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Avenues for establishing criminal responsibility for international crimes committed during the Russo-Ukrainian armed conflict

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Abstract: The armed conflict between Russia and Ukraine has once again drawn the attention of the international community to an inter-state war in its classical sense. Unfortunately, it also means that a 'side-effect' of armed conflicts has resurfaced in the form of international crimes. Both sides accuse one another of war crimes, crimes against humanity and to a degree even genocide. The crime of aggression is also being analysed by academia as the most serious violation of the prohibition of the use of force. Even though the end of war is nowhere in sight, discussion needs to be initiated on how to establish accountability mechanisms for these crimes. This paper will analyse four possible scenarios, weighing advantages and disadvantages along with a reality check to ascertain their feasibility. Firstly, processes before the International Criminal Court will be assessed followed by a quick overview of the role of domestic courts. As the third and fourth possibilities, the establishment of an ad hoc tribunal or a hybrid court will be looked into. The novelty element of the present article lies in the comprehensive comparison of the various international, internationalized and domestic forums with the goal of aiding the decision-making process of the parties and the international community seeking justice for international crimes committed over the course of the armed conflict.

Keywords: International Criminal Law; International Tribunals; Ad Hoc Tribunal; Hybrid Courts; Russia and Ukraine.

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1. Outline: possible international crimes in the Russo-Ukrainian armed conflict

The armed conflict in Ukraine has once again drawn the attention of the international community to an inter-state war in its classical sense. Unfortunately, it also means that a 'side-effect' of armed conflicts has resurfaced in the form of war crimes. Use of cluster munitions in Kharkiv, targeting civilian objects such as hospitals and theatres in Mariupol, abducting and deliberately killing civilians in Donetsk, Luhask and Bucha – among others – stand as obvious violations of the 1949 Geneva Conventions and the First Additional Protocol of 1977. Even though the end of war is nowhere in sight, the discussion needs to be initiated on how to establish accountability mechanisms for these crimes.

First and foremost, it is worth stating that this article will analyse the feasibility of various international tribunals[2] through the lens of international crimes. At the current state, there are only four international crimes: war crimes, against humanity, genocide and aggression (Rome Statute Art. 5. hereinafter: Rome Statute). Other, heinous acts have likely been and are being committed during the conflict such as human trafficking and smuggling, but those are categorized as transnational crimes and therefore, are not in the scope of the present article (Staiano, 2022, p. 1-35). In this chapter, it will be addressed based on what can we assume the commission of these crimes as well as the likely instances in which they have occurred. On a side note, we can only talk about alleged crimes as there have not been an international court which would have rendered a judgment and as a result, the presumption of innocence prevails. With the disclaimers out of the way, let us move to the crimes in question. The 'simplest' of which are war crimes.

For a very long time, it was assumed that violations against persons and property were the necessary side effect of all armed conflicts, however with the advent of The Hague and Geneva branches of international humanitarian law this notion has changed substantially and understood through the lens of the military necessity principle (Lieber Code of 1863, Art. 15, Oxford Manual of 1880, Art. 32. Section b, Hague Regulations of 1899 and 1907 Art. 23 Section g., Solis, 2010, p. 49-51, Meron, 2000, p. 239-278). In the Russo-Ukrainian armed conflict there have been numerous reports of war crimes occurring. Among the most telling was the United Nations' (UN) Independent International Commission of Inquiry on Ukraine which has submitted its report on 18 October 2022. The main focus of the inquiry was the Kyiv, Chernihiv, Kharkiv and Sumy regions, where "The Commission found that violations of human rights and international humanitarian law and war crimes had been committed during the conduct of hostilities" (UN Inquiry 2022, Art. 36-37.). The inquiry has noted that there were examples on both sides of failing to protect civilians and civilian objects – albeit to varying degree since the conduct in question takes place on the territory of Ukraine. There have been reports of Russian forces deliberately attacking fleeing civilians (UN Inquiry, 2022, Art. 38.).

Unlawful confinement, inhumane treatment, torture, sexual and gender based violence against victims between the ages of 4 and 80 to name some of the acts which are considered war crimes that the UN Inquiry has found (UN Inquiry, 2022, Art. 65-66, 75, 81, 88-89.). It is worth noting that in an armed conflict, the conduct of both sides needs to be assessed. Ukrainian authorities have also allegedly committed serious violations, such as "torture, ill-treatment, violation of procedural rights, and detention of persons in inhuman conditions", although the UN Inquiry could not corroborate these allegations when the report was submitted to the Human Rights Council on 15 March 2023 (UN Inquiry, 2023, Art. 87-89.).

2 For simplicity's sake "court" and "tribunal" will be used interchangeably throughout the article.

Besides war crimes, crimes against humanity could also have occurred. Based on the UN's report, indiscriminate use of explosive weapons in Kyiv, Khrkiv, Mariupol (OSCE Report, 2022) and other cities can lead to the conclusion of systematic use of incendiary weapons against the civilian population which might result in crimes against humanity being established (UN Inquiry, 2022, Art. 38.). Furthermore, deliberate attacks against the energy infrastructure of Ukraine – serving little to no military goal other than pressuring the civilian population into submission and capitulation have occurred during the winter months of 2022-2023 (UN Inquiry, 2023, Art. 40.). Summary executions (UN Inquiry, 2022, Art. 67.) and exhumed mass graves in Izium and Bucha (UN Inquiry, 2022, Art. 69.) along with over 16.000 children being forcefully removed from their home towns and transported to Russia (UN Inquiry, 2023, Art. 95.) give rise to the suspicion that even genocide might have been committed in the conflict (Irvin-Erickson, 2022).

The most contentious point is the crime of aggression. The newest international crime in the Rome Statute but one with a long history as in a slightly different form labelled the "crime against peace" has existed since the Nuremberg Trials (Charter of the International Military Tribunal, 1945, Art. 6. para a.). Even though there was no official declaration that aggression has occurred, as on the level of the UN Security Council (SC) such a resolution cannot be adopted against a permanent member, it is the widespread consensus among the majority of the states of the international community that the act of aggression did, in fact occur[3]. If the act of aggression can be established, then the crime of aggression can also be discussed, as it details the individual criminal responsibility of those individuals who have played a major role in the planning, preparation, initiation or execution of the military act itself (Rome Statute Art. 8bis, para 1).

With the possible international crimes briefly described, the challenge arrives in finding the most adequate forum to establish individual criminal responsibility before a court that has legitimacy, is capable of aiding in the fact-finding and reconciliation process and which has the greatest chance of meting out justice.

2. The International Criminal Court

The International Criminal Court (ICC) is the first, permanent judicial structure designated by the majority of member states of the international community to bring the perpetrators of the most serious international crimes to justice. Established after multiple rounds of negotiations in the 1990's and building upon the experiences of the Rwanda and Yugoslavia Tribunals, the Court began its work on 1 July 2002 (Sterio-Scharf, 2019). Based on the cooperation of 123 willing state partners, the ICC is the foremost entity when it comes to handling international crimes. Indeed, its Statute contains provisions for war crimes, crimes against humanity, genocide and aggression (Rome Statute Art. 5.).

This seemingly bright overview becomes a bit more colourful if we take into consideration that the jurisdictional regime of the ICC is a fairly complex system. The first barrier arrives in the form of territorial and personal jurisdiction as the ICC can only initiate the legal process if the crime in question occurred on the territory of a State party or by a citizen of a State that is party to the Rome Statute (Rome Statute Art. 12. para 2,

3 Article 27 Section 3 of the UN Charter requires the "concurrent vote" of permanent members in "all other", non-procedural matters, making it impossible to adopt a resolution against a permanent member such as the Russian Federation if the permanent member in question does not support the resolution. Therefore, it is only the General Assembly which can accept a resolution on these matters as per Art. 11 Section 2. and the ensuing practice of the so-called "uniting for peace resolutions". Subsequent General Assembly resolutions are reinforcing this view. See: United Nations General Assembly Resolution ES11/1, 02 March 2022; United Nations General Assembly Resolution ES11/4, 12 October 2022 condemning the Russian attack on the territory of Ukraine with 141 and 143 states out of 193 voting in favour of the resolution respectively.

section a.). In this regard, neither Russia nor Ukraine are parties to the Rome Statute. However, this hindrance is circumvented to a degree by Ukraine's referral the situation to the Court as the crimes in question have occurred on the territory of Ukraine (Rome Statute Art. 13. section a. Art. 14. para 1). Indeed, Ukraine has done so in 2014 after the annexation of the Crimean Peninsula. The referral was extended to the entirety of Ukraine without temporal limitations in 2022 (2014 and 2022 Referrals by Ukraine).[4]

As soon as the declaration was lodged, the Prosecutor of the ICC has announced the commencement of an investigation regarding the events taking place in Ukraine which was followed by the issue of an arrest warrant by Trial Chamber II on 17 March 2023. Two individuals were targeted by the arrest warrant: Vladimir Vladimirovich Putin, the President of the Russian Federation himself and Maria Alekseyevna Lvova-Belova, the Commissioner for Children's Rights. The arrest warrant stipulates that the two have committed war crimes via the unlawful deportation of children from the occupied territories (ICC announcement on the arrest warrants). It is worth noting that issuing an arrest warrant against a sitting head of state is not without precedent. Two arrest warrants were issued against Omar Al-Bashir in 2009 and 2010 respectively (Al Bashir case). Despite this fact, while in office he has continued to visit states that were parties to the Rome Statute without him getting surrendered to the ICC (Al Bashir's trip to Jordan).[5] Another interesting element is that the charges brought against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova "only" mention war crimes, even though the deportation of children and "converting" them to become Russians can be regarded as genocide (Rome Statute Art. 6. Section e.).

The reason for this lies in the extremely hard nature of proving the genocidal intent. In fact, there has not been a single case before the ICC, where genocide could be established. It is safe to assume that the Prosecutor wanted a case in which there was little doubt that the crime in question has occurred, one that is relatively easy to prove and it also establishes the Court as a primary forum for criminal justice. Meanwhile the Russian Federation appears adamant in its resolution that neither recognition of the ICC nor cooperation with the Court is possible, necessary and desirable. Former President Dmitry Medvedev even suggested airstrikes against the ICC as a response, while Russian authorities have opened an investigation against the Prosecutor of the ICC, Karim Khan (Summary on the Russian reaction 1-2).

There are three other concerns regarding the process of the ICC. The first is concerning the crime of aggression. This international crime was incorporated as a result of the so-called Kampala Amendment to the Rome Statute – adopted in 2010 and coming into effect on 17 July 2018 (Kampala Amendment). The amendment however stipulates that both state parties in question must have signed and ratified the Rome Statute and the Kampala Amendment, leaving little to no wiggle room for the Prosecutor to manoeuvre (Rome Statute Art. 15bis paras 4-5.). In this regard, not even the referral of states or Ukraine is sufficient as per the Rome Statute for the ICC to have material jurisdiction regarding the crime of aggression.

4 Ukraine has made an *ad hoc* declaration to the Court in 2014 after the annexation of the Crimean Peninsula by Russia which was extended in 2015 to be an open-ended declaration in order to encompass all alleged international crimes since 20 February 2014. However, since the Russian Federation is not a State party and refused to allow entry to the Prosecutor to Crimea, the investigation remained "pending" without any concrete steps taken. The situation changed following the Russian armed attack and the events on the 28th February 2022, when 39 States have submitted referrals based on Art. 14 of the Rome Statute. The reach of the Prosecutor is still limited to areas not currently under Russian occupation and the ongoing fighting is also reducing the theatres where evidence can be collected.

5 Based on the Al Bashir case, it is entirely plausible for the Russian President to have trips abroad, meeting leaders of other states in broad daylight as some states are more inclined to focus on existing economic and financial ties and promoting international criminal justice. Another reason why the Al Bashir case might serve as an intriguing parallel, is because even after he was overthrown, years later the current leadership of Sudan has still not transferred him to the ICC, despite numerous promises to do so. As a result, it can be stipulated that unless there is a complete regime change, the leadership is not inclined to bring the unlawful action of the previous regime to daylight as their own roles might be questioned in the process.

There is an ongoing discussion on how the Rome Statute could be amended in order to bridge the lack of jurisdiction regarding the crime of aggression. The first proposal would delete Art. 15bis para 5. from the Rome Statute, resulting in unilateral state referrals to also establish the jurisdiction of the Court regarding aggression. The second idea is an amendment of Art. 15bis para 5. to also include referral not just from the UN Security Council, but for the "Uniting for peace resolution" to trigger the legal effect of a referral in case decision-making in the Security Council is blocked by one of the permanent members (Abken-Rob, 2023). Both notions require considerable political will and time. Even still, there is no guarantee that State parties to the Rome Statute would agree to such a fundamental change and whether such a change – especially on the second proposal regarding referral by the General Assembly (GA) – would be grounded in international law. However, for a pivotal side-stepping of the *pacta tertiis nec nocent, nec prosunt* principle, any amendment to the Rome Statute must be firmly grounded in international law, adopted by the relevant authorities, leaving no room for doubt on its legality.

Another reason for why processes before the ICC concerning aggression might be hard to achieve can be found in Article 98, which stipulates that surrender to the Court is only possible if diplomatic immunity is waived (Rome Statute Art. 98.). Since President Putin is the head of state of the Russian Federation, a criminal process with him involved might result in a clash of the norms of international law, namely immunity of heads of state and government and prohibiting the commission on international crimes. In theory, the issue should not be complicated as the interdiction to commit the four international crimes has been labelled a peremptory norm of international law under the draft material compiled by the International Law Commission (ILC Draft on peremptory norms). Also, the non-applicability of immunity for heads of state and government were enshrined in the Nuremberg principles but in practice, when it is contrasted by how strictly the immunity of heads of state and government are enforced, the latter often prevails (Rome Statute, Art. 27; Ádány, 2014, p. 31; Lemos, 2023, Galand, 2022, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3)[6]. Nonetheless, the international nature of the court in question as well as immunity matters will also be alluded to regarding hybrid court in subsequent chapters of this article.

Last but not least, the matter of complementarity needs to be addressed. The ICC can only act as a secondary forum in relation to domestic forums, meaning that the criminal processes of domestic forums take precedence (Rome Statute Art. 1., Art. 17. para 2, section a.). Indeed, as we are going to see in later chapters, there is a substantial number of pending cases in both Ukraine and Russia, however, relying solely on domestic platforms is not the most prudent course of action. In order to cope with the hardships faced by the International Criminal Court, other venues and possibilities have also been discussed widely both by politicians and academia.

3. A brief excursion to the realm of domestic criminal forums

With a staggering number of cases reported after one year of the conflict – over 74.000 by the Prosecutor General of Ukraine (Reuters report) – it is a safe to assume that no international court will have the capacity

6 Still, there are some in academia who would go as far as to state that due to the specific nature of the armed conflict and based on the findings in Nuremberg, even domestic courts in Ukraine should be able to prosecute the Russian leadership for war crimes, crimes against humanity and genocide (See: Lemos, 2023). Others argue that the legal quandary of immunity applying before international courts cannot be so steadily resolved due to the lack of state practice and *opinio juris*. A short summary of the debate, see Galand, 2022.

to deal with such vast instances of international crimes. In fact, it is a long-standing practice by international courts to "reserve" the so-called landmark cases where the alleged perpetrator is either a decision-maker involved in the planning or execution of gross violations, or the case can be considered a "first" in the practice of the international forum or the person belongs to the higher echelons of state hierarchy (Annual Report of the Office of the Prosecutor, 2022). As early as March 2022, the Prosecutor General of Ukraine has signalled that she wishes for Ukraine to be in the centre of criminal processes (Interview with the Prosecutor General of Ukraine). Since then, domestic attempts have ramped up through the wide-scale collection of evidence via domestic and international teams along with enhanced reporting mechanisms such as the creation of a streamlined online reporting portal (Online reporting).

By early 2023, 26 people have been found guilty and received sentences for war crimes in the Ukrainian justice system so far. The first analyses by academics and NGOs have also being published in recent months on experiences of the Ukrainian justice system in relation to international crimes (Marchuk, 2022, p. 787-803; Nuridzhanian, 2022; Ambos, 2022; Vasiliev, 2022; Bardet, 2022). It is worth noting that around 80% of Ukrainian courts are still functioning, with some of the local courts in the occupied territories being relocated to other parts of the country so it is fair to assume that Ukrainian court will have the willingness and capacity to conduct the criminal processes (Nuridzhanian, 2022, p. 2). Russia is much less transparent (or cannot reach western media) regarding its domestic processes.

As is unfortunately customary, since we are talking about an ongoing armed conflict, both sides are focusing on international crimes committed by the other party, while domestic perceptions differ greatly regarding the conduct of their own forces[7]. A distinct advantage, however in relying on domestic courts is their willingness and capacity to deal with a large number of cases. Their impartiality, expertise as well as the fairness of the trials with strict procedural standards can be called to question.

4. The "strong-arm" method: the possibility of an *ad hoc* tribunal

Besides emphasizing the feasibility of the International Criminal Court or relying on domestic courts, the third option would be the establishment of a so-called *ad hoc* tribunal. The strongest argument why another criminal justice tool is required, is because the ICC is not capable to handle the crime of aggression under the current iteration of the Charter. Seeing how aggression was "original sin", the crime which enabled the others, the international community is reluctant to accept the fact that it should go unpunished.

So far, there were two *ad hoc* tribunals (not counting the Nuremberg and Tokyo ones), called to life during the conflict in the Balkans and shortly after the Rwandan genocide. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were the response of the international community for the large-scale and systematic violations of fundamental humanitarian and human rights norms along with a major loss of human life. Circumstances may appear familiar: grave breaches of fundamental norms, an intense armed conflict and the outcry of international community. Besides the obvious

7 A similar attitude could be observed after the First World War, when the Entente Powers pressed for domestic processes before the Supreme Court in Leipzig, but out of the 895 persons who were named, only 12 were found guilty and received prison sentences. This was in no small part due to the fact that German soldiers were regarded as patriots and heroes by the people of the country instead of their perception in Entente media, where they were depicted as barbarians and brutes. Not taking this altered perception to account, the Entente Powers lacked understanding and could not comprehend why German courts failed or sabotaged domestic processes against alleged German perpetrators. It was precisely the inadequacy of domestic processes after the First World War which has necessitated the establishment of the Nuremberg and Tokyo Military Tribunals.

similarities, there is a key difference: namely, that for ICTY and the ICTR there was a unique constellation of UN Security Council support by the permanent members[8].

In the case of the Russo-Ukrainian war, such an approval by Russia is impossible at this moment. Only a complete military defeat and the resulting change of regime would serve as necessary catalysts for such a major shift in policy. As of April 2023, there are no signs of such a change, and therefore, an *ad hoc* tribunal which would be established in a similar fashion to the ICTR and the ICTY remains a theoretical possibility. Even if a regime change would occur inside the Russian Federation, China might still use its veto to hinder the establishment of an *ad hoc* criminal justice forum as it has refused to condemn Russian actions and did not support the creation of a forum for international criminal justice so far.

Besides the Security Council, the General Assembly's role is worth glancing over. As Corten and Koutroulis note, the GA has created a court before in the form of the UN Administrative Tribunal in 1949 and it was also possible to establish the UN Emergency Force in 1956. The latter was deemed to fall in the competences of the GA per the decision of the International Court of Justice, while the latter was rendered lawful in the ICTY's Tadić decision. Nonetheless, the resolution of the GA would remain non-binding in nature regarding states which have not supported its adoption, therefore compliance is highly doubtful (Corten-Koutroulis, 2022, p. 15-16).

There have been several international organizations, most notably the Council of Europe (CoE) and its Parliamentary Assembly, the Organization for Security and Cooperation in Europe (OSCE) as well as the North Atlantic Treaty Organization (NATO) which have iterated their view and commitment in creating an *ad hoc* tribunal (Plachta, 2022, p. 70; Kaluzhna-Shunevych, 2022, p. 185-186). The proposal would respect the jurisdiction of the ICC and as a result, the proposed court would only possess jurisdiction regarding the crime of aggression but *ratione temporis* it would date back to 2014 – to the annexation of Crimea. It is currently unclear how cooperation with Ukrainian authorities would be envisioned or those who the court would hold responsible for aggression would be apprehended or whether the court could have trials *in absentia*. A major issue with this notion is the lack of legitimacy (Nuotio, 2022, p. 316). The Russian perspective is already based around the idea that "Western Powers" are fuelling and funding the conflict. Should the proposed *ad hoc* tribunal lack the support of the UN and only established under the aegis of one or more of the organizations calling for its creation right now, it could be perceived by both the Russian citizenry and the currently neutral members of the international community as a partial and biased entity aiming solely to punish Russian leadership. A possible endorsement of a proposed *ad hoc* tribunal by the GA would provide it with much needed legitimacy, although it would not remedy the lack of coercion it could apply (Dannenbaum, 2022).

5. The best of both worlds: the feasibility of a hybrid court

Through cooperation with international organizations, there were examples in the last few decades of so-called hybrid courts being set up. For the context of the present article, a simplified working definition of a hybrid court will be used, which is an international court with a strong, domestic element, created as a result of a cooperation between one or more states and an international organization. There are several international organizations which possess the experience required to see such an undertaking through. For instance, the UN has participated in the creation of the Extraordinary Chambers in the Courts of Cambodia, (ECCC

8 For the ICTY, the decision on the Council floor was unanimous, whereas for the ICTR, there was but one vote against and a single member abstaining (China).

Agreement) the European Union has contributed to the establishment of the Kosovo Specialist Chambers (EULEX cooperation with Kosovo) and the African Union has aided the creation of the Extraordinary African Chambers (Kioko, 2020, p. 69).

By having a treaty between Ukraine and a regional organization, the court would be labelled "hybrid" – international or at least internationalized in nature bringing with itself numerous advantages (Corten-Koutroulis, 2022, p. 16-18). Being able to disregard the immunity of heads of state and government as established in the Arrest Warrant case by the International Court of Justice, bringing with it not only flexibility to be able to be tailored to the circumstances but international expertise as well. A hybrid court that would come into existence through a treaty would possess the added benefit of being in conformity with the constitutional provisions of Ukraine, such as ratification by the Ukrainian Parliament, the Verkhovna Rada, ensuring the respect of its special status under domestic law (Komarov-Hathaway, 2022).

Out of the four organizations supporting the notion, the Council of Europe appears to be the most adamant in its efforts as it was the first to indicate its willingness in creating and participating in such an endeavour. There is a major issue that needs to be addressed as a precondition though: competence. As Csapó points it out, the Council of Europe does not have the competence to establish such an international forum (Csapó, 2022, p. 44). I would go as far as to state that only the United Nations Security Council and maybe the General Assembly has the competence to do so as explained in the Tadić judgment of the ICTY (Tadić case, Appeals Chamber, 296.). As seen by examples above, even though there is existing practice for regional organizations to be involved in such a process, it has never been established regarding the crime of aggression. This point is contrasted by Heller and Owiso for instance, who argue that the implied powers principle can be applied to the Council of Europe as well, enabling the competence to establish a hybrid court via a treaty with Ukraine (Heller, 2022; Owiso, 2022). While the sentiment and effort calling for the creation of an international court for aggression is laudable,[9] there are several major caveats to consider.

First and foremost, the problem of legitimacy. The Council of Europe encompasses the entirety of the member states of the European Union (27 out of 46) who form the majority of CoE members. The very same European Union that has adopted sanction after sanction against the Russian Federation. Even though the legal basis for the sanctions is solid (breach of peremptory norms of international law and the *erga omnes* obligations it entails), it is hard to envision such an organization to be labelled unbiased, impartial and neutral to the conflict, whereas these criteria would be absolutely necessary for legitimacy to be established.

Secondly, neither Ukraine nor the CoE have the option to apprehend the alleged perpetrators of the crime of aggression on the territory of a third state such as Russia and there are no signs this will change in the foreseeable future. This means that if a proposed international court would wish to commence the legal process, it can only do so *in absentia*. So far, there is only one hybrid tribunal which enables *in absentia* trials – the Special Tribunal for Lebanon (STL) (Statute of the Special Tribunal for Lebanon, Art. 22.). It needs to be noted that even though Article 22 of the Statute of the STL provides substantial safeguards for *in absentia* trials, the adequate nature of these provisions and the lingering suspicion of fair trial standards being met and possible human rights violations casts a shadow of doubt over *in absentia* processes before the STL (Trad, 2016, p. 38-54; Wächlisch, 2017, p. 297-322; Jenks, 2009, p. 57-100).

9 See for instance the open call by Gordon Brown, supported by many notable jurists: https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf.

In third place, it is worth remembering the crime of aggression has a special status and place among international crimes. It is precisely due to the lack of consensus between would-be state parties to the Rome Statute that has led to tabling the question and leaving it a decade more of a breathing room. As an international crime, it lacks state practice and discernible *opinio juris*. Its very definition is derived from the act of aggression as established by UN GA resolution 3314 of 1974 and not underlined by the practice of an international criminal court. It would certainly be a progressive development to establish a tribunal like that but it is worth noting that the crime itself does not rest on the same solid footing as the other three international crimes. As a result, the establishment of an international tribunal handling aggression must be exceptionally well-grounded.

As a fourth argument, it could be set forth that to what degree would an *ad hoc* tribunal established via the CoE a veritable international forum by nature. Again, partially tying to the matter of legitimacy, even forums such as the Sierra Leone hybrid court felt it necessary to repeat and reiterate that it is truly international, even though it was created by the UN Security Council, which – in theory – should simply wash away any doubt (Taylor case, para 38, Galand, 2022)[10]. This can lead to the matter of immunity resurfacing as immunity can only be cast aside if the alleged perpetrator is tried before an international criminal tribunal.

Last but not least, it should not be forgotten that Russia has both left the CoE and was expelled from the organization. If a state does not wish to cooperate with a regional organization and the organization no longer wishes for the state in question to be a member, the question is raised: what gives the right and the possibility to that international organization to establish a criminal forum aiming to punish citizens of the state that is not a member any more. From another perspective, what compels a state to cooperate with an international organization – one that possesses a subjective legal personality that is based on recognition – if it has previously made it abundantly clear that it does not wish for such a collaboration to happen?

6. Comparative analysis

Table No.1
Comparative overview of various forums of international criminal justice

Aspect /Forum	International Criminal Court	Domestic Courts in Ukraine and Russia	*Ad hoc* tribunal	Hybrid tribunal
Status	currently functioning	currently functioning	not currently functioning	not currently functioning
Modes of changing or establishing the forum	amendment of the Rome Statute: referral by UN GA; or state referral made possible regarding aggression	procedural guarantees could be strengthened; and/or could be linked to a hybrid tribunal	could be established via decision or resolution: UN SC; UN GA; EU, CoE, NATO or OSCE	could be established via a treaty between Ukraine and: UN EU, CoE, NATO or OSCE

10 Prosecutor against Charles Ghankay Taylor, Decision on Immunity for Jurisdiction, SCSL-2003-1-I, para 38.; also in: Galand.

Aspect /Forum	International Criminal Court	Domestic Courts in Ukraine and Russia	*Ad hoc* tribunal	Hybrid tribunal
Ratione materiae	war crimes, crimes against humanity, genocide	war crimes, crimes against humanity, genocide; maybe aggression	aggression	aggression
Legitimacy	well-established (123 out of 193 UN member states)	doubtful – risk of one-sided process	via the UN SC or GA – granted; via regional organizations – doubtful	yes – through the UN; supported by an international treaty based on consent – doubtful concerning the crime of aggression
Independence and impartiality	assured	questionable	yes – through the UN; yes, but not perceived to be so – through regional organizations	yes – if through participation of the two states visibly not – in case of a "coalition of the West" type of tribunal
Type of jurisdiction	complementary	primer with the possibility of referral and becoming secondary in case of an *ad hoc* tribunal	concurrent, primer	specific, sui generis jurisdiction as enshrined in its Statute
Trials *in absentia*	no	likely not	presumably no – based on the practice of the ICTY and ICTR	maybe – depending on the type of hybrid court
Punishment and fair trial standards	fair trial, humane treatment and punishment and defendant's rights assured	penalties might not align with international standards; independent observers required to monitor procedural rights	assured via the UN; member states of the 4 regional organizations are bound by numerous human rights treaties – transference of norms very likely to an *ad hoc* forum	assured via the UN; member states of the 4 regional organizations are bound by numerous human rights treaties – transference of norms very likely to an *ad hoc* forum
Benefits	legitimacy; transparency; impartiality	swift; close to evidence and witnesses; could handle a larger workload; could encompass other, „regular" crimes as well	concurrent, primer jurisdiction enables strong collaboration with states; easier apprehension of fugitives; expertise	could encompass other, „regular" crimes as well; expertise; flexible statute capable to be tailored;
Caveats and disadvantages	lack of jurisdiction regarding aggression; slow process; small number of cases	lack of impartiality; possibility of political pressure; possibility of bias; lack of expertise (initially)	requires regime change; lack of legitimacy if not based on UN SC or GA resolution; if based on UN GA resolution: compliance and coercion doubtful	requires regime change; needs constant political will to maintain;

Source: author's own compilation.

Before we get into the deeper comparison, I must state that I agree with Heller's assessment that whether the international community casts its vote for an *ad hoc* or hybrid tribunal, any tribunal for aggression is better than having no tribunals at all (Heller, 2023). With that said, the international community must pay attention not to commit the same mistakes it did when establishing the ECCC or the STL. It will be task of scholars and practitioners to advise states in creating the best possible statute. There is a broad consensus that the vast majority of cases will be handled by domestic courts, whereas regarding the most serious instances of war crimes, crimes against humanity and possibly genocide, the International Criminal Court will be the torchbearer of international criminal justice. This does not mean however, that existing provisions could not be amended to provide an opportunity for the international community to allow the ICC to add aggression to its repertoire regarding the current situation or for domestic courts to be strengthened by international monitoring (without interference in the process itself), signalling where domestic systems need to be strengthened.

Legitimacy is a different matter. The ICC is considered to have the support of the majority of UN member states but domestic courts do not have this luxury and must prove their impartiality and observance of fair trial standards. As for *ad hoc* and hybrid courts, the strongest legitimacy can be provided by the UN Security Council, barring that, the General Assembly. As explained above, regional organizations can provide a degree of legitimacy but that it is highly doubtful whether they can bestow legitimacy regarding the crime of aggression as well. Independence and impartiality are met by the ICC; in fact, it would be beneficial to have a case moving to the trial stage from outside of the African continent but for *ad hoc* and regional organizations, the optics of a biased "Western Coalition" imposing their values on the "East" and using an international or internationalized criminal tribunal to do so should be avoided. The same conclusion can be drawn concerning *in absentia* trials – best to be avoided.

For all international tribunals, strict adherence to fair trial standards is an absolute requirement. Simply put, none of the international organizations aspiring to create an international criminal forum can afford to appear is if they are not providing all necessary guarantees of a fair trial. Special care must be taken and assistance given to domestic processes. It would be prudent to monitor and advise local criminal courts who will bear the brunt of the work while at the same time, making certain that international presence does not feel like suppression or supervision.

Establishing any international criminal justice forum as well as the supporting the continued process of the ICC is by itself constitutes a major step towards independent fact-finding, adequate punishment and hopefully, deterrence. The ICC already has legitimacy, transparency and impartiality but it can only handle a select few cases which would be landmark decisions nonetheless. Lacking jurisdiction regarding aggression and apprehending those targeted by arrest warrants is another matter. Domestic courts should not handle high-profile cases as on the one hand, they might lack the expertise to do so, and secondly, the mounting political pressure can jeopardize the impartiality of local courts.

For *ad hoc* tribunals, it is unlikely at this point that they will receive the blessing of the Security Council and it is highly doubtful whether cooperation with such a Court could be enforced in case it is "merely" a regional organization backing it. Support by the General Assembly could be sufficient but needs reinforcement by a possible advisory opinion of the International Court of Justice. In case support by the GA could be assured and a new forum would be set up with concurrent, primer jurisdiction just as in the cases of the ICTY and the ICTR, that would render it easier for alleged perpetrators to be apprehended and bring international expertise to the table.

One of the major advantages of a hybrid court is the fact that it can be tailored to the specific needs to the countries and situation it is created to help and remedy respectively. Which would mean that it is possible to add other crimes to their statutes besides international ones, would be integrated. Furthermore, cooperating closely with the domestic judicial structure and the expertise it brings can aid in the training of the local judiciary. It would require an international treaty with at least Ukraine and political will on both ends to maintain it. Again, the GA's support and blessing would be highly desirable not just regarding legitimacy but in encouraging compliance by other states.

7. Concluding remarks

It is very likely that not a single court but several will bear the burden of international criminal justice. None of the proposals currently on the table doubt the role the ICC has to play regarding war crimes, crimes against humanity and aggression, nor the fact that due to the sheer number of cases, local courts will be involved as well. The establishment of either an ad hoc or hybrid court would require substantial political will which will be tested in the near future as it is one thing to condemn an act on the floor of the UN General Assembly, but another to actually provide continuous support and resources for an international tribunal. The "cleanest" solution – *ad hoc* tribunal established by the UN Security Council does not appear realistic at this moment as it would require a regime change in the Russian Federation. In its stead, the role of the international community is to analyse various possibilities in detail and test the waters in order to ascertain which type of proposal would garner the support of the majority. If states can rally behind a specific notion, it would reduce the time needed for negotiations on the specific characteristics, jurisdiction and setup of the tribunal.

Looking at the work and role of individual courts, the process of the ICC should be supported as it provides a legitimate forum that already exists which obliges States to cooperate regarding the arrest warrant. Not certain that they will cooperate (based on the aftermath of the Al-Bashir arrest warrant) but the legal obligation and pressure is there.

Domestic courts will bear the brunt of the cases inevitably. International support must be provided to ensure fair trial rules are observed without intruding on the domestic process as well. The international community should play the role of the soothing voice coming from the background – standing ready to help and alerting, raising their voice if procedural guarantees are not maintained.

Lastly, having a hybrid or ad hoc tribunal would only be desirable if there was a regime change in Russia and the new leadership would be open to cooperation with the rest of the international community. As of this moment, there are no signs of this happening. The other alternative is to set up an international tribunal without the support of the UN Security Council through the collaboration of the 141-143 States who have supported the resolution on the floor of the General Assembly condemning Russia. However, it is highly doubtful whether such a coalition would come through in actually agreeing on the conditions of such a tribunal and providing the long-term financial and political support that is required. Furthermore, based on current reality, such a court is likely to carry out trials *in absentia* – which would not only render its work ineffective but would seriously question its legitimacy.

International criminal justice is a slow-moving vehicle which is navigating a very bumpy road but it exists, it is moving ahead and if it can traverse such terrain it will come out stronger on the other end.

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