU*, which states that a person who committed a crime and voluntarily surrendered before the crime is discovered or the person is confirmed wanted, may be relieved from criminal liability or have his sentence reduced.⁵²⁰ The court noted the severity of the crime, taking into account the individuals' circumstances, including the mitigating and aggravating factors, and sentenced both the defendants to 11 years and six months for shelling Ukrainian settlements in the Kharkiv region.⁵²¹ The defendants chose not to appeal their verdict, and requested to be included in the prisoner of war exchange between Russia and Ukraine.⁵²²

From the above cases we can see that Ukrainian courts are holding trials resulting from the invasion. In the mentioned cases the evidence was readily available at the courts' disposal, as they have "...access to crime scenes, evidence, and suspects it can apprehend...".⁵²³ The Office of the Prosecutor (OTP) set up an online portal that allows information of recent alleged crimes to be submitted.⁵²⁴ From the cases above it is also clear that Ukrainian courts do consider mitigating factors and the circumstances of the defendants, and harsh sentences can be overturned on appeal. This implies that there is real justice, and not merely vindictive, cynical proceedings against captured enemies. The next section will investigate some of the difficulties faced by Ukrainian courts when holding trials for crimes that emanate from the invasion into Ukraine.

4.1.2 Possible Difficulties With Holding Trials in Ukrainian Courts

⁵¹⁶ *Ibid.*

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.*

⁵²⁰ Article 67 - Criminal Code of Ukraine.

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ Vasiliev "The future of justice for Ukraine is domestic" [The future of justice for Ukraine is domestic - JusticeInfo.net](#) (accessed on 9 May 2024).

⁵²⁴ *Ibid.*

Ukraine's primary challenge regarding these trials is immunities. There is a distinction between personal immunity and functional immunity that can be granted to high-level individuals. Personal immunity is "... restricted to certain high-level officials, in particular heads of State, heads of government and ministers of foreign affairs..." and "...covers all acts performed, whether in a private or official capacity, or prior to or during the term of office."⁵²⁵ Functional immunity "... is not attached to the position of the official, but to the acts performed in an official capacity, therefore applying to any person who conducted such acts."⁵²⁶

So when Ukrainian courts seek to prosecute individuals for the crime of aggression, they will be faced with challenges surrounding immunity. In Chapter 2 of this study, we looked at the definition of aggression as defined by the ICC. The *CCU* defines aggression as:

Article 437. Planning, preparation and waging of an aggressive war

1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.
2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.⁵²⁷

As it stands, the definition in *CCU* and that of the ICC differ, as the *CCU* does not mention the leadership requirement, implying that it could be committed by anyone.⁵²⁸ However, as mentioned before, Ukraine is undergoing efforts to better align its domestic laws with international laws. On 28 February 2024 the Supreme Court of Ukraine delivered a judgement to clarify the persons that can commit the crime of aggression under the *CCU*.⁵²⁹ In this case it was stated that crimes of aggression are committed by individuals who are:

... able to exercise effective control over political or military actions of a state and/or significantly influence political, military, economic, financial, information and other processes in their own state or outside its borders, and/or manage specific directions of political or military actions. ... by way of illustration, that such persons could be heads of States and governments, members of parliament, leaders of political parties, diplomats, heads of special services, military commanders, or heads of State bodies.⁵³⁰

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ Article 437 – Criminal Code of Ukraine.

⁵²⁸ Labuda "Prosecuting the Crime of Aggression in Ukraine and Beyond: Seizing Opportunities, Confronting Challenges and Avoiding False Dilemmas" [Prosecuting the Crime of Aggression in Ukraine and Beyond \(justsecurity.org\)](#) (accessed on 9 October 2024).

⁵²⁹ Decree in the Name of Ukraine, The Grand Chamber of the Supreme Court, Case No. 415/2182/20, 28 February 2024.

⁵³⁰ *Ibid.* Labuda "Prosecuting the Crime of Aggression in Ukraine and Beyond: Seizing Opportunities,

The crime of aggression or the “act” of aggression is therefore “by its nature a leadership crime”.⁵³¹ In turn, prosecuting certain high-level individuals for the crime of aggression in Ukrainian courts would trigger both functional and personal immunities. This does not, however, mean that lower-level individuals cannot be tried for the crime of aggression. It has been noted that about “100 cases of aggression with over 600 suspects” have been filed by the OTP General of Ukraine.⁵³² The list of suspects includes individuals “...from high-level military commanders and members of Moscow’s State Duma to Russian propagandists and the leader of the Russian Orthodox Church”.⁵³³ Notably, the following state leaders are not on the list, “...Russian President Vladimir Putin, Prime Minister Mikhail Mishustin, and Foreign Minister Sergey Lavrov...”.⁵³⁴ The fact that Ukraine has not included the mentioned state leaders on the list of suspects evidences the fact that Ukraine is respecting the personal immunities afforded to such heads of state.

In the domestic courts of Ukraine, there is no way around the immunities held by certain high-level officials. It would therefore be prudent to explore alternative mechanisms where the immunities held by these high-level officials will not hinder them from prosecution. As such, alternative justice mechanisms will be explored in Chapter 5 of this study. For the purpose of this chapter, the next section will conclude the evaluation of the feasibility of holding trials in Ukrainian courts.

4.1.3 The Viability of Holding Trials in Ukrainian Courts

Prior to the outbreak of the Russia-Ukraine war, the Ukrainian government was focused on creating a transitional justice roadmap that would encompass reparatory measures, hence Ukraine’s commitment to developing the professional skills of the

Confronting Challenges and Avoiding False Dilemmas” [Prosecuting the Crime of Aggression in Ukraine and Beyond \(justsecurity.org\)](#) (accessed on 9 October 2024).

⁵³¹ Hathaway “Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression.” [Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression \(justsecurity.org\)](#) (accessed on 9 October 2024).

⁵³² Mulin “Prosecuting Putin: Creation of a Special Tribunal for Russian Aggression” [Prosecuting Putin: Creation of a Special Tribunal for Russian Aggression - Opinio Juris](#) (accessed on 9 October 2024).

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

prosecutors and investigators.⁵³⁵ The Ukrainian legal system is clearly not just blindly prosecuting individuals for the sake of exercising power as a counterattack on Russia. Ukrainian legal professionals are continuously developing their skills to be better equipped to handle the war crime trials emanating from the Russia-Ukraine war. Due to the increase in atrocity crimes in Ukraine, efforts to further develop the Ukrainian judicial body in line with international laws, will equip Ukraine to sufficiently respond to these atrocity crimes. This is evident from the recent case before the Ukrainian Supreme Court, discussed above, where the definition of the crime of aggression as stipulated in the *CCU* was amended to better align with international laws. As evidenced earlier, Ukrainian Courts have already commenced with trials for atrocity crimes emanating from the ongoing invasion into Ukraine. The OTP, as mentioned, set up an online portal for the collection of information of recent crimes that have allegedly been committed.⁵³⁶ Despite the challenges faced by Ukrainian courts regarding immunities, this has not hindered Ukraine to continue seeking justice for atrocity crimes committed during the ongoing invasion within the borders of Ukraine. The continued trials held in Ukrainian courts will in turn lighten the burden and aid other international courts. To conclude, Ukraine is continuing to develop its legal system, and keeping record of ongoing alleged crimes and pursuing prosecution for atrocity crimes. This indicates a favourable likelihood that Ukrainian courts are a feasible mechanism in addressing atrocity crimes committed by individuals that do not hold immunities.

In this section, the viability of holding trials in Ukrainian courts was addressed. The next section will explore the viability of holding trials *in absentia*, which is quite a controversial mechanism.

4.2 Trials *in absentia*

In absentia trials have been suggested in literature, yet remains controversial. The use of trials *in absentia* bears some critique. First, there is doubt as to whether trials *in absentia* are compatible with European Court of Human Rights (ECtHR)

⁵³⁵ Busal “Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process”, [Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process \(justsecurity.org\)](https://www.justsecurity.org/2024/05/09/mariupol-and-the-origins-and-avenues-of-ukraine-s-transitional-justice-process/) (accessed on 9 May 2024).

⁵³⁶ Vasiliev “The future of justice for Ukraine is domestic” [The future of justice for Ukraine is domestic - JusticeInfo.net](https://www.justiceinfo.net/2024/05/09/the-future-of-justice-for-ukraine-is-domestic/) (accessed on 9 May 2024).

jurisprudence, as there is “the absence of an explicitly mentioned right to retrial following *in absentia* conviction”.⁵³⁷ Second, Art 6(3) of the *European Convention on Human Rights (ECnHR)*, of which Ukraine is a party, encapsulates that the accused has a right to be notified in a language he understands of the cause and nature of the accusation, including the right to defend himself either in person or *via* a legal practitioner.⁵³⁸ Similarly, in the case of *Colozza v Italy*, the ECtHR reiterated the main purpose of Art 6 of *ECnHR*, which is that a person who is charged with a criminal offence is permitted to be part of the hearing.⁵³⁹

Nonetheless, there is no human rights treaty, whether international or domestic, that outrightly prohibits proceedings being held *in absentia*.⁵⁴⁰ Treaties (such as Art 14(3)(d) of the *International Covenant on Civil and Political Rights (ICCPR)* and Art 6 of the *ECnHR*) mainly stress the importance of the accused’s right to be present at a trial.⁵⁴¹ There is an understanding amongst the international community that the right to be present for a trial is not unlimited, and that there are certain exceptions in this regard.⁵⁴² In turn, trials *in absentia* are lawful under certain circumstances. These include that the accused was present at the trial but has subsequently disrupted the proceedings to the point where the court requested the accused to be removed from the courtroom.⁵⁴³ In this regard, the court needs to safeguard the victim’s rights as well, so proceeding with such a trial *in absentia* is lawful.⁵⁴⁴ Another reason for an *in absentia* trial is where the accused was present at the trial but then absconded, or if the accused waives the right to be present at the trial.⁵⁴⁵ When an accused waives his right to the trial, the prosecutor bears the burden to prove that the accused was aware of the proceedings.⁵⁴⁶ The prosecutor has “to demonstrate that the accused had actual knowledge; vague and informal knowledge is insufficient, and any waiver must be

⁵³⁷ Marchuk 2022: 787-803.

⁵³⁸ Article 6(3) – European Convention on Human Rights.

⁵³⁹ *Colozza v. Italy*, application No. 9024/80, ECtHR, reported at (1985) 7 EHHR 516, para 27.

⁵⁴⁰ Bellelli 2010: 438.

⁵⁴¹ *Ibid.*

⁵⁴² UpRights *et al*: 621.

⁵⁴³ Global Rights Compliance “Trials in Absentia: A dilemma for Ukraine”, <https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf> (accessed on 9 May 2024).

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

⁵⁴⁶ IBA “Report on the ‘Experts’ Roundtable on trials in absentia in international criminal justice”, <https://www.ibanet.org/document?id=Experts-roundtable-trials-in-absentia> (accessed on 11 May 2024).

expressed”.⁵⁴⁷ Ultimately, under these “lawful *in absentia* trials”, the accused’s absence will not result in the delay or avoidance of justice.⁵⁴⁸ Therefore, in this regard, trials *in absentia* are seen as lawful, provided that the, right to a retrial as recognised by the ECnHR and ECtHR, is guaranteed (as mentioned above) to the individual that has been convicted.⁵⁴⁹

In addition, trials *in absentia* have not taken place in international criminal proceedings. We can refer here to the *in absentia* case of Martin Borman at the International Military Tribunal at Nuremberg (IMT).⁵⁵⁰ At the IMT, Borman was convicted for crimes against humanity, as well as war crimes, and was sentenced to death.⁵⁵¹ Borman had already passed away at the time of the trial.⁵⁵² Another reference here can be made to the Special Tribunal of Lebanon (STL). The case before the STL focused on the bombing that murdered the “former Lebanese Prime Minister Rafik Hariri and others”.⁵⁵³ The proceedings lasted 11 years, and exhausted the available funds, leading to its closure.⁵⁵⁴ Aside from this, the STL convicted Salim Ayyash *in absentia* on the grounds of “conspiracy to commit a terrorist act, committing a terrorist act, intentional homicide and attempted intentional homicide for participating in a conspiracy to assassinate Hariri”.⁵⁵⁵ The other three defendants were acquitted.⁵⁵⁶

It might be difficult getting hold of individuals to face trial, so Ukraine makes provision for trials *in absentia* through its 2013 *Criminal Procedural Code of Ukraine* (CPCU).⁵⁵⁷ The CPCU was amended to include trials *in absentia*, following the Maidan protests, which began in November 2013, when President Yanukovich refused to sign an

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Global Rights Compliance “Trials in Absentia: A dilemma for Ukraine”, <https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf> (accessed on 9 May 2024).

⁵⁵⁰ International Military Tribunal, Nuremberg, Judgment 1 October 1946, Vol. I, at 338–341.

⁵⁵¹ *Ibid.*

⁵⁵² Scharf “Confirmation of Charges in Absentia for Joseph Kony: Paving the Way for Putin?” <https://www.justsecurity.org/99033/joseph-kony-in-absentia-putin/> (accessed on 9 October 2024).

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Traldi A “Special Tribunal for Lebanon Hands Down Historic Verdict on Hariri Assassination Charges” <https://www.lawfaremedia.org/article/special-tribunal-lebanon-hands-down-historic-verdict-hariri-assassination-charges> (accessed on 9 October 2024).

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Criminal Procedural Code of Ukraine, Biljvjcni Bep [jdyj” Pa | Ib [Verkhovna Rada Gazette], 2013, No. 9-10, No. 11-12, No. 13, at 88, Art. 297-1.

agreement which would integrate Ukraine further with the EU.⁵⁵⁸ This allowed the prosecution of senior Ukrainian officials along with the former President Yanukovich, who fled to Russia from Ukraine.⁵⁵⁹ Trials *in absentia* were regarded as a helpful tool in ensuring the prosecution of conflict-related crimes, where obtaining the suspect for trial is impossible.⁵⁶⁰ However, the opposite is true in practice, as mentioned earlier (briefly: doubt that trials *in absentia* are compatible with ECnHR jurisprudence and challenges regarding notifying the accused). Further, Ukrainian prosecutors felt uneasy proceeding with war crime trials *in absentia* that necessitated lengthy terms of imprisonment.⁵⁶¹

To demonstrate that Ukraine is trying to align with international laws, reference will be made to a few articles from the CPCU with regards to trial in absentia. Art 7 of the CPCU makes provision to ensure respect for the rights of the suspects and accused during trials *in absentia*.⁵⁶² Art 297-1 of the CPCU states: “*in absentia* pre-trial investigation may be held in cases of those who went into hiding ... in order to avoid criminal responsibility”.⁵⁶³ Art 374(5) of the CPCU requires the court to “comment on whether the prosecution used all available options to ensure the rights of a suspect or accused in the “absent” proceeding”.⁵⁶⁴ The CPCU also demonstrates certain challenges. Art 297-5 of the CPCU states that with regards to an *in absentia* summons, it must be served on the “last known address and be published in the country-wide mass media and on official websites of authorities conducting pre-trial investigations ... as soon as a summons is published ..., a suspect is considered to be properly introduced to the contents of such summons”.⁵⁶⁵ Clearly, there is no guarantee that the summons has indeed been served through the use of media publication on the accused. However, the burden of proof is placed on the court to prove that the accused has been served. This provision is in line with international laws. The CPCU does not

⁵⁵⁸ Kozyrev “Understanding Ukraine’s Euromaidan Protests”, <https://www.opensocietyfoundations.org/explainers/understanding-ukraines-euromaidan-protests> (accessed on 11 May 2024).

⁵⁵⁹ Marchuk 2022: 787-803.

⁵⁶⁰ *Ibid.*

⁵⁶¹ Marchuk 2022: 787-803.

⁵⁶² Article 7 – Criminal Procedure Code of Ukraine.

⁵⁶³ *Ibid.*, at Art 297-1.

⁵⁶⁴ *Ibid.*, at Art 374(5).

⁵⁶⁵ *Ibid.*, at Art 297-5.

make it clear that, after conviction, the accused has the right to a re-trial.⁵⁶⁶ With that said, trials *in absentia* have already taken place in Ukraine in relation to the current ongoing conflict, and will be looked at below.

4.2.1 *In Absentia* Trial Emanating from the Russia-Ukraine Conflict

The Russia-Ukraine conflict has put trials *in absentia* back in the limelight. On 23 June 2022, the Solomyansky District Court in Kyiv held its first trial *in absentia* of Mikhail Romanov (Romanov), a Russian soldier, described as a serviceman of the 239th Regiment of the 90th Guard Tank Vitebsk-Novgorod Twice Red Banner Division of the Armed Forces of the Russian Federation. Romanov was not in Ukrainian custody.⁵⁶⁷ Romanov, along with another unidentified soldier, shot a civilian and proceeded to rape his wife throughout the day.⁵⁶⁸ Romanov was duly accused of murdering a civilian and raping the victim's wife multiple times.⁵⁶⁹ Romanov had the right to be informed about the criminal proceedings against him.⁵⁷⁰ A summons was therefore published on the court's website and in Ukrainian media, to give Romanov a fair opportunity to appear in court.⁵⁷¹ Once the court has been satisfied that Romanov has sufficient knowledge of the trial, and that his non-appearance is obstinate, the court will proceed with the trial *in absentia*.⁵⁷² It is believed that Romanov is alive in Russia, although some sources say that he is deceased.⁵⁷³ The "Ukrainian Law Enforcement Officers" are not aware of the apparent death of Romanov, but if that is the case, then the case will close.⁵⁷⁴ The prosecutors informed the public after the preliminary hearing, at the request of the victim, that the trial will be held behind closed doors.⁵⁷⁵ At the point of writing the thesis the trial is still ongoing. For the purpose of this chapter, the next section will conclude the evaluation of the feasibility of holding *in absentia* trials.

⁵⁶⁶ Marchuk 2022: 787-803.

⁵⁶⁷ *Ibid.* <https://www.justiceinfo.net/en/103572-ukraine-first-war-time-rape-trial-in-absentia-behind-closed-doors.html> (accessed on 17 September 2023).

⁵⁶⁸ <https://www.reuters.com/world/europe/ukraine-begin-first-trial-russian-soldier-accused-rape-2022-06-23/> (accessed on 17 September 2023).

⁵⁶⁹ *Ibid.*

⁵⁷⁰ <https://www.justiceinfo.net/en/103572-ukraine-first-war-time-rape-trial-in-absentia-behind-closed-doors.html> (accessed on 17 September 2023).

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ <https://www.reuters.com/world/europe/ukraine-begin-first-trial-russian-soldier-accused-rape-2022-06-23/> (accessed on 17 September 2023).

4.2.2 The Viability of Holding *in absentia* Trials

As can be seen, there is much critique amongst the international community about holding trials *in absentia*, however, Ukrainian laws (the CPCU) have measures in place to consider the rights of both the accused and the victim(s). As mentioned earlier, the accused is duly informed of the pending trial against them by publishing the summons on the court's website and certain media outlets in Ukrainian cities. It is up to the discretion of the courts whether the accused has been sufficiently notified of the trial against him. Once the court is satisfied that the accused has been duly informed, the matter will proceed. The court notes that if the accused does not appear for their trial they have done so wilfully.⁵⁷⁶ During the trial, the accused in their absence is granted a legal representative.⁵⁷⁷ The accused's rights are respected as much as the victims' rights, as full legal representation is provided even in the absence of the accused. Bearing this in mind, Ukraine has already commenced with trials *in absentia*, although no judgement has been passed to date. We can also note the limited number of international criminal trials held *in absentia*. There is no certainty that any orders given *in absentia* will lead to a true finding of justice, given the fact that the accused is not present resulting in problems regarding enforcement of the order. Holding trials *in absentia* could provide the victims of the crimes that have occurred during the ongoing conflict, an alternative opportunity to seek some sort of satisfaction or justice, ensuring order and control.

If trials *in absentia* are implemented, it is unlikely to bring about a sense of justice, as the convicted parties are not in custody. There will be some stigma attached to the convicted, but they will not be incarcerated, and will be free to roam in Russia wherever they want. This could lead to the perception that trials *in absentia* are a sham. Perhaps in certain instances, this is the best 'justice' that could be hoped for.

4.3 Trials held in Russia

⁵⁷⁶ Global Rights Compliance "Trials in Absentia: A dilemma for Ukraine", <https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf> (accessed on 9 May 2024).

⁵⁷⁷ Article 262 – Criminal Procedure Code of Ukraine.

With Ukraine holding domestic trials as a result of the invasion of Russia in Ukraine, Russia is potentially retaliating by holding trials of its own.⁵⁷⁸ Some regard the use of such trials as Russia's way of influencing the course of the war through a court of public opinion, rather than to ensure justice.⁵⁷⁹ Since the start of the invasion 24 February 2022, many Ukrainian civilians have been captured by Russia, and are registered as prisoners of war (POWs).⁵⁸⁰ The section below will provide a brief theoretical exposition of POWs and the "combatant's immunity". The next section will apply the theoretical discussion to the Russian "show trials" ("Azov trial" and "Aidar trial") that have emanated from the current conflict. Both *Azov* and *Aidar* were declared as terrorist organisations by the Donetsk People's Republic (DPR) in 2016.⁵⁸¹ This section will conclude with an evaluation of the feasibility of holding trials in Russian courts for crimes emanating from the Russia-Ukraine conflict.

4.3.1 Theoretical exposition on Prisoners of War

In terms of Art 82 of the *Geneva Convention (III) on POW*:

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a POW against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed. If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.⁵⁸²

POWs are awarded the so-called "combatant's privilege/immunity", which states that "no POW may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."⁵⁸³ In terms of the "combatant's privilege", any POW is protected from prosecution for "...lawful acts of war committed in the course of an armed conflict,

⁵⁷⁸ McCarthy "Why Putin uses Russian law to crack down on dissent", <https://www.washingtonpost.com/politics/2022/04/07/autocrats-russia-kremlin-protest-fines-jail/> (accessed on 14 May 2023).

⁵⁷⁹ Hyde "Russia's long history of show trials in Ukraine", [Russia's long history of show trials in Ukraine – POLITICO](https://www.politico.com/news/2022/11/05/russia-show-trials-ukraine/) (accessed on 5 November 2023).

⁵⁸⁰ *Ibid.*

⁵⁸¹ Vishchyk "Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant's Immunity", <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (accessed 5 November 2023).

⁵⁸² Article 82 - Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949.

⁵⁸³ *Ibid.*, at Art 99.

even if their acts constitute a criminal offence under the domestic laws of the Detaining Power”.⁵⁸⁴ Therefore, we can note two exceptions recognised by contemporary IHL in which POWs can be prosecuted: first, as stated above, committing “international crimes, including grave breaches of IHL ... referred to as war crimes”, and second, committing crimes unrelated to the war such as robberies and “*pre-capture terrorist offenses* not related to the conflict”.⁵⁸⁵

As mentioned in the introduction of this section, Russia has declared *Aidar* and *Azov* as terrorist organisations. Acts of terror are forbidden in terms of Art 51(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977.⁵⁸⁶ Terrorism is further regarded as a war crime under CIL as confirmed in the *Prosecutor v Stanislav Galić*.⁵⁸⁷ Prosecution is permitted if the purpose of the threats of violence or acts related to the conflict is to spread terror, or commit terrorist acts that do not relate to the conflict.⁵⁸⁸ In a NIAC, IHL and Counterterrorism Laws (CTL) may overlap.⁵⁸⁹ However, acts relating to an IAC may limit or negate the use of CTL, as acts relating to IAC are governed or complemented by the rules of IHL.⁵⁹⁰ Criminal laws governing terrorism cannot simply be utilised to criminalise the involvement in a combat.⁵⁹¹ Therefore, most counterterrorism treaties relating to an IAC include provisions that state that the application is replaced by IHL, or that the acts relating to an IAC are regulated by IHL and not CTL.⁵⁹² The reasoning behind this is to prevent the prosecution of the actions of combatants that would otherwise be protected by the “combatant’s immunity” in an IAC.⁵⁹³ Thus, to determine whether the charges against the POWs are covered by the “combatant immunity” during an IAC, we need to look

⁵⁸⁴ IHL Commentary on Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-85/commentary/2020?activeTab=undefined#30> (accessed on 5 November 2023).

⁵⁸⁵ Vishchyk “Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant’s Immunity”, <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (accessed 5 November 2023).

⁵⁸⁶ *Ibid.* Prosecutor v Stanislav Galić, IT-98-29-A, 30 November 2006.

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*

at the nature of the actions in relation to the IAC, rather than to exclude the IAC and classify the actions as terrorist activities.

With the above brief exposition established on POWs and the “combatant’s immunity”, the following section will apply the discussion to the trials held in Russian courts. Based on this we will then be able to analyse the viability of holding trials in Russian courts.

4.3.2 The Trials Held in Russian Courts

This section will address the trials of *Azov* and *Aidar* held in Russian Courts. First, we will briefly address the *Azov* Regiment, which is a unit of “Ukraine’s National Guard” that performs military duties as part of the UAF.⁵⁹⁴ The *Azov* took the lead in defending Ukraine at the start of the invasion, in February 2022.⁵⁹⁵ Around 2 000 *Azov* soldiers at the besieged Azovstal Iron and Steel Works, Mariupol, surrendered in May 2022, after three months of conflict.⁵⁹⁶ In the middle of June 2023, in the Southern District Military Court of Rostov-on-Don, Russia, the trial of 22 Ukrainian citizens of which some were affiliated with *Azov* commenced.⁵⁹⁷ The defendants in this case were prosecuted on various charges under the Russian criminal code, including alleged actions to overthrow the Russian authorities in Donetsk, Ukraine, and participating in activities that are associated with a terrorist organisation.⁵⁹⁸ Other defendants were accused of undergoing training to execute acts of terrorism.⁵⁹⁹ During a court proceeding on 28 June 2022, after three defendants had testified, it came to light that while being detained in Donetsk, a Russian controlled area, the defendants were ill-treated and had to sign confessions under duress.⁶⁰⁰ In August 2022, the Russian Supreme Court (RSC) declared *Azov* a terrorist organisation.⁶⁰¹ This decision was

⁵⁹⁴ Kvitka “Russia’s Sham Trial of Ukrainian Prisoners of War.” <https://www.hrw.org/news/2023/07/06/russias-sham-trial-ukrainian-prisoners-war> (accessed on 5 October 2024).

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.*

⁵⁹⁷ Vishchyk “Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant’s Immunity”, <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (accessed 5 November 2023).

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*

based on a number of reasons listed by the National Anti-Terrorism Committee of Russia, specifically “threatening Russian security by participating in hostilities in the east of Ukraine and sabotage operations in Crimea; supporting neo-Nazi and radical ideology; and the commission of war crimes”.⁶⁰²

Next, we will briefly address the *Aidar* Regiment of the UAF. *Aidar* was established in 2014 as a “...voluntary 24th Territorial Defence Battalion... under the command of the Ministry of Defence of Ukraine.”⁶⁰³ *Aidar* was part of the Anti-Terrorist Operation forces in Luhansk, and its mission was to protect the territorial integrity of Ukraine.⁶⁰⁴ In July 2023, 18 POWs that were part of *Aidar* were tried in the same court as *Azov*.⁶⁰⁵ In this case the members of *Aidar* were charged with being involved in a terrorist organisation, violently seizing power and altering the constitution framework of the DPR, under Russia’s criminal code.⁶⁰⁶

In both of the above two instances involving UAF, the Ukrainian citizens were charged with “attempts to overthrow the government of the DPR” and with “participation in terrorist organisations”, while others were charged with “training for terrorist activities”.⁶⁰⁷ Russia stated that the “...POWs were accused of collecting information about the whereabouts of the [Russian forces] and firing at [their] positions,” “preparing for the violent seizure of new territories of the DPR, controlling checkpoints, guarding and defending the military positions, as well as the occupied territories of the DPR”.⁶⁰⁸ The language used by Russia in these cases makes it seem as though the Russian trials are just a pretext to prosecute Ukrainian soldiers by merely politicising the trials.⁶⁰⁹

⁶⁰² *Ibid.*

⁶⁰³ RBC- Ukraine “Trial of detained “Aidar” soldiers underway in Russia”, [Trial of detained “Aidar” soldiers underway in Russia | RBC-Ukraine](#) (accessed on 5 October 2024).

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Khlodnova “The trial of 18 soldiers of the “Aidar” battalion began in Russia” <https://babel.ua/en/news/96573-the-trial-of-18-soldiers-of-the-aidar-battalion-began-in-russia> (accessed on 5 October 2024).

⁶⁰⁷ Vishchyk “Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant’s Immunity”, <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (accessed 5 November 2023).

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Hyde “Russia’s long history of show trials in Ukraine”, [Russia’s long history of show trials in Ukraine – POLITICO](#) (accessed on 5 November 2023).

As mentioned, both *Aidar* and *Azov* were declared terrorist organisations in 2016 by the DPR. Further, the accused members of *Azov* and *Aidar* hold the status of POWs, and should therefore be protected from prosecution by the “combatant privilege” principle for the acts the members of these units have committed during the IAC. The fact that both *Aidar* and *Azov* were classified as terrorist organisations, and Russian courts still proceeded to prosecute POWs on the basis of membership to these units of the UAF, diminishes the combatant’s privilege.⁶¹⁰ The POWs would have been required to participate in the war, and the fact that they were part of a unit of the UAF is not a just ground for prosecution.⁶¹¹ Taking the above into consideration, the charges in these cases focus on the fight against the Russian forces, which fall under the combatant’s immunity. Even if the acts, such as aggressive acts against Russian forces would have qualified as acts of terrorism in peacetime, in an IAC, as mentioned in 4.3.1, these acts are safeguarded by the combatant’s privilege principle, which prevents the complete application of the CTL.

Therefore, where individual members of *Azov* or *Aidar* have committed war crimes, then criminal responsibility should be enforced on them.⁶¹² If the individuals who committed the crimes remain unidentified, then such a violation would remain unpunished.⁶¹³ The prosecution of combatants for war crimes which have not been committed by themselves but by other members belonging to the same group constitute collective punishment that is prohibited by Art 87 of the *Geneva Convention (III) on POW*.⁶¹⁴ Without this in place, every POW could be prosecuted purely based on membership to an organisation or association. Despite Art 87 of the *Geneva Convention (III) on POW* being in place, Russia has, as seen from the two (*Azov* and *Aidar*) trials above, declared units of the UAF as terrorist organisations and prosecuted

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid.*

⁶¹² <http://nac.gov.ru/hronika-sobytyj/terroristicheskaya-organizaciya-ukrainskoe-voenizirovannoe.html> (accessed on 10 May 2024).

⁶¹³ IHL Commentary on Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-87/commentary/2020?activeTab=undefined>.

⁶¹⁴ Article 87 - Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949.

POWs for their association with these units, thereby clearly impeding on the “combatant’s immunity”.

It is evident that some Russian courts holding trials for Ukrainian citizens have disregarded the core IHL principles. Their main purpose seems to be to retaliate against Ukraine and influence the course of war. As mentioned above, the POWs suffered ill-treatment, which is in breach of Art 13 of the *Geneva Convention (III) on POW*.⁶¹⁵ Evidently, these Russian trials raise concerns regarding the ill treatment, forced confessions and unfair trials of POWs. The Russian courts show no impartiality and respect for the rights of POWs, which is in clear breach of Art 130 of the *Geneva Convention (III) on POW*.⁶¹⁶ Denying the accused the right to a fair trial also breaches Art 8(2)(a)(vi) of the *Rome Statute*.⁶¹⁷ From the above, it is clear that Russia is disregarding core international laws. The fact that Ukraine has been proceeding with the trials of Russian soldiers could potentially aggravate Russia in pursuing and holding more show trials. For the purposes of this section, the next subsection will conclude on the viability of holding trials in Russian courts.

4.3.3 The Viability of Holding Trials in Russian Courts

To determine the viability of holding trials in Russian courts in order to address the violations emanating from the ongoing conflict, the following factors should be taken into consideration: broadly – the clear violation of the *Geneva Convention (III) on POW*; specifically – identifying units of the UAF as terrorist organisations and prosecuting members’ (even Ukrainian civilians associated to the units) acts as terrorist acts, irrespective of the fact that the acts arise from the IAC; the collective punishment and ill-treatment of POWs; and the forced confessions that could potentially harm and humiliate the POWs. Considering these factors, this researcher concludes that it would not be viable to hold trials in Russian courts in an attempt to hold those responsible for the violations emanating from the ongoing conflict accountable. For this reason, it is important to look at the feasibility of different legal

⁶¹⁵ Article 13 - Geneva Convention Relative to The Treatment of Prisoners of War Of 12 August 1949.

⁶¹⁶ *Ibid*, at Art 130.

⁶¹⁷ Hyde “Russia’s long history of show trials in Ukraine”, [Russia’s long history of show trials in Ukraine – POLITICO](#) (accessed on 5 November 2023).

mechanisms along with transitional justice mechanisms (discussed in the next chapter). Below the feasibility of holding trials in third states will be explored.

4.4 Doctrine of Universal Jurisdiction

This section focuses on the doctrine of universal jurisdiction. It starts off with a brief theoretical understanding of the concept of universal jurisdiction, inclusive of the immunity defence under universal jurisdiction. Following from this, it will be explored how third states have applied universal jurisdiction. The next subsection will look at the possibility of third states utilising universal jurisdiction in the context of the ongoing conflict. Finally, this section will conclude with an analysis determining whether the use of universal jurisdiction could be a viable mechanism to address the misdeeds emanating from the ongoing conflict.

Those involved in the Russia-Ukraine war could possibly be held accountable through the use of the doctrine of universal jurisdiction. The doctrine of universal jurisdiction denotes that a public authority or prosecutor in another country can prosecute individuals for crimes that violate international laws.⁶¹⁸ When applying universal jurisdiction, states can act on behalf of the international community to protect norms and values.⁶¹⁹ This fundamental justification helps to “explain why universal jurisdiction is only available for prosecutions involving certain serious international crimes that have risen to the level of *jus cogens* crimes”, denoting that the only crimes that are identified by the international community are severe and divergent from the accepted norms.⁶²⁰ States usually exercise this form of jurisdiction over crimes of genocide, crimes against humanity and war crimes, similar to what have allegedly been committed in Ukraine.⁶²¹ However, the limitation here is that the crime of aggression under universal jurisdiction is not vested in CIL. For states to make use of this doctrine, the *jus cogens crimes* have to be codified and defined in their domestic laws to ensure that the state can exercise jurisdiction without any link to the offense.⁶²² Depending on

⁶¹⁸ Nalepa & Remington “Transitional Justice Options for Postwar Russia”, <https://www.monikanalepa.com/uploads/6/6/3/1/66318923/russiatj.pdf> (accessed 14 May 2023).

⁶¹⁹ Dutton 2022:391-422.

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

⁶²² Nalepa & Remington “Transitional Justice Options for Postwar Russia”, <https://www.monikanalepa.com/uploads/6/6/3/1/66318923/russiatj.pdf> (accessed 14 May 2023).

the country and the national law, the conditions of applying the doctrine may vary between countries, which make it tricky to compare cases.

Universal jurisdiction is fundamentally different from international prosecutions in that international prosecutions require international cooperation, while universal jurisdiction is more of a unilateral domestic act.⁶²³ The state exercising universal jurisdiction will not ask for permission to prosecute, but will inquire whether the territorial state has proceeded with exercising jurisdiction, and can require assistance from other states in collating evidence, or arresting defendants.⁶²⁴

Briefly, let us look at the applicability of the immunity defence under universal jurisdiction. In this regard Kreß stated that “national criminal courts, when adjudicating crimes under international law, also act on behalf of the international community. This is most clearly visible in a case where a national criminal court exercises universal jurisdiction over such a crime.”⁶²⁵ The main reason that states exercise universal jurisdiction and prosecute crimes, is to address grave breaches of international law. It is valid to ask - if domestic courts exercising universal jurisdiction act on behalf of the international community to address grave breaches, when will the defence of immunities not succeed in this regard? The general norm under CIL is that when a high-level official is no longer in office, he no longer enjoys personal immunity but enjoys functional immunity. However, functional immunity will not stand “in case of perpetration by a state official of such international crimes ... such acts, in addition to being imputed to the state of which the individual acts as an agent, also involve the criminal liability of the individual. In other words, for such crimes there may coexist state responsibility and individual criminal liability”.⁶²⁶ A distinction can be made between personal and functional immunity, as discussed in section 4.1.2. Therefore, in the instance where an official is no longer in office, the individual is not protected by the defence of personal immunity. This is has been echoed in case law, and the

⁶²³ Johns *et al.* 2022:1184-1207.

⁶²⁴ *Ibid.*

⁶²⁵ Galand 2023: 184-212.

⁶²⁶ Cassese 2002: 853-875. ILC Draft Articles – A/72/10 state that “Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction **shall not apply** in respect of the following crimes under international law”.

Pinochet case bears reference here.⁶²⁷ In the *Pinochet case*, the court held that if Pinochet was still in his position as head of state, he would have enjoyed personal immunity.⁶²⁸ As he was no longer in office, and was charged with crimes against peace, the defence of functional immunity did not apply.⁶²⁹ This echoes the principle of the CIL in that “...functional immunities are simply inapplicable to the prosecution of international crimes”.⁶³⁰

Above, explored the theoretical exposition of the principle of universal jurisdiction as well as the role that immunities play under this framework. In the next section, the practical use of universal jurisdiction by third states will be examined.

4.4.1 Practical Use of Universal Jurisdiction by Third States

A few commentators are of the view that the use of universal jurisdiction is vital in closing the “impunity gap” with regards to international crimes, but this is not readily apparent in practice.⁶³¹ This can be true for a number of reasons. First, most states have not codified the relevant *jus cogens crimes* (genocide, war crimes and crimes against humanity) in their domestic legislation, let alone recognising these crimes in their legislation, to afford the states the possibility to exercise jurisdiction without any link to the offense.⁶³² Second, irrespective of the fact that universal jurisdiction is permitted by law, states are reluctant to initiate prosecutions.⁶³³ A reason for this can be seen from the fact that about 20 cases relating to trials based on universal jurisdiction have been held.⁶³⁴ Last, if we look at these cases held under universal jurisdiction, it is evident that most relate to the prosecution of low or mid-level perpetrators, rather than high-level perpetrators.⁶³⁵ This could be because the

⁶²⁷ R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte, House of Lords, Judgment of 24 March 1999, in [1999] 2 All ER.

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

⁶³⁰ Dannenbaum “Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine” [Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine \(justsecurity.org\)](https://www.justsecurity.org/2022/09/27/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/) (accessed on 9 October 2024).

⁶³¹ Dutton 2022:391-422.

⁶³² IJRC “Universal Jurisdiction” [Universal Jurisdiction – International Justice Resource Center \(ijrcenter.org\)](https://www.ijrcenter.org/) (accessed 7 October 2024).

⁶³³ *Ibid.*

⁶³⁴ Human Rights Watch “Basic Facts on Universal Jurisdiction” [Basic Facts on Universal Jurisdiction | Human Rights Watch \(hrw.org\)](https://www.hrw.org/reports/2022/07/20/basic-facts-on-universal-jurisdiction/) (accessed on 7 October 2024).

⁶³⁵ *Ibid.*

prosecution of higher-level individuals would impose greater economic and political costs to the prosecuting state.⁶³⁶

The following are all reasons why states would be reluctant to exercise universal jurisdiction: challenges surrounding witnesses and evidence, political costs, securing custody over defendants, and the availability of prosecutorial resources.

4.4.1.1 Witnesses and evidence

Universal jurisdiction presents possible evidentiary challenges that result in states avoiding or refusing to exercise of jurisdiction. These challenges include the following: the acts might have occurred in earlier years and in different territory; the way these acts are reported differ from the way in which acts are reported in the prosecuting states; legal authorities could be unacquainted with the context (both politically and historically) of the crime and the relevant international laws; and specifically regarding witnesses - they can be dispersed in different countries; or the state wherein the crime was committed refuses to cooperate with investigations – creating problems for the defendant in accessing witnesses and/or evidence that could be used to excuse the defendant.⁶³⁷ Similarly, challenges could also arise where a state responsible for the commission of the crime refuses to cooperate, posing difficulties to the investigation with regards to accessing relevant evidence or witnesses.⁶³⁸

Another obstacle here is the safety of witnesses, both during and post-trial. This could be because the witnesses reside in the state where the crimes were committed, and could therefore be exposed to the risks of threat or harm by powerful groups.⁶³⁹ The state pursuing prosecution would need to think of an alternative method of pursuing the trial while simultaneously ensuring that fair trial standards are upheld. Some states have resorted to “testimony by video-link” to mitigate threats to safety.⁶⁴⁰ One example is the case of *R v Zardad*, where the UK allowed Afghanistan witnesses to testify via

⁶³⁶ Dutton 2022:391-422.

⁶³⁷ Human Right Watch “Universal Jurisdiction in Europe The State of the Art” [Universal Jurisdiction in Europe: The State of the Art | HRW](#) (accessed on 7 October 2024). Dutton 2022:391-422.

⁶³⁸ *Ibid.*

⁶³⁹ Dutton 2022:391-422.

⁶⁴⁰ *Regina v Faryadi Sarwar Zardad*, United Kingdom, London High Court, Case No: 200505339/D3, 19 July 2005.

video-link against the “warlord” Zardad, who was charged with “conspiracy to torture” in the 1990s.⁶⁴¹

4.4.1.2 Political costs

States may encounter costs when proceeding with universal jurisdiction, especially in relation to high-level officials.⁶⁴² One example in this regard is the case held in Belgium against the former USA President, George Bush, and Vice President, Dick Cheney, to highlight how political costs and pressure are imposed.⁶⁴³ Early in the 2000’s Belgium instituted lawsuits, against Bush and Cheney based on universal jurisdiction.⁶⁴⁴ The USA retaliated, threatened Belgium and noted that if Belgium continued with the lawsuit, it would no longer remain the headquarters and meeting place of NATO.⁶⁴⁵ Initially, the universal jurisdiction laws in Belgium allowed Belgium to try any perpetrator, irrespective of their rank, for war crimes.⁶⁴⁶ In 2003, however, Belgium amended its universal jurisdiction laws, probably as a result of the diplomatic pressures exerted on Belgium.⁶⁴⁷ Currently, Belgium’s laws are more stringent with regards to universal jurisdiction cases.⁶⁴⁸ From this case we can clearly see how political costs and diplomatic pressure challenge third states in holding universal jurisdiction trials.

Another example with regards to high-level officials is where the Democratic Republic of the Congo (DRC) sued Belgium at the ICJ (*Arrest Warrant* case) in October 2000.⁶⁴⁹ Belgium had initially charged the DRC’s Minister of Foreign Affairs, Abdoulaye Yerodia Ndombasi, with “grave violations of international humanitarian law”, and subsequently issued an arrest warrant.⁶⁵⁰ Before the ICJ, the DRC claimed that Belgium improperly utilised universal jurisdiction and that, as a Minister of Foreign Affairs, Ndombasi

⁶⁴¹ *Ibid.*

⁶⁴² Dutton 2022:391-422.

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ DW “Belgium to Amend Controversial War Crimes Law” [Belgium to Amend Controversial War Crimes Law – DW – 06/23/2003](#) (accessed on 9 October 2024).

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Human Rights Watch “Belgium: Universal Jurisdiction Law Repealed” [Belgium: Universal Jurisdiction Law Repealed | Human Rights Watch \(hrw.org\)](#) (accessed on 7 October 2024).

⁶⁴⁹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Order 13 December 2000, ICJ Rep 2000, p235.

⁶⁵⁰ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), [Arrest Warrant of 11 April 2000 \(Democratic Republic of the Congo v. Belgium\) \(icj-cij.org\)](#) (accessed on 9 October 2024).

enjoyed immunity as a high-level governmental official.⁶⁵¹ In turn the ICJ concluded that Ndombasi enjoyed immunity.⁶⁵² The ICJ further stated that Belgium ignored international laws by issuing the warrant of arrest, and thus dismissed Belgium's warrant.⁶⁵³ From this case it is clear that there are difficulties relating to immunity in pursuing universal jurisdiction against high-level government officials, due to their positions.

Illustrated above are cases that involved high-level defendants, but there are also examples of low-level defendant cases. In 2001, Belgium charged four Rwandans that had been residing in Belgium for atrocities committed in Rwanda in 1994.⁶⁵⁴ In this case there was no challenge with regards to Belgium's exercise of jurisdiction, neither Rwanda nor the ICTR interfered with the trial, nor did they seek for the accused's release or transfer.⁶⁵⁵ In this situation the international community was in agreement that the individuals, classified as low-level defendants, committed terrible crimes and should be prosecuted.⁶⁵⁶ Belgium incurred no political costs as a result of this case.⁶⁵⁷

4.4.1.3 Securing custody over defendants

Proceeding with a universal jurisdiction prosecution could be hindered by the fact that the prosecuting state is unable to gain custody over the defendants.⁶⁵⁸ An example is the Spanish court where Judge Garzon had "issued about 50 arrest warrants ... based on atrocities committed in Argentina during the 1970s".⁶⁵⁹ In this instance the Spanish court was only successful with proceeding on one of the warrants against the "retired Argentine Captain Adolfo Scilingo", after Scilingo travelled to Spain, where he was arrested.⁶⁶⁰

4.4.1.4 Availability of prosecutorial resources

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ Dutton 2022:391-422.

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.*

⁶⁶⁰ Scilingo Manzorro (Adolfo Francisco) v Spain, Spain National Court Criminal Chamber, Judgment No.16/2005.

Due to a state's limited availability of prosecutorial resources, states might not be as inclined to proceed with universal jurisdiction trials, to prevent the exhaustion of its prosecutorial resources necessary to address domestic matters.⁶⁶¹ However, they may rather be more inclined to request exploring alternative avenues in this regard.⁶⁶² The USA, for example, has chosen not to exercise universal jurisdiction, and relies on international courts instead.⁶⁶³

Having briefly highlighted some hurdles that third states may face in terms of universal jurisdiction, third states have still proceeded in launching investigations and/or trials. One can note that despite the hurdles linked to universal jurisdiction matters, such matters can prevail, provided that “there is an institutional and policy commitment to prosecuting international crimes”.⁶⁶⁴ The next section will analyse the use of universal jurisdiction in the context of Russia and Ukraine.

4.4.2 The Use of Universal Jurisdiction by Third States in the Context of Russia and Ukraine

Thus far we briefly considered the principles of universal jurisdiction, its application and potential challenges that might arise from third states holding universal jurisdiction trials. This section will analyse the use of universal jurisdiction by third states in an attempt to address the atrocities that emanate from the ongoing conflict between Russia and Ukraine. This section will commence by addressing the possibility of exercising universal jurisdiction by third states in the context of the ongoing war. The section will conclude with an analysis of whether universal jurisdiction can indeed be considered as a viable mechanism to address the atrocities that emanate from the ongoing conflict.

4.4.2.1 Possibilities for Exercising Universal Jurisdiction by Third States in the Context of the Russian Ukraine Conflict

⁶⁶¹ Dutton 2022:391-422.

⁶⁶² *Ibid.*

⁶⁶³ *Ibid.*

⁶⁶⁴ Human Rights Watch “Basic Facts on Universal Jurisdiction” [Basic Facts on Universal Jurisdiction | Human Rights Watch \(hrw.org\)](#) (accessed on 7 October 2024).

The focus will now shift to the stance of the international community in seeking accountability for the heinous crimes committed against Ukraine.⁶⁶⁵ In November 2022, a meeting was held between the justice ministers of the G7 countries (Canada, France, Germany, Italy, Japan, UK and USA, and the European Commission is also considered to be a member) along with the Ukrainian Minister of Justice, the Ukrainian Prosecutor General, the European Commissioner for Justice and the Chief Prosecutor of the ICC.⁶⁶⁶ During this meeting it was noted that the G7 countries would ensure a central national contact point in each of the states to prosecute international crimes.⁶⁶⁷ This would afford the sharing of information on evidence and legal requirements between the international organisations and states.⁶⁶⁸

Germany confirmed that it has already commenced investigations into the crimes committed in Ukraine.⁶⁶⁹ The following countries also announced their intention to prosecute crimes committed by Russia in Ukraine through the use of universal jurisdiction, and have launched their investigations, namely Lithuania, Estonia, Poland, Spain, Latvia, Slovakia, Norway, Sweden, Switzerland and France.⁶⁷⁰

However, as mentioned in section 4.4.1, universal jurisdiction is favoured in prosecutions relating to low-level individuals, rather than those who would require extensive diplomatic and additional costs from the prosecuting state.⁶⁷¹ So how would it be possible to prosecute high-level perpetrators, and potentially the President of Russia? As mentioned in Chapter 1 of this study, the UNGA passed a resolution that was voted in favour by 141 states that “deplores in the strongest terms the aggression by the Russian Federation against Ukraine”.⁶⁷² The international community went further and ceased Russia’s membership to the Council of Europe and the Human

⁶⁶⁵ Whatcott “Compilation of Countries’ Statements Calling Russian Actions in Ukraine “Genocide” [Compilation of Countries’ Statements Calling Russian Actions in Ukraine “Genocide” \(justsecurity.org\)](https://www.justsecurity.org/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/) (accessed on 9 October 2024).

⁶⁶⁶ [G7 Justice Ministers Agree to Coordinate Ukraine War Crime Probes \(usnews.com\)](https://www.usnews.com/story/news/world/2022/11/07/g7-justice-ministers-agree-to-coordinate-ukraine-war-crime-probes) (accessed on 5 November 2023).

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Petrossian 2023: 1-6

⁶⁷⁰ Dutton 2022:391-422.

⁶⁷¹ *Ibid.*

⁶⁷² Resolution - A/ES-11/L.1 - [Aggression against Ukraine : \(un.org\)](https://www.un.org/development/dp/undp/press/2022/11/07/11-11-2022-aggression-against-ukraine).

Rights Council.⁶⁷³ Sanctions have been imposed by the EU, and major companies (like Apple) “withdrew from the Russian market”.⁶⁷⁴ Economically and politically isolating Russia potentially hampers its ability to impose economic and diplomatic costs on the prosecuting state.⁶⁷⁵ This would potentially bring Russia’s high-level perpetrators to the same level as low-level perpetrators. Thus, by politically and economically isolating Russia, Russia’s ability to prevent states from prosecuting its officials is hampered.

With the above in mind, the acceptance of over a million Ukrainian refugees by West European countries and Germany, adds more pressure on countries to initiate proceedings through universal jurisdiction.⁶⁷⁶ Most of the states are in consensus that they will not impose political costs on states that choose to exercise universal jurisdiction in the cases emanating from the Ukraine-Russia invasion.⁶⁷⁷

Currently, states that are looking to pursue cases based on universal jurisdiction do not necessarily face the same evidentiary difficulties (for example due to satellite images and social media) as in the past, in that historical events need not be recreated since the crimes were committed recently. As mentioned above, the G7 countries have agreed on a central contact point to aid in collecting and sharing of evidence. Further, the ICC states are in agreement that evidence will be shared amongst them, inclusive of states seeking to prosecute, thereby ensuring joint cooperation.⁶⁷⁸ As for states in Europe that proceed with universal jurisdiction prosecution, witnesses and evidence is relatively accessible due to Ukraine’s location.⁶⁷⁹ With regards to witnesses, it is expected that witnesses who have testified against government nationals will require

⁶⁷³ Resolution CM/Res (2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe – adopted 16 March 2022, [CM/Res\(2022\)2 \(coe.int\)](#).
Resolution A/RES/ES-11/3 adopted 7 April 2022, [Suspension of the rights of membership of the Russian Federation in the Human Rights Council](#) .:

⁶⁷⁴ Hartig “Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine” <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 6 October 2024).

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Johns *et al.* 2022:1184-1207

⁶⁷⁷ McDougall “Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics” [“Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics - Opinio Juris](#) (accessed on 5 November 2023).

⁶⁷⁸ Dutton 2022:391-422.

⁶⁷⁹ *Ibid.*

witness protection for themselves and their families, as they might be at risk of facing retaliation from Russian authorities.⁶⁸⁰ The burden will fall on Ukraine to protect these persons, in pursuit of Ukraine's commitment in ensuring accountability for crimes emanating from the invasion.⁶⁸¹

Above, examined the possibilities of pursuing universal jurisdiction in the context of Ukraine and Russia. The study will now consider the viability of seeking justice through the use of universal jurisdiction in the context of the ongoing conflict.

4.4.2.2 Analysing the Viability of Universal Jurisdiction as Mechanism to Respond to the Atrocities Emanating from the Ongoing Conflict

The interest in holding prosecutions by third states is greater when the benefits outweigh the costs.⁶⁸² The said "benefit" depends on the "domestic level of interest favouring the prosecution and trial of certain defendants", which varies based on the "... strength of evidence, the type of social groups affected by them and whether the crimes took place in a State with any cultural links to the potentially prosecuting State".⁶⁸³ Despite the fact that prosecutions can be held in relation to war crimes, these crimes all emanate from the act of aggression imposed by Russia on Ukraine. Having the international community stand together and pursue the prosecutions of perpetrators that committed violations in the ongoing conflict, aligns with the goal of achieving international peace.

Taking note of the above, it is evident that states are committed to ensuring that the perpetrators of the Russian-Ukraine invasion are held accountable. One could speculate that the international community is willing to stand together, as the G7 countries have agreed on a central point of contact, and additional states have commenced investigations. However, there are some concerns that need to be considered, as some states might be hesitant to proceed with prosecutions. There is a possibility that states that are in pursuit of prosecutions through universal jurisdiction,

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid.*

⁶⁸² Hartig "Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine" <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 6 October 2024).

⁶⁸³ *Ibid.*

can possibly incur political costs. President Putin has already warned that should any state support Ukraine, that state will bear grave costs.⁶⁸⁴ This raises the question of uncertainty in whether the states will still support Ukraine, or stand back and resort to negotiations. However, as mentioned above, the international community has attempted to curtail the costs by politically and economically isolating Russia. In this way, Russia's ability to prevent states from prosecuting Russian officials is hampered, as high-level perpetrators will be on the same level as low-level perpetrators. Additionally, most states would be reluctant to impose costs, given the gravity of the situation at hand. The possibility remains, however, that Russia will do her best to protect her defendants and retaliate against those seeking justice.

Moving away from the aspect of potential political cost, third states might be faced with difficulties in getting hold of defendants. Alternatively, a defendant might claim immunity and block prosecution. Another consideration to be kept in mind is whether the Russian government will comply with the arrest warrants that are issued against their nationals, which is highly unlikely. Even though the Russian government will not necessarily comply, this does not mean that all the Russians who have committed crimes will escape prosecution. It is however likely that they will be unable to travel freely, as the threat of prosecution will always be looming.⁶⁸⁵ This is substantiated by the fact, as mentioned, that the international community has politically and economically isolated Russia. Additionally, some Russians that have been captured in Ukraine could be "surrendered or extradited" to a third state (provided that the relevant treaties for extradition are in place between Ukraine and the third state), to face trial for the crimes committed in Ukraine.⁶⁸⁶ Russian perpetrators would therefore much rather seek to return or remain in Russia under Russia's protection, rather than risking arrest and prosecution in other states, basically curtailing their right to movement. This situation differs substantially from the situation emanating from the Rwandan genocide of 6 April 1994, where the new Rwandan government would seek to prosecute the

⁶⁸⁴ Weitz "Russia's War in Ukraine: WMD Issues", [Russia's War in Ukraine: WMD Issues | Hudson](#) (accessed on 5 November 2023).

Baczynska "Threat of prosecution hangs 'forever' over Ukraine war crimes perpetrators, EU's top justice official says", [Threat of prosecution hangs 'forever' over Ukraine war crimes perpetrators, EU's top justice official says | Reuters](#) (accessed on 5 November 2023).

⁶⁸⁶ Dutton 2022:391-422.

Rwandan perpetrators and hold them accountable for their actions.⁶⁸⁷ The Rwandan perpetrators would much rather have risked their chances of being prosecuted through universal jurisdiction than to be tried in Rwanda.⁶⁸⁸

Taking the above into account, it is pertinent to keep in mind that prosecutions through universal jurisdiction might not be able to completely account for all crimes, such as the crime of aggression. The fact is that third state laws differ with regards to the criminalisation of the act of aggression and other international crimes, including the issue that the crime of aggression under universal jurisdiction is not vested in CIL. Nevertheless, as mentioned earlier, there has only been a limited number of universal jurisdictions heard to date. Reliance on previous precedents of universal jurisdiction would also be challenging, as domestic laws differ. With that said, as illustrated in this section, most of the international community is striving for the same goal of international peace. In theory, would it be feasible to utilise universal jurisdiction as an aid to address some crimes committed in Ukraine? The answer is yes, as this will bolster the international goal of seeking justice, as well as alleviate the pressure on international tribunals, as only a limited number of cases are heard per year. It would be prudent to further explore alternative justice mechanisms such as creating an *ad hoc* tribunal for the crime of aggression, as will be done in Chapter 5. One could say that holding aggression trials at an international tribunal could potentially better reflect the international community's condemnation.⁶⁸⁹ However, this will depend on whether the international community will be able to seize the opportunity for international justice.⁶⁹⁰

4.5 The viability of domestic courts as discussed above to respond to the violations emanating from the ongoing conflict

In conclusion, this chapter discussed the legal mechanisms available on a domestic scale and their viability to respond to the violations of international criminal laws. Specifically, this chapter focused on the viability of holding trials in Ukrainian courts;

⁶⁸⁷ Reydams 1996: 18-47.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Hartig "Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine" <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 6 October 2024).

⁶⁹⁰ *Ibid.*

trials in absentia; holding trials in Russian courts and holding trials in third states through the principal of universal jurisdiction. Below, the analysis on each avenue will be illustrated.

A) The Viability of Holding Trials in Ukrainian Courts

It is clear that trials on the domestic level are already underway. Looking at the Ukraine's judicial system (section 4.1), Ukraine aims to be more aligned with international standards and further develop their judicial system. This is also echoed by the recent case before the Ukrainian Supreme Court, held in February 2024, where the definition of the crime of aggression as stipulated in the *CCU* was amended to align with international laws. At the same time, holding trials in Ukrainian courts is beneficial, as evidence is readily available at the courts' disposal, as mentioned in section 4.1.1. Further, as mentioned in 4.1.3, the OTP created an online portal for the collection of information. One critique might be that holding trials in domestic courts pose opportunities for bias. Ukrainian courts have however, shown that there is real justice in the justice meted out, and it is not simply vindictive, cynical proceedings. Even though certain perpetrators might claim immunity as a defence in domestic courts, as mentioned in section 4.1.2, this should not be seen as a factor to deter Ukrainian courts' ability to seek redress for crimes committed in Ukraine. This indicates a favourable likelihood that Ukrainian courts are a feasible mechanism in addressing crimes committed by individuals that do not hold immunities.

With that said, it is prudent to explore alternative mechanisms where the immunities held by high-level officials will not prevent their prosecution. In turn, other alternative justice mechanisms will be explored in Chapter 5 of this study.

B) The Viability of *In Absentia* Trials

When the whereabouts of a perpetrator are unknown, a trial can be held *in absentia*. Despite the controversies surrounding holding trials *in absentia*, as discussed in 4.2 above, Ukraine has already proceeded with such a trial, which at the time of writing this is still ongoing. The argument that can be made is that it might not bring about a sense that justice has been served, as the convicts are not in custody. There might be a degree of stigma attached to the convicted, but they would still be able to move

around freely in Russia. This in turn could create the perception that such trials are a sham. However, given the realities of this conflict, and that the convicts are able to hide in Russia, recourse might have to be taken in this way by holding trials *in absentia*. Would trials *in absentia* bring about justice to the victims in this conflict and help address the crimes committed in the ongoing conflict? As this issue is surrounded by a lot of controversy, it would not be prudent to give a definite answer. By holding *in absentia* trials, victims might get a sense that they are being heard while seeking justice, and their voices do not fall moot. Presently, because no judgement has been rendered in the open *in absentia* trial of Romanov, it is yet to be seen whether such trials can lead to a concretised solution to address the crimes emanating from the ongoing war.

C) The Viability of Holding Trials in Russian Courts

Looking at the matter of holding trials in Russia, on the other hand, it does not seem that Russia holds the same values as Ukraine in attempting to lawfully hold trials. This leads to the following question: is it feasible to hold trials in Russian courts in order to address the crimes emanating from the invasion into Ukraine? To properly address this question, the researcher refers to the case illustrations (*Azov* and *Aidar* trials) as discussed in section 4.3.2, in order to bolster an opinion in this matter. Russia rendered its judgement in both cases. Briefly, some the accused were charged with “attempts to overthrow the government of the DPR” and “participation in terrorist organisations”, while others were charged with “training for terrorist activities”.⁶⁹¹ As noted above, Russia also utilised propaganda to politicise these cases, thereby creating the impression that the trials are just a pretext to prosecute Ukrainian soldiers.⁶⁹²

As mentioned in section 4.3.3, certain factors need to be taken into consideration. Broadly, Russia is in violation of the *Geneva Convention (III) on POWs*, by specifically identifying units of the UAF as terrorist organisations and prosecuting members’ acts, even those of Ukrainian civilians associated to the units, as terrorist acts, irrespective

⁶⁹¹ Vishchyk “Trials of Ukrainian Prisoners of War in Russia: Decay of the Combatant’s Immunity”, <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (accessed 5 November 2023).

⁶⁹² Refer to section 4.3.2 for the propaganda allegations made by Russia. Hyde “Russia’s long history of show trials in Ukraine”, [Russia’s long history of show trials in Ukraine – POLITICO](#) (accessed on 5 November 2023).

of the fact that the acts arise from the IAC. Russia is also guilty of the collective punishment and ill-treatment of POWs, and forced confessions that could potentially humiliate and harm POWs. Therefore, at this stage, the researcher can only conclude that it would not be viable to hold trials in Russian courts to hold those accountable for the violations emanating from the ongoing conflict.

D) The Viability of Third States Holding Trials Based on The Principal of Universal Jurisdiction

The international community is committed to ensuring that the perpetrators of the Russian-Ukraine invasion are held accountable, as noted in section 4.4.2.1. This can further be evidenced by the fact that the G7 countries have agreed on a central point of contact in each of the states to prosecute international crimes.⁶⁹³ This allows the sharing of information on evidence and legal requirements between international organisations and states.⁶⁹⁴

Section 4.4.2.1 noted the potential challenges such as political costs, limited precedents on universal jurisdiction and the fact that domestic legislation differs between each state, in proceeding with prosecutions based on universal jurisdiction. Regarding the political cost, it was mentioned that states would be more reluctant in imposing costs given the gravity of the situation. This is bolstered by the attempt of the international community to economically and politically isolate Russia. In doing so, this could potentially hamper Russia's ability to prevent states from prosecuting its officials, as high-level perpetrators would be on the same level as low-level perpetrators. Regardless of the probability that Russia will do her best to protect her defendants and retaliate against those seeking justice, the international community is standing together in the fight for justice.

As mentioned in section 4.4.2.2, the chances of Russia complying with the arrest warrants issued against her nationals is highly unlikely. Despite the probable non-compliance by Russia, it does not mean that all Russians who have committed crimes will escape prosecution, as it is likely that their freedom to travel will be hindered, since

⁶⁹³ *Ibid.*

⁶⁹⁴ *Ibid.*

the threat of prosecution will always be looming.⁶⁹⁵ This can be substantiated by the fact that the international community has attempted to politically and economically isolate Russia. Additionally, Russians that are captured in Ukraine could be “surrendered or extradited” (as discussed above) to a third state, to face trial for the crimes committed in Ukraine.⁶⁹⁶ Consequently, one could say that the Russian perpetrators would much rather seek to return to or remain in Russia, under Russia’s protection, than risking the chance of arrest and prosecution in other states.

With the above in mind, would it be feasible to hold trials in third states based on universal jurisdiction, in an attempt to address the crimes emanating from the ongoing war? Technically, yes, holding trials based on universal jurisdiction can possibly address the crimes emanating from the ongoing war. This finding is based on the following reasons. First, a number of states, as mentioned in 4.4.2.1, have already stated their intention to hold trials based on universal jurisdiction, and have subsequently commenced with their investigations. Second, noting the fact that each of the states’ laws differ from each other, certain states might hold trials for some of the crimes, while other states might hold trials for other crimes. One could say that the crimes are being addressed through trials held in third states. Third, proceeding with universal jurisdiction trials will bolster the international goal of seeking justice, as well as alleviating pressure on international tribunals, as only a limited number of cases are heard per year. Domestic court prosecutions, through universal jurisdiction, can fill the gap in the absence of international trials and “avoid impunity” for the violations of international criminal laws emanating from the Russia-Ukraine conflict.⁶⁹⁷ With that said, only time will tell how effectively this mechanism will be, as no prosecutions for crimes emanating from the crimes committed in Ukraine have been held yet,.

Another challenge to note here is that prosecutions through universal jurisdiction might not be able to fully account for all international crimes, such as the crime of aggression.

Baczynska “Threat of prosecution hangs 'forever' over Ukraine war crimes perpetrators, EU's top justice official says”, [Threat of prosecution hangs 'forever' over Ukraine war crimes perpetrators, EU's top justice official says | Reuters](#) (accessed on 5 November 2023).

⁶⁹⁶ Dutton 2022:391-422.

⁶⁹⁷ Hartig “Domestic Criminal Courts as Gap-Fillers? Avoiding Impunity for the Commission of the Crime of Aggression against Ukraine” <https://voelkerrechtsblog.org/domestic-criminal-courts-as-gap-fillers/> (accessed on 6 October 2024).

There is a possibility that prosecution for the crime of aggression might not be held at all in terms of universal jurisdiction. This is as a result of the fact that domestic laws of third states differ with regards to the criminalisation of the act of aggression and other international crimes, and the fact that the crime of aggression is not vested in CIL. It is therefore pertinent to explore the possibility of creating an *ad hoc* tribunal for the crime of aggression to address this gap.

In this chapter the focus was on evaluating the feasibility of the legal mechanisms available on a domestic level to address the crimes emanating from the invasion. The next chapter will focus on the viability of exploring non-extant transitional justice mechanisms, such as the viability of establishing a tribunal for the crime of aggression, to determine whether alternative legal recourse can be sought to respond to the violations of international criminal laws.

CHAPTER 5

Evaluating the feasibility of transitional justice mechanisms to respond to the violations of international criminal laws within the Russia-Ukraine conflict

The previous chapters in this study focused on the extant legal mechanisms available to respond to the Russia-Ukraine conflict on an international and domestic level. This chapter shifts the focus to non-extant alternative transitional justice mechanisms. It evaluates the viability of transitional judicial justice mechanisms, to determine whether alternative legal recourse can be sought to respond to the violations of international laws emanating from the ongoing Russia-Ukraine conflict. For purposes of this study non-judicial transitional justice mechanisms fall outside the scope. To test the feasibility of alternative justice mechanisms, this chapter will evaluate the legal mechanism specifically the viability of establishing a tribunal for the crime of aggression.

As a preliminary, transitional justice measures are not foreign to Ukraine. As mentioned in Chapter 4, prior to the outbreak of the Russia-Ukraine conflict, the Ukrainian government focussed on developing a transitional justice roadmap that aimed to extend “justice and reconciliation initiatives beyond a courtroom”.⁶⁹⁸ The development of this transitional roadmap was prompted by “the international armed conflict caused by the armed aggression of the Russian Federation”.⁶⁹⁹ This enhanced Ukraine’s commitment to developing the professional skills of prosecutors and investigators, as previously discussed.⁷⁰⁰ The key factor of the transitional justice roadmap was the “investigation and prosecution of atrocity crimes ... in addition to proposals on creating a truth commission; the adoption of unified standards regarding the documentation of atrocity crimes; the establishment of a comprehensive programme on reparations...” and a basis for a lustration policy that includes a caveat

⁶⁹⁸ Marchuk 2022: 787-803. Busal “Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process”, [Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process \(justsecurity.org\)](https://justsecurity.org) (accessed on 9 May 2024).

⁶⁹⁹ Kovalenko & Kobernyk “Punishment for war criminals, compensation for victims, and monuments for heroes — what will justice be like after the war. Interview with the Permanent Representative of the President in Crimea Anton Korynevych”, [Zelensky's representative in Crimea Korynevych about Crimea and Donbass, punishment for the occupiers' henchmen - news of Ukraine](https://www.ukraine.gov.uk/news/zelenskys-representative-in-crimea-korynevych-about-crimea-and-donbass-punishment-for-the-occupiers-henchmen) (accessed on 1 November 2024).

⁷⁰⁰ Marchuk 2022: 787-803. Busal “Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process”, [Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process \(justsecurity.org\)](https://justsecurity.org) (accessed on 9 May 2024). Refer to Chapter 4 section 4.1 of this study.

that no amnesty will be granted to those who commit gross violations of international laws and human rights.⁷⁰¹ However, the continuation of this development has slowed down after the invasion of Russia into Ukraine.⁷⁰²

Even in the face of the stalled transitional justice roadmap, this chapter will test for the feasibility of transitional judicial justice mechanisms, in particular the establishment of an *ad hoc* tribunal for the crime of aggression. The chapter will be subdivided into two main sections. The first section will discuss the need to evaluate the establishment of an *ad hoc* tribunal for the crime of aggression, followed by a brief legal exposition of a hybrid tribunal. The second section will evaluate the establishment of an *ad hoc* tribunal in the context of the ongoing conflict. This section will be further subdivided under the following basic headings: the principle of immunities in the context of an *ad hoc* tribunal for Ukraine; the avenue to create an international *ad hoc* tribunal; and the critique surrounding the creation of such tribunal. This chapter will conclude with an evaluation of the feasibility of this transitional justice mechanism, to respond to the violations of international criminal laws emanating from the ongoing Russia-Ukraine conflict.

5.1 Establishing an *Ad Hoc* Tribunal For the Crime of Aggression

In the findings of Chapter 2, it was noted that the ICC does not have jurisdiction over the crime of aggression, as Ukraine and Russia have not ratified the Kampala amendments. Further, in Chapter 4, it was found that domestic courts are unable to prosecute those accountable for crimes of aggression due to the defence of immunities. Additionally, even though there is no defence of functional immunity under universal jurisdiction, the issue here is that under universal jurisdiction the crime of aggression is not vested in CIL, and most states have not codified this crime. Thus, there is an evident need to evaluate other feasible avenues, such as the establishment of an *ad hoc* tribunal, for the crime of aggression.

The focus will be on evaluating the viability of establishing an *ad hoc* tribunal for the crime of aggression. The subsection below will start off with a brief discussion on

⁷⁰¹ Marchuk 2022: 787-803. Busal “Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process”, [Mariupol and the Origins and Avenues of Ukraine’s Transitional Justice Process \(justsecurity.org\)](https://justsecurity.org) (accessed on 9 May 2024).

⁷⁰² *Ibid.*

hybrid tribunals, inclusive of their structure and function. The next section will look at the establishment of an *ad hoc* tribunal for the crime of aggression in the context of the current conflict. Finally, this section will conclude with an analysis of the feasibility of creating an *ad hoc* tribunal for the crime of aggression.

5.1.2 Hybrid Tribunals

This section will briefly discuss the structure and function of a hybrid tribunal. Some examples of hybrid tribunals include the Extra-ordinary Chambers in the Courts of Cambodia, Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary African Chambers, and the Kosovo Specialist Chambers.⁷⁰³ A hybrid tribunal is a court that is created “through an agreement between the conflict-affected country and an international organization such as the United Nations” or through a treaty between several states.⁷⁰⁴ These tribunals fuse both international and domestic laws, judges, defence attorneys and prosecutors.⁷⁰⁵ Typically, such a tribunal is established in the country wherein the crimes occurred.⁷⁰⁶

Hybrid tribunals can be seen as gap-fillers in instances where the ICC and the ICJ cannot address all the cases as a result of logistical and jurisdiction issues.⁷⁰⁷ Hybrid courts therefore offer a mechanism for countries to respond to international crimes “within their borders”.⁷⁰⁸ Moreover, the advantages of such a tribunal include the fact that the tribunal is usually located close to the conflict, which allows for direct oversight and engagement. This positively influences and impacts the local population, which in turn contributes to national reconciliation.⁷⁰⁹ National legal and other personnel are included in the tribunal.⁷¹⁰ Additionally, such a tribunal can aid in developing the national judicial system of the country wherein the tribunal is located.⁷¹¹ The disadvantages of such a tribunal include the following: the tribunal is limited

⁷⁰³ Sterio 2023: 479-502.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Karpus “Ukraine’s Quest for Justice: Accountability for A s Quest for Justice: Accountability for Atrocities Committed in the Russia-Ukraine War”, https://academicworks.cuny.edu/cc_etds_theses/1120 (accessed on 1 November 2024).

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Sterio 2023: 479-502.

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

geographically and temporally; the lack of political will can cause difficulties in establishing the tribunal; and it may be costly to establish such a tribunal.⁷¹²

Despite this, as discussed in Chapter 4, domestic courts are unable to prosecute high-level individuals. However, hybrid tribunals “do not face the same immunity hurdle that national-level courts do; under international law, such courts may prosecute sitting heads of state and other leaders”.⁷¹³ Additionally, international prosecutions draw substantial attention, thereby playing a greater “global deterrence role”, as the international community becomes aware of the criminal proceedings against state leaders.⁷¹⁴ Moreover, hybrid tribunals meet the standards of international fair trials, which are sometimes lacking in domestic courts.⁷¹⁵ In this way hybrid tribunals achieve international and domestic justice by preserving international law and employing international standards of fair trials.⁷¹⁶

The section above looked at the legal exposition of a hybrid tribunal. The next section will look at the establishment of an *ad hoc* tribunal in the context of the Russia-Ukraine conflict.

5.2 Creating an *Ad Hoc* Tribunal To Respond to the Violations Emanating from The Ongoing Russia-Ukraine Conflict

As mentioned in section 5.1 above, there have been calls for the establishment of an *ad hoc* tribunal for the crime of aggression to ensure accountability for the violations of the international crimes emanating from the ongoing Russia-Ukraine war. To echo the above, domestic courts do not have jurisdiction to prosecute those accountable for the crime of aggression due to the defence of immunities. Additionally, under universal jurisdiction, the issue is that the crime of aggression is not vested in CIL, and most states have not codified this crime in their legislation.⁷¹⁷ On the international level, the ICC can exercise jurisdiction over the crime of aggression. However, in the context of the Russia-Ukraine conflict, the ICC cannot exercise jurisdiction over the crime of

⁷¹² *Ibid.*

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

⁷¹⁵ Karpus “Ukraine’s Quest for Justice: Accountability for A s Quest for Justice: Accountability for Atrocities Committed in the Russia-Ukraine War”, https://academicworks.cuny.edu/cc_etds_theses/1120 (accessed on 1 November 2024).

⁷¹⁶ *Ibid.*

⁷¹⁷ Chapter 4 of this study.

aggression, as neither Russia nor Ukraine has ratified the Kampala amendments.⁷¹⁸ Additionally, Chapter 2 noted that the UNSC can refer an act of aggression to the ICC, in terms of Art 15ter of the *Rome Statute*, even if the state parties have not ratified the Kampala amendments.⁷¹⁹ Furthermore, the UNSC, acting under Chapter VII of the *UN Charter*, can also refer the act of aggression to the ICC Prosecutor.⁷²⁰ However, as discussed in Chapters 1 and 2, Russia would probably block the UNSC from taking action by using her veto power.⁷²¹ On the other hand, the ICC has established jurisdiction over war crimes, crimes against humanity and genocide in the context of the Russia-Ukraine conflict.⁷²² This study has therefore found that the only international crime that the various courts are unable to exercise jurisdiction over is the crime of aggression, and that is why there is a need to explore an alternative avenue for the prosecution of the crime of aggression within the Russia-Ukraine conflict.

The definition of the crime of aggression and the limitation on the ICC to exercise jurisdiction over the crime is discussed in Chapter 2 of this study.⁷²³ The crime of aggression specifically addresses a type of wrongdoing that could be concealed by those in power to wield violence.⁷²⁴ The moral wrongfulness of aggression is determined by the unjustified use of force.⁷²⁵ Consequently, the responsibility lies with those who wield significant control or influence over the decision to engage in war, regardless of the specifics of their connection to any particular constituent action.⁷²⁶ This makes it the primary crime for which President Putin and other leaders would be most accountable. Neglecting to explore feasible avenues to prosecute the crime of aggression, in turn, would result in Russian leaders evading criminal liability and promoting their liberty. It is therefore pertinent to explore the avenue of an *ad hoc* tribunal for the crime of aggression.

⁷¹⁸ Chapter 2 of this study.

⁷¹⁹ *Ibid.* Article 15ter - Rome Statute of the International Criminal Court.

⁷²⁰ *Ibid.*, at Art 13(b) and Art 15ter.

⁷²¹ Chapter 1 and 2 of this study.

⁷²² Dugard *et al* 2018:270. Article 13(b) – Rome Statute of the International Criminal Court. Chapter VII – United Nations Charter.

⁷²³ *Ibid.* Article 8 - Rome Statute of the International Criminal Court.

⁷²⁴ Dannenbaum 2022: 864.

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

The UNGAR A/RES/ES-11/1 adopted on 2 March 2022 declared that Russia's invasion into Ukraine is an act of aggression and in violation of Art 2(4) of the *UN Charter*.⁷²⁷ The UNGA further pointed out in the resolution that "the crime of aggression is a continuing crime that started with the first use of force by the Russian Federation against Ukraine in February 2014".⁷²⁸ The acts of aggression still continues and "will continue until the use of force comes to an end and the sovereignty, territorial integrity and political independence of Ukraine is restored".⁷²⁹ Since the start of the invasion, there has been a range of suggestions for the creation of an *ad hoc* tribunal for the crime of aggression.⁷³⁰ The Ukrainian President has voiced his support for such a tribunal, along with other states such as "Estonia, Latvia and Lithuania, by the North Atlantic Treaty Organization (NATO) Parliamentary Assembly, the Organisation for Security and Cooperation in Europe (OSCE) Parliamentary Assembly".⁷³¹ Further, the European Parliament passed a resolution that:

Call[ed] on the EU Member States and the international community, in close cooperation with Ukraine, to urgently set up a special *ad hoc* international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation and to provide the necessary financial support to the tribunal.⁷³²

In addition, former UK Prime Minister Gordon Brown also issued a statement calling for the creation of a special tribunal in which "nations could join in a kind of *ad hoc* legal coalition of the willing".⁷³³ Additionally, the Yale Club held a meeting during which "a proposal for creating a tribunal to try the crime of aggression through an agreement

⁷²⁷ Refer to discussion in Chapter 1 of this study. UNGAR A/RES/ES-11/1, 2 March 2022, "Aggression against Ukraine", adopted by a vote of 141 in favour to 5 against, during an emergency special session of the UNGA called under the "Uniting for Peace", Resolution due to the lack of unanimity of the permanent members of the UNSC. Article 2(4) - United Nations Charter.

⁷²⁸ Coracini "The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II)", (accessed on 2 November 2024).

⁷²⁹ *Ibid.*

⁷³⁰ Corten & Koutroulis "Tribunal for the crime of aggression against Ukraine - a legal assessment", [Tribunal for the crime of aggression against Ukraine - a legal assessment](#) (accessed on 2 November 2024).

⁷³¹ *Ibid.*

⁷³² *Ibid.* European Parliament, Resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine, P9_TA(2022)0218, 19 May 2022.

⁷³³ Hathaway "The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)", [The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\)](#) (2 November 2024).

between Ukraine and the United Nations, on the recommendation of the General Assembly”, was discussed.⁷³⁴

As mentioned in section 5.1, an *ad hoc* tribunal in the context of Ukraine can be created either through an agreement between the UN and Ukraine, or through a regional agreement within the EU or amongst several states.⁷³⁵ Before delving into the discussion of which avenue is feasible to establish the tribunal (refer to section 5.2.2), the principle of immunities needs to be considered in this context.

5.2.1 The Principle of Immunities in the Context of an *Ad Hoc* Tribunal for Ukraine

This section will discuss the applicability of the principle of immunities in the context of the *ad hoc* tribunal for the crime of aggression. It was pointed out in the *Arrest Warrant case* that:

an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the ... International Criminal Court ...⁷³⁶

Thus, the ICJ is of the view that immunities do not apply within the context of international courts and tribunals. Additionally, the Appeals Chamber of the Special Court for Sierra Leone (SCSL) followed suit and applied this reasoning of immunities, as set out in the *Arrest Warrant case*.⁷³⁷ Therefore, in the *Prosecutor v Taylor case*, the Appeals Chamber of the SCSL found that immunities are not attached to heads of state “before an internationally established court such as the SCSL”.⁷³⁸ The Appeals Chamber stated that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an

⁷³⁴ *Ibid.*

⁷³⁵ Sterio 2023: 479-502.

⁷³⁶ International Court of Justice, Case concerning the Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, 14 February 2002.

⁷³⁷ Coracini & Trahan “Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities”, [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#) (accessed on 2 November 2024).

⁷³⁸ Prosecutor v Charles Ghankay Taylor, Appeals Chamber Special Court for Sierra Leone. Case number SCSL-2003-01-1, 31 May 2004.

international criminal tribunal or court”.⁷³⁹ To confirm the nature of the SCSL as international, the Appeals Chamber noted that the tribunal was established by the “bilateral treaty, initiated by a resolution issued by the U.N. Security Council”.⁷⁴⁰ Additionally, the Appeals Chamber noted that in terms of Art 24(1) of the *UN Charter*, the UNSC “acts on behalf of the members of the United Nations”.⁷⁴¹ Therefore, the bilateral treaty between Sierra Leone and the UN was “an agreement between all members of” Sierra Leone and the UN, making it “an expression of the will of the international community”, thus being international in nature.⁷⁴²

The *Jordan Referral re Al-Bashir* case in the Appeals Chamber of the ICC bears reference as a more recent example.⁷⁴³ In this case the Appeals Chamber was of the view that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under CIL vis-à-vis an international court. To the contrary, *such immunity has never been recognised* in international law as a bar to the jurisdiction of an international court”.⁷⁴⁴ The Appeals Chamber further confirmed that Art 27(2) of the *Rome Statute* is in accordance with CIL, which states that “immunities ... 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”.⁷⁴⁵ However, the AU contested the applicability of Art 27 of the *Rome Statute* with regards to state and non-state parties of the *Rome Statute*.⁷⁴⁶ The AU confirmed that Art 27(2) of the *Rome Statute* “concerns the exercise of jurisdiction by the Court over a person ... and ... excludes the operation of immunity before the International Criminal Court”.⁷⁴⁷ The AU further stated that the UNSCR S/RES/1593 “did not have

⁷³⁹ *Ibid.*

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.* Coracini & Trahan “Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities”, [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#) (accessed on 2 November 2024).

⁷⁴² *Ibid.*

⁷⁴³ The Prosecutor v Omar Hassan Ahmad Al-Bashir, The Appeals Chamber of the International Court of Justice. Case number ICC-02/05-01/09 OA2, 6 May 2019.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Ibid.* Article 27 (2) - Rome Statute of the International Criminal Court.

⁷⁴⁶ Coracini & Trahan “Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities”, [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#) (accessed on 2 November 2024).

⁷⁴⁷ *Ibid.*

the effect of removing, whether directly or indirectly, the immunities of President Al Bashir”.⁷⁴⁸

There are some strong counter arguments amongst international legal scholars, including in the AU, with regards to the reasoning of the ICC Appeal Chamber.⁷⁴⁹ The precedent in international law, however, reflects the rather controversial view that a head of state has no immunity before an international criminal court or tribunal.⁷⁵⁰

Therefore, creating a tribunal that is international in nature will be able to “pierce the veil of head of state” immunities.⁷⁵¹ Since the *ad hoc* tribunal is to be established for the purpose of prosecuting the crime of aggression, it must be international in nature to avoid the defence of immunities. Additionally, Art 125 of the *Ukrainian Constitution* bans the “establishment of extraordinary and special courts”.⁷⁵² In this case, extraordinary courts “are considered to be domestic courts that are formed to consider a specific (usually criminal) case on the basis of a special act of the relevant public authority”, and special courts are “separate domestic judicial institutions with their own system for consideration of certain categories of cases (usually criminal)”.⁷⁵³ Thus, special and extraordinary courts seem to be regarded as national and not international.⁷⁵⁴ The legal jurists of Ukraine are of the view that there is no limitation on the creation of an international judicial institution.⁷⁵⁵ Art 125 of the *Ukrainian Constitution* will therefore not bar the creation of the tribunal for the crime of aggression if it is entirely international in nature.⁷⁵⁶ The next section will discuss and evaluate which avenue will be most suitable to create an international tribunal for the crime of aggression in the context of Ukraine.

⁷⁴⁸ *Ibid.* UNSCR S/RES/1593, 31 March 2005.

⁷⁴⁹ *Ibid.*

⁷⁵⁰ *Ibid.*

⁷⁵¹ Komarov & Hathaway “Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression”, [Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression](#) (accessed 2 November 2022).

⁷⁵² Article 125 – Constitution of Ukraine, 1996.

⁷⁵³ Komarov & Hathaway “Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression”, [Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression](#) (accessed 2 November 2022).

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Ibid.*

⁷⁵⁶ *Ibid.*

5.2.2 Avenue to Create an International *Ad Hoc* Tribunal for the Crime of Aggression

As discussed in the section above, the *ad hoc* tribunal will need to be international in nature to avoid the principle of immunities and be in line with the Ukrainian Constitution. As mentioned, establishing an *ad hoc* tribunal in the Ukrainian court system is prohibited in terms of the Ukrainian Constitution.⁷⁵⁷ Further, any pronouncements made by Ukrainian judges would not carry the same authoritative weight as judgements rendered through a full international tribunal that has been created through the UN.⁷⁵⁸ Establishing a tribunal in the Ukraine court system would allow the heads of state to escape prosecution for the crime of aggression, as the defence of immunity would come into play.⁷⁵⁹ Thus, as discussed in the section above, a tribunal created through a treaty between the UN and the state concerned, like the SCSL, would not be subjected to immunity difficulties. On the other hand, it is uncertain if this would also be the case for a tribunal that is established nationally or regionally.⁷⁶⁰

A tribunal established by the “international community as a whole” would bypass the question of immunity.⁷⁶¹ It is proposed that this *ad hoc* tribunal for the crime of aggression be created as follows:

- (1) after a request by the Government of Ukraine;
- (2) upon a resolution of the U.N. General Assembly;
- (3) which would recommend the creation of the tribunal and request the U.N. Secretary-General to initiate negotiations between the Government of Ukraine and the United Nations;
- (4) ultimately created by a bilateral treaty concluded between the Government of Ukraine and the United Nations⁷⁶²

This proposal, as mentioned in section 5.2, has been supported by a number of states including Ukraine and the Parliamentary Assembly of the Council of Europe through resolution 2482.⁷⁶³ As this tribunal would be established by agreement between Ukraine and the UN, this treaty would be regarded as a source of international law.⁷⁶⁴

⁷⁵⁷ Trahan “The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III)”, [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part III\)](#) (accessed on 2 November 2024).

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.*

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ Coracini & Trahan “Special Tribunal to Prosecute the Crime of Aggression Committed Against

Such a tribunal, created through an agreement with the UN, would clearly reflect the will of the international community.⁷⁶⁵

As a point of reiteration, the UNSC is deadlocked due to Russia's veto power. Therefore, as noted previously, due to the UNSC triggering the Uniting for Peace Agreement, the UNGA has a "particular mandate to act in this situation, within its Charter powers".⁷⁶⁶ By adopting a resolution the UNGA can recommend the establishment of an international tribunal by way of a treaty between the UN and Ukraine.⁷⁶⁷ As mentioned in Chapter 1 of this study, unlike the UNSC, the UNGA does not have the same authoritative enforcement power. Therefore, such a tribunal formed through an agreement between the UN and Ukraine, upon the recommendation of the UNGA, cannot force other states to cooperate.⁷⁶⁸ In turn, states that are not a party to the treaty have no obligation to cooperate with the tribunal.⁷⁶⁹ Nevertheless, it can be assumed that the states that funded and voted in favour of the formation of the tribunal would "have a sense of ownership regarding the tribunal and work toward the execution of its arrest warrants".⁷⁷⁰ Additionally, to ensure cooperation with the *ad hoc* tribunal, states could engage in a separate voluntary cooperation agreement with the *ad hoc* tribunal.⁷⁷¹

Therefore, establishing the tribunal under the UNGA aligns with the inherent commitment of the 140 states that ratified the UNGAR A/RES/ES-11/1 that condemned the invasion by Russia into Ukraine as an act of aggression, in violation of Art 2(4) of the *UN Charter*.

Ukraine (Part VI): On the Non-Applicability of Personal Immunities", [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#) (accessed on 2 November 2024).

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Hathaway "The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)", [The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part I\)](#) (2 November 2024).

⁷⁶⁸ Coracini & Trahan "Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities", [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine \(Part VI\): On the Non-Applicability of Personal Immunities](#) (accessed on 2 November 2024).

⁷⁶⁹ *Ibid.*

⁷⁷⁰ Trahan "The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III)", [The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine \(Part III\)](#) (accessed on 2 November 2024).

⁷⁷¹ *Ibid.*

Above, this section addressed the possible path for creating an *ad hoc* tribunal for the crime of aggression in the context of Ukraine. The next subsection will briefly address some criticism that has been raised by various authors.

5.2.3 Criticism Surrounding the Creation of the *Ad Hoc Tribunal*

This section will briefly discuss three key objections that have been raised with regards to the creation of an *ad hoc* tribunal for aggression. The key points of critique raised include the potential cost of the tribunal; the argument that the tribunal would be redundant; and, last, that establishing the tribunal would amount to selective justice.⁷⁷² These key points of critique will be discussed below.

The first point of critique relates to the potential cost of the tribunal. Some authors are of the view that this objection should be dismissed.⁷⁷³ The issue of costs can be alleviated and/or dispersed but not the value of the tribunal.⁷⁷⁴ The concern here is how the tribunal would be funded, and if that funding would be to the detriment of the financial obligations of the ICC.⁷⁷⁵ As the ICC is an assessed body, its budget is paid with assessments charged to the state parties of the *Rome Statute*.⁷⁷⁶ The OTP has already pursued voluntary contributions, including for investigations in the Ukraine context.⁷⁷⁷ However, having the ICC request an inconsistent amount of money would be unjust and would hamper other investigations that are underway.⁷⁷⁸ Three ways to approach this issue have been proposed.⁷⁷⁹ The first is that the tribunal should be considered as a “de facto extension of the ICC for purposes of investigating and prosecuting the crime of aggression in general”.⁷⁸⁰ In this case the tribunal would cooperate with the ICC in investigating and prosecuting the crime of aggression.⁷⁸¹ This would benefit the long-term goals of the ICC, specifically if the two courts cooperate with a Relationship Agreement or other specific agreement, or an

⁷⁷² McDougall 2023:203-230.

⁷⁷³ *Ibid.*

⁷⁷⁴ Dannenbaum 2022: 865.

⁷⁷⁵ Scheffer “Forging a Cooperative Relationship Between International Criminal Court and a Special Tribunal for Aggression Against Ukraine”, [Forging a Cooperative Relationship Between International Criminal Court and a Special Tribunal for Aggression Against Ukraine](#) (accessed on 4 November 2024).

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Ibid.*

⁷⁷⁸ *Ibid.*

⁷⁷⁹ *Ibid.*

⁷⁸⁰ *Ibid.*

⁷⁸¹ *Ibid.*

arrangement between the courts.⁷⁸² In this case the funding for the tribunal could be seen as a “down payment on the skills and experience needed”, benefitting the ICC over time.⁷⁸³ The second option is a voluntary funded tribunal.⁷⁸⁴ In this regard, it is suggested that the Organisation for Economic Cooperation and Development states that have opposed the aggression by Russia, should “be willing to contribute significant voluntary funding for the establishment and operation” of the tribunal.⁷⁸⁵ The third option is a proposed social bond market that meets “some of the budget requirements of the ICC and organizations dedicated to meeting the needs of victims of atrocity crimes”.⁷⁸⁶ In this regard, it is suggested that a floating social bond is to be kept open, to cover the yearly expenses of the tribunal.⁷⁸⁷

Additionally, other authors have suggested an “accordion structure”. This means that during periods where activities are lower, the staff and other variable costs are reduced, and when activities are higher, the staff and other variable costs increase accordingly.⁷⁸⁸ Moreover, a shared space arrangement could also be an option.⁷⁸⁹ These measures can be considered to accommodate the long interval between the issue of arrest warrants and the start of trials.⁷⁹⁰ On another note, Dannenbaum is of the view that the costs involved in the investigation of the crime of aggression would be lower than the costs involved in investigating other international crimes.⁷⁹¹ Without a doubt, it will be unavoidable and costly to ensure the safety of staff and the tribunal from external threat.⁷⁹² Generally, considering the above discussion, it is possible to design an economically feasible and flexible *ad hoc* tribunal for aggression. Additionally, costs for this *ad hoc* tribunal for aggression could be expected to be suggestively lower than previous tribunals due to the restriction of its jurisdiction and the vast volume of evidence being publicly available.⁷⁹³

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Dannenbaum 2022: 865.

⁷⁸⁹ *Ibid.*

⁷⁹⁰ *Ibid.*

⁷⁹¹ *Ibid.*

⁷⁹² *Ibid.*, at page 866.

⁷⁹³ McDougall 2023: 203-230.

In testing the feasible mechanisms, one should also interrogate the reasons for limiting the scope of jurisdiction of the *ad hoc* tribunal to only aggression and not crimes against humanity and war crimes. Another way to eliminate the high costs would therefore be to bestow jurisdiction of other international crimes to the tribunal. It has been noted that the ICC can only hear a limited amount of Ukraine cases and, as discussed in Chapter 4, domestic courts face difficulties processing the atrocity crimes emanating from the conflict.⁷⁹⁴ Based on this, establishing a tribunal with jurisdiction over all the international crimes could alleviate the burden on the domestic courts, reducing the inherent institutional expenses associated with the establishment of a tribunal for the crime of aggression.⁷⁹⁵ Dovetailing the political will to create an *ad hoc* tribunal would facilitate investigations, and ensure the preservation of evidence, mapping of cases and issuing arrest warrants, while guaranteeing institutional preparedness for when arrests become feasible.⁷⁹⁶ In the interim, “the investigation and warrants would have their own intrinsic express value for victims”, and hold significant consequences for the accused, including the restriction on travel.⁷⁹⁷

The second point of criticism raised is that the establishment of the tribunal would be superfluous.⁷⁹⁸ Vasiliev contends that the *ad hoc* tribunal might not be able to secure the presence of President Putin or his co-accused due to a lack of full Russian co-operation.⁷⁹⁹ Vasiliev further states that once President Putin leaves his position of power, the new Russian authorities could consent to the *Rome Statute* and the amendments of aggression, rendering the *ad hoc* tribunal moot.⁸⁰⁰ However, even in the event of significant political shifts in Russia, it is improbable to believe that Russia would formally endorse the *Rome Statute* and the amendments on aggression, let alone retroactively accept the Court's jurisdiction.⁸⁰¹ Russia's reservations on the ICC,

⁷⁹⁴ Dannenbaum 2022: 865.

⁷⁹⁵ Gramer *et al* “Ukraine’s ‘Nuremberg Moment’ Amid Flood of Alleged Russian War Crimes”, <https://foreignpolicy.com/2022/06/10/ukraines-nuremberg-moment-amid-flood-of-alleged-russian-war-crimes/> (accessed on 9 March 2024).

⁷⁹⁶ Dannenbaum 2022: 866.

⁷⁹⁷ *Ibid.*

⁷⁹⁸ McDougall 2023: 203-230.

⁷⁹⁹ *Ibid.*

⁸⁰⁰ Vasiliev “Aggression against Ukraine: Avenues for Accountability for Core Crimes”, [Aggression against Ukraine: Avenues for Accountability for Core Crimes – EJIL: Talk! \(ejiltalk.org\)](https://ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/) (accessed on 10 March 2024).

⁸⁰¹ A/RES/78/6, Report of the International Criminal Court : resolution / adopted by the General Assembly – 11 November 2023. <https://digitallibrary.un.org/record/4026740> (accessed on 10 March 2024).

articulated in the UNSC and other platforms over time, encompass concerns that extend far beyond the issue of aggression.⁸⁰² At present, one could only speculate the future structure of Russia. Irrespective of the possibility that Russia's co-operation may not materialise, it does not diminish the importance of the proposed *ad hoc* tribunal.⁸⁰³ Additionally, an arrest warrant issued by the tribunal would carry emblematic weight and restrict President Putin's ability to participate in global affairs.⁸⁰⁴ Subsequently, this will taint the ability of Russia to claim "superpower" status during the reign of President Putin, as was seen in the BRICS matter in August 2023.⁸⁰⁵

The third point of critique raised is that the *ad hoc* tribunal represents selective justice, undermining the international criminal justice system.⁸⁰⁶ Various arguments can be identified on this point, namely: past crimes of aggression were not punished and it would not be appropriate to establish an *ad hoc* tribunal for Ukraine, as other perpetrators of international crimes that were committed in places like Syria and Yemen, were ignored.⁸⁰⁷ It is true that the failure to hold those who have waged war accountable is regrettable.⁸⁰⁸ However, prosecuting the crime of aggression has to start somewhere.⁸⁰⁹ The invasion into Ukraine can be seen as such an opportunity.⁸¹⁰ The second branch of criticism, that of selectivity, is more challenging. The challenging reality is that some of the states that could support the proposed tribunal have actively curtailed the ICC's jurisdiction over the crime of aggression, have further not ratified the Kampala amendments and, in turn, "stand accused of waging aggressive war in the not-too distant past (Iraq being the most obvious example)".⁸¹¹ The hypocrisy here does not affect the viability of the proposed tribunal, but it does question the "tribunal's moral standing to issue the kind of condemnation that is supposed to inhere in

⁸⁰² *Ibid.*

⁸⁰³ McDougall 2023: 203-230.

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *Ibid.* Reuters "Putin uses BRICS summit to justify Russia's war in Ukraine" [Putin uses BRICS summit to justify Russia's war in Ukraine | Reuters](#) (accessed on 4 November 2024).

⁸⁰⁶ McDougall 2023: 203-230.

⁸⁰⁷ McDougall "Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics", [Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics - Opinio Juris](#) (accessed on 10 March 2024).

⁸⁰⁸ Dannenbaum "Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine", [Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#) (2 November 2024).

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*

international criminal punishment”.⁸¹² However, the support of establishing a tribunal should be steered by the states that have ratified the Kampala amendments.⁸¹³

Additionally, considering the support provided to the ICC’s investigations into Ukraine, the established complementary accountability mechanisms, and the vast range of domestic investigations opened, fall outside of the scope of the argument that there has been an inconsistent criminal justice response to the crimes in Ukraine, juxtaposed to Syria and Yemen, for example.⁸¹⁴ One should avoid jumping to the conclusion that Ukrainian victims are seen as more worthy of justice.⁸¹⁵ This surpasses the fact that “absent action on the UNSC’s part, a relevant State’s consent is an integral precursor to justice, and Ukraine (unlike Syria and Yemen) is an enthusiastically cooperative partner”.⁸¹⁶ The dilemma faced here is that if there is refusal to support and develop the justice initiatives, whilst being readily available, there would be no point in developing the international criminal justice system. This would send out the wrong message to the international community and simply suggest the condonation of criminal activity. Dealing with the argument regarding previous crimes going unpunished, it needs to be pointed out that from the 1950s the definition of aggression has been under debate, and different definitions were utilised up until 2009.⁸¹⁷ Therefore, it would be improbable to expect the international community to establish a tribunal for the prosecution of a crime based on an antiquated definition enshrined in customary law.⁸¹⁸ At the same time, however, there were active treaty negotiations for the definition of aggression.⁸¹⁹ Therefore, the grounds for upholding this argument are unlikely to stand, as it was not taken into account that only in 2010 consensus was reached on the post-Charter definition of the crime.⁸²⁰ The philosophical tension here is between the deontology and *tu quoque* principle. Past actions should not hinder the opportunity to create an *ad hoc* tribunal that would

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴ McDougall 2023: 203-230.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ Heller “Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea”, [Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea - Opinio Juris](#) (accessed on 9 March 2024).

⁸¹⁹ *Ibid.*

⁸²⁰ McDougall 2023: 203-230.

advance the international community due to the mere fact it will hold a powerful state leader accountable.

In conclusion, this section evaluated the critique that has been raised in the context of creating an *ad hoc* tribunal for the crime of aggression. The three points of criticism discussed in this context are: the political costs; the redundancy of the *ad hoc* tribunal; and the issue on selectivity. In terms of political costs, it goes without saying that it would be costly. However, the financial costs should not hinder the establishment of an *ad hoc* tribunal. It is pertinent for the international community to stand united and fund this tribunal as a step towards preventing a repetition of such crimes. As discussed above, there has been a myriad of proposals made in order to alleviate the burden of the costs. It has also been said that due to the restriction of its jurisdiction, and the vast body of evidence being publicly available, this tribunal could be less costly than those established in the past.

It is true that accountability depends on political conditions. As seen throughout this study, it goes without saying that the chances of Russia complying with the tribunal is highly unlikely. However, an arrest warrant, issued by an international court, carries emblematic weight, as was seen when President Putin was restricted in his ability to participate in global affairs.⁸²¹ Subsequently, this tainted the ability of Russia to claim “superpower” status.⁸²²

It goes without saying that if there is a refusal to support and develop the justice initiatives, there would be no point in developing the international criminal justice system. This in turn would send the wrong message, and simply suggest the condonation of criminal activity. It is pertinent that past actions should not hinder the opportunity to create an *ad hoc* tribunal that would advance the international community by the fact that it will hold a powerful state leader accountable.

The next subsection will evaluate the feasibility of establishing an *ad hoc* tribunal for the crime of aggression in the context of Ukraine.

⁸²¹ *Ibid.*

⁸²² *Ibid.* Reuters “Putin uses BRICS summit to justify Russia's war in Ukraine” [Putin uses BRICS summit to justify Russia's war in Ukraine | Reuters](#) (accessed on 4 November 2024).

5.2.4 The Feasibility of Establishing an *Ad Hoc* Tribunal for the Crime of Aggression

In conclusion, the need for establishing an *ad hoc* tribunal for the crime of aggression in the context of the current Russia-Ukraine invasion has been noted throughout this study. Establishing an *ad hoc* tribunal for the crime of aggression is the most compelling option. The international legal community has been faced with an unprecedented challenge as a result of the invasion into Ukraine. Despite having the ability to exercise jurisdiction over the crime of aggression, the ICC is unable to do so in the context of this conflict, as neither Russia nor Ukraine has ratified the Kampala amendments. In addition, since Russia is a permanent member of the UNSC, the veto power comes into play. This results in a situation where the UNSC is “paralysed” and unable to refer an act of aggression to the ICC acting under Art 15*ter* *Rome Statute* or under Chapter VII of the *UN Charter*. This clearly blocks the UNSC and restricts the ICC’s ability as an international court to exercise jurisdiction over the crime of aggression. Additionally, in section 5.2, it was noted that domestic courts are not a viable option in holding heads of state accountable due to the defence of immunities.

The only alternative left in this case is therefore to establish an *ad hoc* tribunal for the crime of aggression. As stated in section 5.2, despite the controversies around the applicability of immunities in an international court, most of the arguments favour the view that there are no immunities in an international court. For the tribunal to be able to prosecute heads of states, it has to be international in nature in order to “pierce the veil” of immunities. Additionally, Art 125 of the *Ukrainian Constitution* prohibits the establishment of special and extraordinary courts. This further supports the proposed international nature of the tribunal.

To create an international tribunal and remain in line with the Constitution of Ukraine, the *ad hoc* tribunal for the crime of aggression needs to be established by an agreement between the UN and Ukraine upon the recommendation of the UNGA. Further, as mentioned in section 5.2.2, there has been great support from various states and organs for this proposal.

As a point of reiteration, the UNGA lacks enforcement authority, so the UNGA in this regard would not be able to force any state to cooperate. However, establishing the

tribunal under the UNGA aligns with the inherent commitment of the 140 states that ratified the UNGAR A/RES/ES-11/1 that condemned the invasion by Russia into Ukraine as an act of aggression and in violation of Art 2(4) of the *UN Charter*.

Therefore, we can note that establishing a hybrid tribunal for the crime of aggression might be the only viable option in holding heads of state accountable for the grave breaches of international laws. The reality faced here once again is that it will be difficult to convince Russia to cooperate. But bearing that in mind, the *ad hoc* tribunal for the crime of aggression will be able to circumvent the difficulties that accompany the ICC.

Further, a warrant of arrest issued from an international *ad hoc* tribunal for the crime of aggression, will bear emblematic weight. We have seen that, as mentioned above, President Putin was previously restricted in his ability to participate in global affairs.

It goes without saying that refusal to support and develop the justice initiatives that are readily available, would render the development of the international criminal justice system superfluous. This would send out the wrong message, and simply support the condonation of criminal activity.

Creating an *ad hoc* tribunal for the crime of aggression in the context of the ongoing conflict not only prioritises justice for the vulnerable at the cost of those who hold power, but such a tribunal would positively reinforce the international criminal justice system. Strengthening the international community's faith in the international justice system while, at the same time, bolstering the prohibition of the use of force, would have a meaningful impact as an international response. However, as such a tribunal has not been established yet, only time will tell how the situation will unfold.

CONCLUSION

This study has critically tested the feasibility of various legal mechanisms to address the questions of accountability for the crimes and atrocities emanating from the current (2022 – present) Russia-Ukraine conflict. Specifically, this study evaluated the feasibility of the extant legal mechanisms available on the international and domestic levels, as well as the non-extant alternative transitional justice mechanisms. On the international level, feasibility was tested by evaluating the following legal mechanisms: the mechanisms available to the UN, specifically the UNSG, UNGA and the UNSC (Chapter 1); the ICC, specifically its ability to establish jurisdiction over the core crimes and impose individual criminal responsibility (Chapter 2); and the ICJ, inclusive of provisional measures and non-party interventions (Chapter 3). The feasibility on the domestic legal framework was tested by evaluating the following avenues: Ukrainian courts; the rather controversial mechanism of holding trials *in absentia*; Russian courts; and the possibility of third states utilising the principle of universal jurisdiction (Chapter 4). With regards to the alternative transitional justice mechanisms, feasibility was tested by evaluating the establishment of an *ad hoc* tribunal (Chapter 5). This conclusion will comprehensively summarise the key findings of feasibility for each of the legal mechanisms evaluated to mete out criminal responsibility.

This study evaluated the mechanisms available to the UN, specifically the UNSG, the UNSC and the UNGA, to respond to the current ongoing Russia-Ukraine conflict.⁸²³ As a preliminary, the UN system made clear efforts to respond to the ongoing conflict from the start. However, the UN and its UNSG was unable to prevent the invasion into Ukraine.⁸²⁴ The UNSG further urged Russia and Ukraine to engage in a peaceful settlement, with no success. Despite this, the UN and its UNSG played a critical role and sought alternative ways to respond to the invasion, by utilising the UN's available resources to counter the consequences that emanated from the invasion. The UNSG has successfully reached a deal that resumed trade exports from Ukrainian Black Sea Ports. Russia signed an MoU that allowed full global access to food and fertiliser. This positively alleviated global markets by reducing food and fuel prices. Another deal worth mentioning here is the support of the IAEA and the establishment of the permanent council to supervise all the nuclear plants in Ukraine to prevent a nuclear

⁸²³ Refer here to Chapter 1 of this study.

⁸²⁴ *Ibid*, section 1.2.1, for the discussion on the UN and its UNSG.

accident. Further, the UNHRC established the HRMMU to document violations that emanated from the conflict. The HRMMU has found evidence that international crimes have been committed. Additionally, the UN and its humanitarian partners have provided vital assistance to Ukrainian citizens and Ukrainian refugees to alleviate the suffering caused by the invasion.

As pointed out in the findings of Chapter 1, the UNSC is deadlocked and unable to exercise its primary responsibilities due to the veto power held by Russia.⁸²⁵ This means that the UNSC is not a feasible mechanism to directly respond to the ongoing Russia-Ukraine conflict. Despite this, the UNSC has played a critical role in triggering the UNGA special emergency sessions. This has led to various UNGAR being passed. A rather profound UNGAR that was adopted is Resolution A/RES/76/262 that demands the permanent members who cast a veto vote to appear before the UNGA to explain the rationale behind the use of the veto. This is a simple symbolic step towards accountability and control.

The findings in Chapter 1 note that the responses from the UNGA and the UNHRC, including the UN and its UNSG, are feasible regarding the ongoing conflict.⁸²⁶ However, the UN and its system has not been successful in pressurising Russia to withdraw from Ukraine and end the conflict. Focusing solely on the UN to address questions of accountability that emanate from the conflict is insufficient. Nevertheless, the responses emanating from the UN could be used as a basis for seeking other legal avenues that could better address the questions of accountability.

Next, the ICC as an international legal mechanism to bring alleged perpetrators of international crimes, committed within the border of Ukraine, to justice was evaluated.⁸²⁷ As a preliminary, it was noted that Russia is not a state party to the *Rome Statute* but Ukraine is an *ad hoc* party to the *Rome Statute* in terms of Art 12(3), based on the two declarations submitted by Ukraine.⁸²⁸ As a result, the ICC has established jurisdiction over war crimes, crimes against humanity and genocide emanating from the continuing invasion into Ukraine. Briefly, the ICC's OTP commenced preliminary

⁸²⁵ *Ibid*, section 1.2.2, for the discussion on the UN and its UNSG.

⁸²⁶ *Ibid*, section 1.3.

⁸²⁷ Refer here to Chapter 2 of this study.

⁸²⁸ *Ibid*, section 2.2.1.

investigations into the situation in Ukraine on 24 April 2014.⁸²⁹ On 28 February 2022, the ICC Prosecutor, Khan, confirmed that the recent alleged crimes committed in Ukraine as a result of the current invasion, are included in these investigations.⁸³⁰ The OTP noted that the next step was to approach the Pre-trial Chamber in order to open investigations. As suggested by the OTP, receiving referrals from State Parties would expedite this process. Subsequently, as of 1 March 2022, State Party referrals were submitted to the OTP's office. This clearly highlights the international community's support regarding this matter. As a result of the investigations by the Pre-trial Chamber, four arrest warrants have been issued to date.⁸³¹

As noted above, the international community has already shown its support in this matter. Continued international support is vital, as the ICC is dependent on States cooperation to execute arrest warrants and surrender suspects to the ICC. Additionally, an onus placed on signatory State Parties to the *Rome Statute* to cooperate with the ICC. Warrants that are issued by the ICC can still be implemented at any point in the future, although currently no arrest warrants have been executed. Thus, should the suspects at any point enter the country of a State Party to the *Rome Statute*, the onus imposed on them is to act in terms of the issued arrest warrant. Despite intending criminal prosecutions, these arrest warrants have incidentally also impeded suspects' travel to foreign states. The fear of arrest is real, as was seen when President Putin intended to travel to South Africa but decided against it. In this regard, South Africa would have been obliged to arrest President Putin had he entered the country. In sum, it is evident in the findings of Chapter 2 that the chances of Russia complying with the ICC and surrendering its suspects is highly unlikely.

The findings in Chapter 2 further suggest that the ICC is a feasible mechanism in bringing alleged perpetrators of war crimes, genocide and crimes against humanity, committed within the border of Ukraine, to justice.⁸³² It was noted, however, that any

⁸²⁹ Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, December 11, 2020, ICC Statements - <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine> (accessed on 20 May 2024).

⁸³⁰ Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation." <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening> (accessed 1 July 2024).

⁸³¹ Ukraine Investigation – ICC-01/22. <https://www.icc-cpi.int/situations/ukraine> (accessed on 1 July 2024).

⁸³² Chapter 2, section 2.2.3.

judgement or future judgements rendered by the ICC might not be implemented immediately due to Russia's non-compliance with the ICC. However, the judgements rendered by the ICC can be implemented in future, should the suspects travel to a country that is a state party to the ICC.

Since Ukraine and Russia have not ratified the Kampala amendments, the ICC does not have jurisdiction over the crime of aggression. The ICC is, therefore, not a feasible mechanism to bring alleged perpetrators of the crime of aggression, within the border of Ukraine, to justice. For this reason, additional feasible mechanisms were explored, such as the creation of an *ad hoc* tribunal and its feasibility, which will be addressed below.

The ICJ was investigated as an international legal mechanism to impose responsibility on either Russia or Ukraine.⁸³³ It seems as if the ICJ is a seemingly feasible mechanism in imposing responsibility on Russia. It is pertinent to reiterate that Ukraine filed an application to institute proceedings in the ICJ on 26 February 2022. The ICJ had in turn established *prima facie* jurisdiction and subsequently granted provisional measures on 16 March 2022.⁸³⁴ These provisional granted measures were that first, Russia should immediately suspend the military operations, and second, Russia must ensure that any military or armed forces, including persons associated to its control, take no steps to further the military operations. These requested provisional measures are rather profound in that Ukraine requested the suspension of the military operations. However, as discussed in the merits application, Ukraine sought a declaratory order from the ICJ, to declare that no genocide has been committed by Ukraine and that the invasion by Russia cannot be justified on grounds of genocide.⁸³⁵

On 2 February 2024, during the preliminary objection ruling, the ICJ confirmed that the matter would proceed to the merit stage. The ICJ therefore has established jurisdiction into the *Ukraine v Russia* case before the court. As mentioned, the ICJ holds no power to enforce its judgement, but its judgement is final and binding. Depending on the type of order issued by the ICJ, the UNSC is empowered to enforce the judgement, should there be non-compliance thereof. Russia holds the veto right, which would make this

⁸³³ Refer here to Chapter 3 of this study.

⁸³⁴ *Ibid*, section 3.1.2.

⁸³⁵ *Ibid*, section 3.2.

process difficult.⁸³⁶ However, in this case, the UNGA can recommend that the Member States enforce countermeasures to force Russia to comply, as discussed in the chapter.

As it stands, Ukraine is requesting a declaratory order from the ICJ. If the ICJ is to merely pass a declaratory order, such an order would not impose responsibility on Russia for the invasion. Should the ICJ proceed to pass its judgement, it would be pertinent to look at what such an order could disable rather than enable. Looking to the future, this declaratory order could have a significant effect by removing false claims of genocide, and preventing any grounds for future justification of dispute between Ukraine and Russia.

As with the ICC orders, the judgements made by the ICJ might not be implemented immediately, but could be implemented in the future.⁸³⁷ At this stage it is not exactly clear how the ICJ will impose responsibility on Russia or Ukraine for the invasion into Ukraine, and it will be interesting to see how the case before the ICJ unfolds. Despite how difficult it might be for the ICJ to impose responsibility on either state, the ICJ is on its way to pursue justice. Depending on the final order, the ICJ is able to impose responsibility on either Russia or Ukraine. As mentioned throughout this study, a single avenue alone is not feasible to mete out criminal responsibility emanating from the ongoing invasion into Ukraine.

Another key finding to point out in the *Ukraine v Russia* case before the ICJ, is the international community's stance in preventing atrocities and the desire for accountability. The international support can be noted from the numerous Art 63 non-party intervention declarations that have been submitted.

The focus of the study then shifted from the feasibility of the legal mechanisms available on an international level, to the domestic legal framework to respond to the questions of accountability for the crimes emanating from the ongoing invasion into Ukraine.⁸³⁸ To test for the feasibility of the domestic legal mechanisms, the evaluated

⁸³⁶ *Ibid*, section 3.3.

⁸³⁷ Just like in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

⁸³⁸ Refer here to Chapter 4.

avenues were inclusive of the Ukrainian courts;⁸³⁹ the rather controversial trials *in absentia*,⁸⁴⁰ Russian courts,⁸⁴¹ and third party states through universal jurisdiction.⁸⁴²

As discussed, domestic trials are already underway. In the study it was noted that Ukraine aims to be more aligned with international standards, which is echoed by the recent amendment of the definition of the crime of aggression, held before the Ukrainian Supreme Court in February 2024. Further, holding trials in Ukraine courts is easier as evidence is readily available. Critique might be stated here, in that holding trials in domestic courts pose opportunities to be biased. Ukraine courts, however, have shown that mitigating factors are considered, and harsh sentences do get overturned on appeal. The courts have shown that there is real justice in the justice meted out, and it is not simply vindictive proceedings against their enemies. Despite the obstacle of immunity that might be claimed by certain perpetrators, this should not be seen as a factor to deter Ukrainian courts from seeking redress for crimes committed in Ukraine by other perpetrators. Taking the above into account, holding trials in Ukraine is a feasible mechanism to address the atrocity crimes committed by individuals that do not hold immunities. Clearly, this leaves a gap open to seek alternative mechanisms that can hold those individuals who hold immunities accountable.

The whereabouts of perpetrators might be unknown, leading to the rather controversial trials *in absentia*. Despite controversies in this regard, Ukraine has already proceeded with holding trials *in absentia*. Presently, as no judgement has been rendered in the open case of *Romanov*, it is yet to be seen whether such trials can lead to a concretised solution to address the crimes emanating from the ongoing war. In this case one could argue that such trials might not bring about a sense that justice is served, as the convicted persons are not in custody. Having been convicted carries some stigma, but the convicted parties still have the freedom of movement in Russia. This could create the perception that such trials are a sham. Given the realities in this case, such as the fact that the convicted can roam freely in Russia, recourse might have to be taken to holding trials *in absentia*. Holding trials *in absentia* might give the

⁸³⁹ *Ibid*, section 4.1.1.

⁸⁴⁰ *Ibid*, section 4.2.

⁸⁴¹ *Ibid*, section 4.3.

⁸⁴² *Ibid*, section 4.4.

victims peace of mind that they are being heard while seeking justice, and that their pleas do not fall moot.

Regarding the discussion of holding trials in Russian courts, it goes without saying that it would not be a feasible mechanism to address the crimes emanating from the invasion into Ukraine. As opposed to Ukrainian courts, Russia does not hold the same value in attempting to hold trials. The case discussions in this chapter illustrate the clear disregard of lawful trials and international treaties such as the *Geneva Convention (III) on POW*. In these cases, it is further clear that Russia has utilised the opportunity for politicisation in its cases against Ukrainian soldiers through its propaganda tactics.

This chapter also discussed third party states holding trials based on the principle of universal jurisdiction. Based on the findings, holding trials based on universal jurisdiction could be feasible despite certain limitations that will be briefly addressed. The effectiveness of this mechanism has yet to be assessed to date, as no trials have yet been held. The support from the international community, in seeking to hold those accountable for the atrocities emanating from the ongoing invasion, is evident. This is bolstered by the fact that numerous states have noted their intent to hold trials based on universal jurisdiction, with Germany having commenced investigations. Further, G7 countries have agreed on a central point of contact in each state to prosecute crimes and share information on evidence and legal requirements. However, domestic laws differ between each state, so some states might hold prosecutions for some of the crimes. There is also the possibility that the crime of aggression might also not be addressed, as most states have not codified this crime, including the issue that the crime of aggression under universal jurisdiction is not vested in CIL. Another point to note here is the defence of immunities that might arise, making it difficult to hold trials of high-level individuals. However, as discussed, the defence of functional immunities will not stand if the individual is no longer in office. Here we can note that the international community has also tried to economically isolate Russia, with the intent to potentially hamper Russia's ability to prevent states from prosecuting Russia's officials. It is, however, clear that domestic courts alone will not be able to address all the atrocity crimes emanating from the ongoing invasion, let alone put high-level individuals who hold immunities on the stand.

The focus now shifts from the feasibility of the domestic legal framework to transitional justice mechanisms to respond to the violations of international criminal laws.⁸⁴³ The non-existent legal mechanism evaluated in this regard was the establishment of an *ad hoc* tribunal for the crime of aggression. The need to establish an *ad hoc* tribunal for the crime of aggression has been noted throughout this study, and establishing an *ad hoc* tribunal for the crime of aggression is the most feasible option.

As a preliminary, the international legal community has been faced with an unprecedented challenge due to the invasion. As mentioned, the ICC cannot exercise jurisdiction over the crime of aggression in this context, as neither Ukraine nor Russia have ratified the Kampala amendments. Additionally, the UNSC is “paralysed” and unable to refer an act of aggression to the ICC, as Russia will most likely exercise the veto. This clearly blocks the UNSC and restricts the ICC as an international court to exercise jurisdiction over the crime of aggression. Moreover, domestic courts face challenges with regards to holding high-level individuals accountable due to the defence of immunities, while international courts do not face the same challenges with regards to immunities. Despite the controversies, most arguments favour the view that there are no immunities in an international court.

Further, Art 125 of the *Ukrainian Constitution* prohibits the establishment of special and extraordinary courts. An international *ad hoc* tribunal for the crime of aggression, created through an agreement between the UN and Ukraine upon the recommendation of the UNGA, is therefore in line with the *Ukrainian Constitution*.

Therefore, an international *ad hoc* tribunal will be feasible to “pierce the veil of immunities” and prosecute high-level individuals with the crime of aggression. As mentioned in section 5.2.2, this proposal has received support from various states and organs.

Should such an international tribunal be established, any arrest warrant issued will bear emblematic weight. As noted, President Putin was restricted in his ability to participate in global affairs as he cannot freely travel internationally.

An *ad hoc* tribunal for the crime of aggression would not only prioritise justice for the vulnerable at the cost of those who hold power, but would positively reinforce the

⁸⁴³ Refer here to Chapter 5.

international criminal justice system. However, the effectiveness of this mechanism has yet to be assessed to date, and only time will tell how it will play out.

In conclusion, based on the findings in this study, an isolated or stand-alone approach in seeking legal mechanisms to address the questions of accountability for the crimes emanating from the ongoing conflict, is not viable. A more viable suggestion would be to look at all the proposed feasible mechanisms in conjunction with one another, to mete out criminal responsibility. For example, the study has noted that the defence of immunities arises when holding trials based on the feasible domestic legal mechanisms, however, this is not true when holding trials based on the feasible international legal mechanisms. Further, the ICC has established jurisdiction for the recognised international crimes other than the crime of aggression. The study has also found that it would be difficult to hold high-level individuals accountable for the crime of aggression in domestic courts. Therefore, resorting to alternative transitional mechanisms, by creating an *ad hoc* tribunal for the crime of aggression, could possibly close this gap.

As mentioned, the purpose of this study is not to seek findings that would end the war, but rather to mete out criminal responsibility by evaluating possible legal mechanisms. By incorporating the proposed approach of looking at each of the evaluated feasible mechanisms in conjunction with one another, along with the findings discussed in this study, this could allow for:

1. International Accountability – As the ICC has established jurisdiction for the core crimes, except the crime of aggression, the ICC is able to hold those accountable for the grave breaches of international law on an international level. Further, the ICJ also has clearly established jurisdiction in the case of *Ukraine v Russia*. Therefore, the ICJ, depending on the final order, can impose responsibility on either Russia or Ukraine.
2. Domestic Accountability – Despite the difficulties that might arise with regards to the defence of immunities and the crime of aggression, domestic courts can hold trials of individuals who do not hold immunities for crimes excluding the crime of aggression. The domestic Ukrainian legal system is continuously evolving to be better aligned with international laws, reaffirming the viability of holding trials for the crimes emanating from the invasion in Ukrainian courts.

Holding those accountable in domestic courts is further strengthened by those third states willing to hold trials based on universal jurisdiction.

3. An *ad hoc* tribunal for the crime of aggression – This study has noted the complexities and challenges involved in holding those accountable to the crime of aggression. An international *ad hoc* tribunal focused on the crime of aggression would circumvent the complexities and challenges involved by ensuring legal prosecution of those accountable for the crime of aggression. This would therefore offer a viable path to ensure accountability and the development of the international criminal justice system.

Upon evaluating the feasible mechanisms to mete out criminal responsibility, it is noted that some of the mechanisms are already being utilised, such as sanctions; the ICC; the ICJ; and trials in domestic courts, while others are proposed to be utilised. Based on the findings of this study, the common denominator in each of the evaluated feasible mechanisms is the probability of whether Russia will comply with any order emanating from the feasible mechanisms. Throughout the study, it has been concluded that the chances of Russia complying with any order is highly unlikely, as seen from Russia's non-compliance of the ICJ's provisional order. Thus, one could argue what would be the point of searching for a feasible mechanism if it is already known that Russia will not comply. On the other hand, as mentioned, the judgements found might not be implemented immediately, but could be implemented in future. It is not to say that seeking feasible avenues to mete out criminal responsibility is futile. By proceeding and evaluating feasible avenues to mete out criminal responsibility, they could perhaps potentially limit Russia's ignorance regarding the rule of law. Further, the clear international support evident throughout the study regarding each legal mechanism evaluated, could further hinder Russia's non-compliance. It goes without saying that the grave breaches committed in Ukraine require an all-inclusive accountability process to ensure that all those accountable are held liable for their actions. Ignorance of the pursuit of justice leads to perpetrators being exempt for the atrocities they committed, eroding the rule of law. Looking at the bigger picture, addressing the atrocity crimes committed between Russia and Ukraine sets a precedent for the international community, that any state that would wish to ignore the rule of law will be faced with legal consequences.

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