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Master's Thesis

Political, Organizational and Legal Challenges for the Creation of the International Tribunal for the Crime of Aggression against Ukraine

Politiniai, organizaciniai ir teisiniai iššūkiai kuriant Tarptautinį tribunolą agresijos prieš Ukrainą nusikaltimui tirti

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Vilnius
2023

ABSTRACT

Discussions on upholding accountability for the atrocities committed throughout the Russian aggression in Ukraine have been a focal point of discussion from the onset of the conflict, although, a particular path, or a meticulous template to follow in creating a tribunal has not yet been established. This thesis intends to analyze the legal, political, and organizational obstacles that will arise during the creation of such tribunal. The study employs a qualitative and historical comparative approach, analyzing the research problem through an extensive review of literature, scrutinizing norms, examining retrospect and prospect of international tribunals with special regards to the crime of aggression, inspecting challenging precedents, and concurrently drawing parallels to the potential analogies in establishing an International Tribunal for the Crimes of Aggression committed by Russia against Ukraine.

Based on the conducted analysis, the thesis suggests that the path to establishing an international tribunal for Ukraine is not only a question of legal mechanics, but a profound exercise in navigating the interstices of international law, diplomacy, and political will. The pursuit of justice through such tribunal, while steeped in legal precedent and international doctrine, is ultimately a reflection of the international community's commitment to accountability and the rule of law.

Keywords: crime of aggression, international, United Nations, Russian aggression in Ukraine, challenges, tribunal, International Criminal Court (ICC)

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INTRODUCTION

The establishment of an international tribunal to address the Russian crime of aggression against Ukraine, has been a subject of extensive discourse for the modern society, commencing from the likes of the European Parliament (European Parliament, 2023) in conjunction with various international organizations and political leaders. An exhausting array of strategies have been explored in search of achieving comprehensive reaction for the Russian-Ukrainian war crimes and peculiarly the crime of aggression. Ukraine has expressed its intention to establish an ad hoc tribunal aimed at holding senior Russian officials accountable for the crimes of aggression. This concept has instantly, and up to this day, growingly received political support throughout the world, but will these efforts suffice in the fight against the Russian aggression? Even if this is my prevailing belief, it is not a matter of dispute that various organizational, political, and legal challenges will riddle the path forward. Thus, despite these advancements, what exactly these efforts will transpire into, or a detailed blueprint, addressing the inherent challenges in establishing an international tribunal remains for us to be articulated and refined.

The main aim and objective of the thesis is to analyze the potential legal, political, and organizational implications that are in the way of establishing an international tribunal for the crimes of aggression in Ukraine and the sets of the challenges that come with the possible forms of tribunals, their legitimacy and eventual effectiveness, which will be discussed throughout. The thesis hopefully contributes towards the swift development of events in achieving accountability, which we, the international community are seeking. The scope of the thesis is limited to the challenges in forming an International Tribunal; however, factors, such as characteristics of past tribunals or various legal mechanisms are briefly discussed when in relevance with the thesis' subject.

Engaging in qualitative research methodology and literature review, the main objective of this research is to assert and identify the obstacles in the three spheres and contemporaneously assess ways of their resolution.

In addressing the debates surrounding the establishment of a tribunal, I will present my perspectives while fully acknowledging that these do not encompass all conceivable viewpoints. Therefore, this thesis will prudently explore the array of legal, political, and organizational challenges, analyze

available options at tackling said challenges, and discuss their respective benefits and limitations. It will identify the most plausible or compelling positions in light of current international law and offer informed feedback. The thesis will primarily focus on the general challenges associated with creating a tribunal. At this juncture, the thesis will not delve into more technical issues. Indeed, the examination of such detailed questions is contingent upon the initial decisions regarding the tribunal's establishment and operational framework. As such, the focus will remain on broader considerations until the foundational modalities of the tribunal's creation and function are determined.

Hence, the thesis will be segmented into four main chapters. The first chapter gives a concise introduction to the matter and provides a retrospect to historical insights regarding international tribunals. The second chapter aims to focus on, and scrutinize in thorough detail the legal challenges in forming an international tribunal. The third chapter explores organizational and administrative obstacles and finally, the fourth chapter delves into the specifics of political challenges in forming an international tribunal.

1. RETROSPECT IN INTERNATIONAL JUSTICE: MODERN APPLICATIONS OF HISTORICAL INSIGHTS

Until recently, the criminalization of aggression, austerely contrasting with the principle of state sovereignty has remained a dormant matter. Commencing in July 2018, the ICC has been granted the authority to prosecute individuals for the crime of aggression. Crime of aggression' definition adopted under Article 8*bis* of the Rome Statute, established on the likes of two archaic documents, the Nuremberg Charter from year 1945, and the United Nations General Assembly (UNGA) resolution 3314 (XXIX), constituted in 1944, is vividly outdated to address the emerging challenges of our times. Herewith blooms the question of applicability of historic definitions and experiences to modern legal academia, which will be discussed throughout the thesis. To comprehend thoroughly the potential obstacles that may emerge in the process of setting up an international tribunal, it is essential to conduct a concise evaluation of historical instances: namely, the international military tribunals of Nuremberg and Tokyo war crimes trial; the *ad-hoc* tribunals of the former Yugoslavia and Rwanda, succeeded by the Residual Mechanism; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia; the Special Tribunal for Lebanon; the non-UN examples of the Extraordinary African Chambers and the Kosovo Specialist Chambers, and lastly, the permanent, ICC.

1.1. The International Military Tribunals of European Axis and the Far East

It was the Second World War that was preceded by the formation of the first two international military tribunals. The Nuremberg International Military Tribunal (NIMT), also referred to as the Tribunals of European Axis, was formed following the London Agreement of August 8, 1945, where the United States, Soviet Union, Great Britain, and France signed a charter. This tribunal was tasked with proceeding trials of major Axis war criminals whose offenses did not have any particular geographic location (Encyclopedia Britannica, 2023). The proceedings at Nuremberg played a major part in the establishment of the ICC in The Hague, which has recently initiated an inquiry into alleged war crimes by Russia. A year later, in April of 1946 was convened The Tokyo Tribunal, which is also referred to as the International Military Tribunal for the Far East (IMTFE). Its' purpose was prosecuting high ranking officials of the Japanese Empire for war crimes committed during the World War II.

The NIMT brought charges against twenty-two prominent German figures from the political and military spheres, including individuals such as Rudolph Hess, personal aide to Hitler and Deputy Party Leader; Ernst Kaltenbrunner, Chief of the Reich Security Main Office; Nazi philosopher Alfred Rosenberg, and Hitler's personal architect, Albert Speer. Notably absent from the list of the indicted was Adolf Hitler, the Nazi leader, due to his suicide in April 1945 as Germany was on the verge of capitulation. Not only individuals, but seven Nazi organizations were subject to indictment, too. The prosecution's aim was to secure a declaration from the tribunal, recognizing these entities as "criminal organizations," later allowing for subsequent legal actions against their members in different judicial institutions. Throughout NIMT's lifespan, between November 1945 to October 1946, sentences varying from capital punishment to fifteen years of incarceration were handed to nineteen individuals. Conversely, three individuals were acquitted, while another was unable to stand trial due to having committed suicide, and one was exempted due to health issues. Furthermore, the tribunal adjudicated that three out of the seven Nazi entities indicted, including the SS and Gestapo, were indeed "criminal organizations" as per its stipulations in the Charter.

The IMTFE, which took place from May 1946 to November 1948, conducted trials for nine high-ranking Japanese political figures and eighteen military leaders. The tribunal delivered guilty verdicts and issued sentences varying from the death penalty to seven years of imprisonment. During the trial,

two defendants died, and one was deemed mentally unfit to stand trial, leading to the dismissal of their charges. The link between the two tribunals resides in the trio of crimes over which they held jurisdiction: crimes of aggression, crimes against humanity and war crimes, e.g. grave breaches of the Geneva Conventions of 12 August 1949 (Japan's was for a more extended period, from its 1931 invasion of Manchuria to its consequent surrender in 1945.).

The IMTFE and NIMT played a pivotal role in shaping the early stages of international criminal law. For many years, they were the sole instances of international war crimes tribunals. Furthermore, they eventually became the blueprint for a new wave of international criminal tribunals that started emerging in the 1990s. It is of significant importance to draw a parallel to Ukraine, as the NIMT and IMTFE are the sole tribunals whose jurisdictions did cover crimes of aggression, which elucidates scholars frequently citing it as a notable instance as grounds of establishing a special tribunal for atrocity crimes committed in Ukraine. Meanwhile, the differences are not overshadowed by the author (Sands, P. 2022.) as well, as they assert that the NIMT, does not represent as much of an applicable robust example as some suggest. Although, different stands have been voiced, too. In an interview to a news portal "Politico", a high-ranking Ukrainian official stated, that the way to hold the highest political and military leadership of Russia accountable is to base the tribunal on the NIMT: "We see the Nuremberg trial as a model" (Smyrnov, A. 2022).

1.2. Ad Hoc International Criminal Tribunals for the former Yugoslavia and Rwanda

Following the conclusion of the Cold War, we experienced major transformative progress in the field of international criminal law. The post-Second World War era, distinguished by the formation of the Nuremberg and Tokyo tribunals, was then followed by an extended stagnation, while efforts to create similar judicial bodies proved unsuccessful. This dynamic shifted in 1993 with the Security Council, acting under Chapter VII of the Charter, adopting the resolution for formation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Zahar, A. 2011). This was succeeded three years later by the establishment of the International Criminal Tribunal for Rwanda (ICTR). The Statute of the Tribunal, annexed to its founding Resolution, is primarily identical to that of the former Yugoslavia Tribunal. The UN Security Council (UNSC) established both Tribunals through resolutions passed under Chapter VII of the UN Charter, which are binding for all states. This approach was chosen to

directly enforce the Tribunals' jurisdiction globally. To put emphasis on the legal foundation of these tribunals, it's crucial to recognize that in the absence of a universal code of criminal procedure, leading to the Tribunals formulating their own Rules of Procedure and Evidence, with the ICTR's rules closely mirroring those of the ICTY. Both of these rules were predominantly influenced by the common law system, which is prevalent in most Anglo-Saxon countries, where the rules lean towards an accusatorial approach, as opposed to the inquisitorial style, which is generally typical to the civil law systems. The ICTY played a crucial role in altering the view of accepted impunity to expected accountability regarding war crimes. The prosecutions by the ICTY were groundbreaking in their scope and complexity. During its operations stretching between 1993 to 2017, the ICTY issued indictments against 161 persons, ranging from political leaders to military commanders and other key figures, including the first sitting head of state indicted for war crimes, Slobodan Milošević.

These developments can be marked as the beginnings to the subsequent establishment of the International Criminal Court (ICC) and other international criminal justice mechanisms, alongside a renewed emphasis on the domestic prosecution of international crimes, spotlighting the 1998 Rome Statute, playing a pivotal role in the formation of the ICC. This period witnessed the reinvigoration of the then-dormant domain of international criminal law. The ad hoc tribunals definitively illustrated the efficacy of international criminal law as a worthy instrument within the global legal framework, and as analyzed above, effectively undermined the previously accepted inevitability of impunity for the most serious offenses.

However, the courts' jurisdictions did not include the crimes of aggression, rather limiting it to crime of genocide, war crimes and crimes against humanity, marking as the key difference between the now discussed Ukraine tribunal. Considering the fact that addressing the Russian aggression against Ukraine through the binding Chapter VII resolution of the UNSC is not probable, the relevance of the ICTY and the ICTR in regard to the Ukraine tribunal is very limited, thus, the likelihood of constructing the future tribunal on these models is frictional.

1.3. The International Residual Mechanism for Criminal Tribunals

After the formal closure of the ICTR in 2015 and the ICTY in 2017, based on Resolution 1966 of the UNSC (2010), another noteworthy institution, the International Residual Mechanisms for Criminal

Tribunals (IRMCT) was founded. This distinctive entity was encompassed with the responsibilities of undertaking the remaining functions of the above-indicated tribunals. While the overarching goal remains to ensure the seamless continuation of the two tribunals' work, the IRMCT introduces distinct structural elements to enhance efficiency and adapt to its anticipated reduced workload. The mandate of the IRMCT envisages a varying array of responsibilities and duties, not limited to completing the remaining legal cases, providing a form of protection and assistance to witnesses and overseeing the execution of sentences. Like its predecessor courts' jurisdictional reach, it operates through two divisions located in Arusha, Tanzania, and The Hague, Netherlands, which commenced operations in July 2012 and 2013 respectively. A notable feature is the consolidation of leadership roles, with a single Prosecutor and Registrar acting as a conduit between the IRMCT two branches. Furthermore, the IRMCT's Statute designated a common President who, unlike the separate Presidents for each Tribunal, exercises her duties across both seats of the Mechanism as needed. This President also serves as the Presiding Judge of the Appeals Chamber, a role mirrored from the ICTY's Statute. (McIntyre, T. 2011).

In regions like the Western Balkans, where hate speech and the glorification of war criminals threatens the reconciliation process, the IRMCT's work is particularly crucial, as it helps communities in understanding the true nature of past crimes and acknowledging the suffering endured, thereby countering disinformation. Apart from the obvious task of maintaining legacies of the ICTY and the ICTR, the creation of the IRMCT puts emphasis on the society's commitment in adhering to international law principles, allowing it to gradually become a critical part in the ongoing evolution of international criminal jurisprudence.

1.4. The Special Court for Sierra Leone

A homogeneous example to the beforementioned tribunals is the Special Court for Sierra Leone (SCSL), which, unlike the ICTY and ICTR, was not a subsidiary of the UNSC. After UNSC's exhaustive negotiations to Sierra Leone's governments' request, in January 2002, was established in form of an independent Special Court (United Nations Security Council, 2000, S/RES/1315), technically differing from their original ask an international tribunal. Even though its' jurisdiction covered war crimes, crimes against humanity and a selection of Sierra Leonean domestic crimes, including powers to prosecute persons responsible, by various critics and experts, it was often referred

to as an example unlike others, emphasizing Sierra Leone's national legal mechanisms not being the basis of the applied international judicial system. The final version of the bilateral agreement and its annexed statute was ratified in Freetown, the capital of Sierra Leone, on January 16, 2002. This agreement applied legal structure for a hybrid court, integrating both local and international components, and drawing upon the experiences of the *ad hoc* ICTY and ICTR. The SCSL was designed to operate autonomously from both the Sierra Leonean judicial system and the UN. Notably, in contrast to the ICTY and ICTR, which were situated far from the locations of their respective conflicts, the SCSL was established in the epicenter of the strife it was addressing. Additionally, it was to be funded through voluntary contributions from UN member states, rather than as a subsidiary organ of the Security Council. (Jalloh, 2011). This unique positioning and funding mechanism led to various organizational and political challenges during the courts' operation, which will be explored subsequently in the upcoming chapters.

Despite facing significant challenges in setting up a new court in a post-conflict area marked by terrible crimes, the SCSL managed to move past its initial slow phase. It effectively prosecuted and convicted nine individuals for their roles in the Sierra Leone Civil War. These convictions included leaders from all three main fighting groups: the Revolutionary United Front, the Armed Forces Revolutionary Council, and the Civil Defense Forces. The most notable conviction was Charles Taylor, the former President of Liberia, for his part in supporting the conflict in Sierra Leone. In April 2012, despite his appeal for immunity ((Special Court for Sierra Leone, 2004, SCSL-2003-01-I), he was found guilty on all eleven charges brought against him, which included terror, murder, and rape, leading to his subsequent sentencing three months later, to fifty years in prison.

The relevance of this court to Ukraine's potential court for the crimes of aggression has indeed been a topic pertaining among experts, although, it is of great significance to note, that the likeliness of SCSL serving as an example for the foundation of the Ukrainian tribunal is almost unthinkable, considering the Russian veto power (United Nations Security Council, 2022).

1.5. The Khmer Rouge Tribunal

The Extraordinary Chambers in the Courts of Cambodia (ECCC), also referred to as the Khmer Rouge Tribunal (Ciorciari, J.D. 2006), prove to be an example of the UN and a State member of the

organization dually convening to battle against exemption from international crimes. Cambodian government showed great will to adapt, respectively marking the ECCC as a structural part of their judicial system. In 1997, the co-Prime Ministers of Cambodia formally approached the Secretary-General of the United Nations, seeking support in establishing trial proceedings against the top echelons of the Khmer Rouge. Following protracted discussions, a treaty was ultimately concluded and signed on 6 June 2003 between the Royal Government of Cambodia and the UN, which received subsequent endorsement from the UNGA (2003). In their aim of bringing justice to the persons who, throughout a political stint from 1975 to 1979, committed various heinous acts, per se mass executions, forced labor, torture and other crimes which qualify for the act of genocide and the crime against humanity, Cambodia's jurisdictions encompassed war crimes, crimes against humanity, breaches of the Geneva Conventions and an array of crimes under their penal law. With the mentioned support from the UN Secretary-General, the Chambers became fully operational in 2006, having dissolved only in 2022, after prosecuting several senior leaders and key figures including Kaing Guek Eav, who oversaw the infamous S-21 prison, as well as Nuon Chea, Khieu Samphan, and others.

While advocating for a need of establishing a special hybrid tribunal in his speech in May 2023 at the Hague, Ukrainian President Volodymyr Zelensky argued, that the U.N. General Assembly had the capacity to pass a resolution, requesting the U.N. Secretary-General to commence to working with the Ukrainian government on establishing a tribunal similarly to the ECCC.

Despite the fact that analogous to the ECCC, UNGA could solicit the Secretary General to commence directing efforts towards establishing a tribunal to address Russia's aggression against Ukraine, Cambodian governments' actions, which actively fought for the tribunals establishment by enacting the requisite to domestic legislation can not be mirrored in Ukraine's case, where such internal support and legal framework alignment is not applicable, as amendments to Ukrainian Constitution in emergency state or under martial law are not a viable option.

1.6. The Hariri Tribunal

The Hariri Tribunal, commonly referred to as the Special Tribunal for Lebanon (STL), despite its broad differences over the mere similarities to the potential Ukrainian tribunal, is undeniably worth a mention. In February 2005, the former Lebanese Prime Minister Rafiq Hariri was killed in a massive

car bombing, killing 22 and injuring over 200 people in Beirut. This tumultuous event was followed by significant political stagnation, resulting in the Lebanese government asking UNSC for international assistance. As a result, the Tribunal was established in 2009, by Security Council resolution 1757 (2007). While the STL was instituted through a UN Security Council resolution, its inception was rooted in a collaborative effort between Lebanon and the United Nations. Consequently, it is often discussed as a potential model for a treaty-based approach to establishing an international tribunal through an agreement between Ukraine and an international organization. Despite the unfavorable feedback it was receiving in its early stages (El-Masri, S. 2008), while still operational, they have acquitted and indicted multiple high ranking officials, while also managing to attract one notable conviction. After completing its judical activities, the STL closed on the last day of 2023.

Reflecting on the Ukrainian tribunal, besides the commonality of being special international judicial mechanisms created as a response to atrocities suffered, The Hariri Tribunal is of great difference to the latter. The UNSC played a significant role in the establishment of the STL, however, such direct involvement is not anticipated in the establishment of a tribunal for Ukraine, given the likelihood of a veto from Russia, a permanent member of the Council. The development of the Ukrainian tribunal will most likely draw on lessons from the STL, but it will also have to address unique challenges specific to the Ukrainian context and the crime of aggression.

1.7. Regional Responses to International Crimes

Although it being a meager occasion, we have witnessed regional response to international crimes. The Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC & SPO) and The Extraordinary African Chambers (EAC). After an agreement with the African Union, Senegal, similarly to the ECCC, modified its national court system to establish EAC as a domestic judicial institution (Government of the Republic of Senegal and the African Union, 2012). Their jurisdictions covered the crimes of genocide, war crimes, crimes against humanity and torture, to prosecute a Chadian former acting president, Hissène Habré for the crimes committed during his notorious political run from 1982 to 1990. Under different circumstances, but through the same way of formation, with Kosovo amending its constitution and adopting a law to effectively sanction the formation of KSC and SPO, chambers and prosecutor's office with the jurisdiction over crimes against

humanity, war crimes and other criminal offences under Kosovo law were established. (Corten, O., & Koutroulis, V. 2022).

Both the EAC and the KSC have been points of reference while discussing the potential formation of a tribunal in Ukraine, although, with it being unlikely that Russia would waver the immunities of their officials or consent to creation of an international tribunal, unlike the EAC, where the state, whose former President was put on trial by the tribunal, was party to the international organization that established the agreement with Senegal, while giving its consent to both the establishment of the tribunal and the relinquishment of any immunities that might be applicable, it is almost impossible to apply here the know-how salvaged at the African Chambers. Similarly, KSC is not perceptible as an epitome for Ukraine, given its exercise of domestic criminal jurisdiction.

1.8. The International Criminal Court

The establishment of the ICC in July 2002 marked a seminal moment in the pursuit of international justice, being the world's first permanent international criminal tribunal which was established by the Rome Statute, a multilateral treaty that was ratified by over 120 countries. As an independent judicial institution, the ICC seeks not only to prosecute and punish but also to deter future atrocities and contribute to a more just and stable international order. In current times, the ICC, which has been operational for a year over two decades now, is the only international court whose jurisdiction covers the crime of aggression, amongst others. Based on article 12 (3) of the Rome Statute, Ukraine has submitted two declarations accepting ICC jurisdiction over the alleged crimes for different timeframes, one with respect to the crimes committed during the 2014 conflict, and one for the current developments. ICC commenced investigative efforts shortly after and determined they have reasonable grounds to believe that there have been cases of children being deported from occupied territories of Ukraine to the Russian federation, which, in itself is a war crime and the suspects, for which arrest warrants have been issued are the President of Russia and the Russian Commissioner for Children’s Rights.

A lot of high ranking ICC officials have safeguarded the ICC as a viable option for achieving international justice. Regrettably, despite Ukraine’s efforts, since the two countries at war are not

members of the Rome statute and have not ratified Kampala amendments on the crime of aggression, the ICC might not have sufficient power to prosecute the atrocity crimes committed on Ukrainian soil.

Even though the Russian aggression in Ukraine has sparked conversations into amendments and expansion of the ICC's array of jurisdictional reach, which we will discuss in more detail further into the thesis, unfortunately, a revision of that volume, which requires agreement of the ICC Statute member states, will be a very exhaustive procedure.

1.9. Summary of Chapter

As we have determined that pinning the establishment of this Ukrainian tribunal to any of its predecessors as a direct model is practically impossible, as each past tribunal has operated under distinct circumstances and faced unique challenges, for example, jurisdictional, immunity issues or rather vivid distinction from the proposed tribunal, we will further examine the nuances of international law, the complexities of political dynamics, and the practical considerations of setting up such a tribunal. By analyzing these aspects, we hope to contribute to the ongoing discourse on international justice and the pursuit of accountability for the atrocity crimes committed during the conflict in Ukraine.

2. LEGAL OBSTACLES IN FORMING AN INTERNATIONAL TRIBUNAL

Recent development of events are pointing towards the likeliness of granting Ukraine's request for a special tribunal, although, forming an international tribunal has always, and at all levels come with a set of challenges. Those challenges will vary in nature, thus, following the review of legal precedents, this chapter will delve into the specifics referring to legal obstacles along the way of our international quest for justice.

2.1. Challenges of an *ad-hoc* tribunal

Throughout extensive academic and legal discourse, an *ad hoc* tribunal has been widely regarded as one of the most endorsed mechanisms in achieving accountability for the crime of aggression atrocities committed throughout Russian invasion of Ukraine. In its nature, *ad hoc* tribunals are

temporary judicial bodies which ensure filling the gaps where existing courts have difficulties achieving jurisdiction or capacity. Although the legal academia has agreed on the general applicability of this form, elucidating the specifics of establishing such tribunal is still a work in progress. It is worth noting that despite the above-mentioned prevalent consensus, there are compelling arguments opposing this view, too. It's crucial to acknowledge that the establishment of a 'special' or *ad hoc* tribunal inherently battles with issues of legitimacy. The principles of predictability and stability, fundamental to criminal law, dictate that individuals should be able to anticipate the applicable criminal offenses and always understand the jurisdiction of courts or tribunals. It is well argued that an attempt at achieving justice through an *ad-hoc* tribunal could potentially undermine the international legal system, as the foundational goal of a permanent court like the ICC is to obviate the necessity for constituting further tribunals and avoid introducing ambiguity concerning the jurisdiction and definition of crimes of aggression. Currently, the legal and institutional framework does not moderate the crimes of aggression in Ukraine, however, given the unique circumstances and the intense international response to these atrocity crimes, the exceptional establishment of a tribunal might be considered. In such case, it is imperative to avoid any perception of a tribunal being unilaterally established by a select group of states, but rather direct efforts towards ensuring solid involvement from universal international organizations, thereby reinforcing the tribunal's legitimacy and aligning it with broader international legal principles.

There are different pathways of forming an *ad-hoc* international tribunal, which, evidently, come with a set of their own legal challenges. We will elaborate further below.

2.1.1. International Tribunal

The foremost benefit of creating an *ad hoc* tribunal is the possibility of tackling immunity-related challenges, i.e. for Putin, as personal immunities are not recognized by such tribunals, or the Charles Taylor case scrutinized earlier. This concept is exemplified throughout the Nuremberg Principles, asserting, that a person who, as a leader or official, commits an act constituting an international crime is not exempt from legal responsibility under international law." (United Nations. 1950.).

A viable option for the tribunal’s formation would be through a multilateral treaty among states, as opposed to a UN mandate, which has been suggested by the European Commission earlier this year.

The establishment of the tribunal under the auspices or with the endorsement of the United Nations would help in ensuring that member states of the UN are obligated to cooperate with the tribunal. (Corten, O. & Koutroulis, V. 2002.) The UN backing would also benefit the tribunal by expediting the establishment process and ultimately, positively affecting the tribunal's legitimacy in the international legal world. Notably, forming a tribunal through the UN is a highly intricate and complex procedure, thus, we will be exploring further the various ways of approaching the challenges through different UN entities.

2.1.1.1. United Nations General Assembly

Unaffected by the Russian veto power, one of the viable options for forming an international *ad hoc* tribunal is through the UNGA. UN Charter's article 24 designates the Security Council as the principal entity for upgolding global peace and stability. Conversely, the Uniting for Peace mechanism (UfP), founded by the UN, proclaims, that in cases of the UNSC being derelict in its primary obligation towards international peace and security, the UNGA is empowered to put forth recommendations to uphold or recover international peace and security. Although the resolution's language specifies the UNGA's role as recommending, and the UN Charter characterizes its functions as discussing, promoting, and advising, the actual scope of the UNGA's responsibilities has extended to the establishment of peacekeeping forces and the formation of a hybrid tribunal, the ECCC, both actions falling well within its legitimate powers.

Furthermore, Article 22 of the Charter endows the authority to create subsidiary bodies as required to fulfill UNGA's duties. The contention, backed by the ICTY Appeals Chamber's declaration that the UNGA's lack of inherent judicial powers does not preclude it from forming the UN Appeal Tribunal, a second level appellate review tribunal within the internal justice system, indicates that despite the Assembly not being a judicial entity per se, it retains the capacity to create judicial organs as instruments to enact its powers.

The legal validity of a prospective ad hoc tribunal, if constituted directly by the UNGA, in likes to the UN Appeal Tribunal, is subject to considerable scrutiny, particularly when contrasted with a scenario where the UNGA empowers the Secretary-General to assess the situation and initiate commenccement of appropriate measures. It is pertinent to note that both the UfP and the UN Charter vest the UNGA with the capacity to offer recommendations, thereby precluding it from adopting binding decisions.

The limitation is further emphasized the Security Council's exclusive authority of adopting binding decisions. Consequently, the establishment of a tribunal by the UNGA raises substantial legal concerns regarding its obligatory nature and enforceability upon UN Member States. It is worth noting that UN Member States are under no compulsion to execute actions predicated on a recommendation issued by the UNGA, thereby further attenuating the efficacy of this methodology. Concurrently, it has been proposed that international law might evolve through the enactment of a new UNGA resolution under the UfP framework. Such a resolution could potentially empower the UNGA to create an international judicial entity dedicated to battling impunity for grave international crimes, while simultaneously acknowledging the Security Council's primary role in upholding international peace and security, particularly through military means. The UNGA possesses the capability to pass such resolutions under the UfP mechanism; however, this procedure is inherently more political than juridical, and attaining consensus on such issues can prove to be a challenging task. (Carswell, A. J. 2013.)

2.1.1.2. United Nations Security Council and the United Nations Secretary-General

Security Council is endowed with the power to institute ad hoc tribunals through Chapter VII of the UN Charter. This prerogative was exercised in 1991 by forming ICTY via Resolution 827 of the Security Council. Article 39 of the Charter authorizes the Security Council to ascertain the presence of any threat, breach of peace, or act of aggression and to propose or enact measures to sustain or reinstate international peace and security. Furthermore, Article 41 provides the Council with the jurisdiction to impose measures, excluding the use of armed forces, to bind its resolutions, thereby providing the legal foundation for the establishment of such tribunals. Nonetheless, given Russia's status as a permanent member with veto rights in the Security Council, it remains highly unlikely that the Council will successfully adopt any initiatives or strategies to address the crime of aggression. (Shaw, M. N. 2021.)

Article 98 mandates that the Secretary-General shall execute the functions delegated to him by both the Security Council and the UNGA. As a result, the Secretary-General occupies a pivotal position in the potential formation of an *ad hoc* tribunal, as the Assembly has capacity to instruct the Secretary-General to initiate negotiations with the Ukrainian government for the establishment of such a tribunal, as stipulated above in relation to the Khmer Rouge tribunal.

2.2. Domestic Tribunal

National courts may exercise jurisdiction over the crime of aggression through principles of territoriality, nationality, or universal jurisdiction. Unlike other fundamental international crimes, the penal codes of numerous states do not cover the crime of aggression, and an even smaller number apply universal jurisdiction over it. Furthermore, the application of universal jurisdiction to the crime of aggression is subject to notable scrutiny, due to the lack of a definitive consensus on its standing within customary international law. (Scharf, M. P. 2012.) Although, according to Article 437 of Ukraine's penal code, which delineates crime of aggression, preparing, plotting or conspiring aggressive war or armed conflict is subject to imprisonment of seven to twelve years, while conducting the act incurs a ten-to-fifteen-year sentence. Furthermore, penal codes of at least 18 states, including Lithuania, asserts universal jurisdiction over the crime of aggression. (McDougall, C. 2022.)

Accordingly, given Ukraine's instance, a legal foundation to prosecute the crime of aggression at the domestic level does exist. Nonetheless, executing such prosecutions in national courts presents an array of challenges. The effectiveness of enforcing international criminal law in national settings, is often limited, illustrated with the former Ukrainian President Viktor Yanukovych's case. A Ukrainian court, which conducted proceedings *in absentia,* convicted Viktor of complicity in the crime of aggression and treason, and the verdict remains unenforced since Yanukovych has blatantly fled to Russia. Various concerns, including those related to human rights issues due to the trial in absentia, and the defendants lawyers' claims of governmental coercion affecting the trial's outcome have surfaced (Komarov, A., & Hathaway O. A. 2022.). If Ukraine's domestic courts were to attempt to prosecute the crime of aggression, it is likely that similar challenges would resurface despite its legality, raising doubts about the ability to conduct a fair trial given the current circumstances. Moreover, immunities for the senior Russian officials presents a significant challenge. International Court of Justice (ICJ) has affirmed that such state officials are entitled to personal immunity from foreign criminal jurisdictions. Consequently, pursuing accountability for the crime of aggression against state leaders within domestic legal frameworks is fraught with complexities.

2.3 Hybrid Tribunal

Hybrid tribunals represent a distinctive category of ad hoc criminal tribunals that integrate both domestic and international components, though they exhibit considerable diversity in their structures. For example, while the SCSL was formed through an international treaty between the UN and Sierra Leone, the ECCC was established via domestic legislation and subsequently supported by the UN based on the relevant agreement. These structural distinctions influence their respective capacities to prosecute foreign leaders. In the case of Prosecutor v. Taylor, the SCSL scrutinized its jurisdiction to prosecute Charles Taylor, the President of Liberia, referencing the authority vested in a "truly international" court as a manifestation of the international community's consensus. However, not all hybrid tribunals meet this criterion, as possibly exemplified by the ECCC. Thus, while the hybrid construct does not inherently bar the prosecution of foreign leaders, it may complicate the process.

Concurrently, the establishment of a hybrid tribunal encounters various obstacless. For starters, Article 126 of Ukraine's Constitution prohibits foreign nationals from serving as judges, precluding the formation of an internationalized tribunal within Ukraine's judicial framework.

Beyond the legal complexities inherent in this approach, there is a significant probability of encountering political challenges and pressures, irrespective of the case being adjudicated in a Ukrainian domestic court or a foreign jurisdiction. In scenarios with significant political implications, ensuring the tribunal's impartiality and neutrality is of utter importance. This affects the level of cooperation between the tribunal and sovereign states, particularly those inclined to maintain neutrality in the Ukrainian conflict. In this context, a fully international tribunal might be more appropriate than a hybrid one due to its perceived impartiality and broader legitimacy.

Ukraine’s senior leadership, and particularly the President of Ukraine, Volodymyr Zelenskyi had expressed strong opposition to a hybrid tribunal, perceiving it as a diluted form of an international institution. Their concern was that such a tribunal, comprised of Ukrainian and international judges, would not possess the requisite international legitimacy to achieve accountability for the atrocity crimes committed on Ukrainian soil. Recent developments have seen the United States endorsing creation of a special tribunal through a hybrid approach. Advocates for this model contend that it represents the most direct route to the tribunal's establishment and enhances the likelihood of realizing

"meaningful accountability", but as elaborated earlier, amending Ukraine's constitution during a state of emergency would pose constitutional concerns.

2.4. Jurisdictional challenges over the crime of aggression and the ICC

As we proceed to delve deeper into the legal challenges of forming an international tribunal, it is highly important to understand the specific mechanisms and obstacles from all perspectives. This chapter offers a deeper look at the nuanced legal landscape around the ICC's jurisdiction, particularly over the contentious issue of the crime of aggression, which will allow us to comprehend the ICC's current capabilities and limitations. In 2010, at Kampala conference, State Parties to the Rome Statute adopted amendments in regard to the crime of aggression, which was decided to be activated later in 2017. This landmark decision was a huge step forward for the international law community, as it meant that individuals responsible for committing crimes of aggression could be held accountable at an international level, the latter acting as a legal basis for the prosecution of high-ranking officials who engage in illegal military actions. Despite its potential for enhancing global peace and security, this expansion of jurisdictions did not come without its challenges. As mentioned earlier, the ICC's jurisdictions cover the crimes of aggression, if both involved parties, on whose grounds the crimes are being committed and the perpetrator as well, are parties of the Statute and have ratified the Kampala amendments to the Rome Statute. Neither Russia nor Ukraine has ratified the Statute amendment concerning the crime of aggression, consequently, the ICC finds itself without jurisdiction. (Ukrainian Bar Association. 2023).

The Rome Statute does provide an alternative mechanism for the ICC to assert jurisdiction through a referral by the UNSC. In such instances, the previously mentioned restrictions do not apply, allowing the Council to refer acts of aggression to the ICC irrespective of the acceptance of ICC jurisdiction by the involved states. However, it is clearly stipulated that these referrals must occur under the framework of Chapter VII of the United Nations Charter and the decision is bound to get denied, as firstly, Russia has veto powers as a permanent member of the Security Council (United Nations Security Council, n.d.), and moreover, it calls for a flexible interpretation of international law, which, under the current geopolitical environment, will not be favored.

Discussions of possible revisions to the Rome Statute have recently surfaced, as an alteration regarding the jurisdictional regime established by the Kampala Amendments could grant the ICC authority to prosecute the crime of aggression. Although the Kampala Amendments initial design was to extend to all State Parties, it is vivid that the amendment process presents significant challenges, demonstrated by the persistent difficulties encountered in reaching a consensus on the precise nature and scope of the crime's definition. Scheduled for 2025, the State Parties will reconsider the jurisdiction over the crime of aggression, offering a theoretical window for change. Under Articles 121 and 122 of the Rome Statute, any State Party has the right to propose amendments. These proposals can then be ratified at conferences by a majority of the members present and casting votes.

Nevertheless, alongside potential dialogue on amendments, the challenge of retroactive application has to be analyzed, should there be changes to the jurisdictional clause. Presently, the ICC operates on a principle of non-retroactivity, indicating its inability to probe incidents preceding the Statute's enactment on July 1, 2002. This limitation extends to all States, except those ratifying or acceding subsequent to this date, for which the ICC's jurisdiction is activated only for offenses committed post the Statute's effectuation in the respective State Party. This remains applicable unless the State explicitly stipulates otherwise (International Criminal Court. n.d.). The discussed challenges of jurisdiction, ratification, veto powers within the UNSC, and the principle of non-retroactivity highlight the limitations inherent in the current framework, therefore deeming the ICC and the Rome Statute incapable of achieving accountability.

2.5. Complications of immunities

The crime of aggression is traditionally assessed as a 'leadership crime,' a categorization resonated in Article 25 of the ICC Statute which asserts that only those persons effectively able to control or direct political or military actions bear individual responsibility for state atrocity crimes. This definition highlights a major challenge in prosecuting individuals for international crimes: the challenge of immunity. Although the debate surrounding immunity has been embedded within international criminal law for quite some time, its implications become particularly pronounced in alignment to the crime of aggression. Given their high-ranking roles, individuals accountable for this crime are likely to be shielded by immunities. To better analyze the challenges raised by immunities, it is crucial to

scrutinize the types of immunities State officials benefit from, namely personal immunity, functional immunity, the principle of sovereign equality among States.

2.5.1. Personal immunities

The extent of personal immunity is notably expansive, covering all actions undertaken by state officials while in office, including both official duties and private conduct, as well as private acts preceding their term. However, this extensive immunity is reserved for a very select group of high-ranking officials: Heads of State, Heads of Government, and Ministers of Foreign Affairs. Thus, the extensive scope of actions protected by personal immunity is counterbalanced by a limited range of individuals who qualify. Although, this protection persists only for the duration of their official term in office. For instance, even initiating a war is deemed an official state action and Ukraine is precluded from imposing their criminal jurisdiction over Russian senior officials while they hold office, as per personal immunity. Upon their departure from office, these individuals will be subject to the same legal treatment as any other state official, with protection limited to only functional immunity. Therefore, personal immunity is comprehensive, encompassing all actions performed in both an official and private capacity, undertaken prior to and during tenure. Although, its revocation after leaving the office is well documented by the cornerstone case of understanding the personal immunity, the Arrest Warrant of 11 April 2000 case (Democratic Republic of the Congo v. Belgium), where the International Court of Justice (ICJ) held that a sitting foreign minister enjoys full immunity from prosecution in foreign national courts for all acts, whether private or official, while in office, but ceases once an individual no longer holds the position. (International Court of Justice. 2002,)

2.5.2. Functional immunities

Functional immunity exclusively protects acts performed during an official's tenure, while actions undertaken in a personal capacity do not fall under this immunity. Differing from personal immunity, functional immunity extends to state officials of all ranks, thus encompassing fewer acts, but a broader range of individuals. This type of immunity is not limited by time constraints; therefore, a state official will remain immune for acts conducted both while in office and after their tenure concludes. For instance, if a senior Russian official were to leave their official position, their involvement in the war against Ukraine would still be considered as act conducted in their official capacity. Consequently,

Ukraine would not be able to assert authority over the individual, whether they are still in the office or not. (Stahn, C. 2019)

The principle of immunities is based on the concept of sovereign equality between states. Public international law asserts that all states are equal, without any precedence over another. This principle precludes one state from exerting jurisdiction over another or over individuals who act as representatives of that state. In this context, immunities serve to protect foreign state officials from the criminal jurisdiction of other states. For most of these officials, such immunity is restricted to acts performed in their official capacity — these are the acts tied to the state they serve and, by extension, to the concept of state sovereignty (referred to as functional immunity). However, for top-tier officials, whose roles are so intrinsically linked to the state and crucial for international relations are granted a more comprehensive immunity by customary international law. The concept of revoking immunity for international crimes was elaborated in the case law of the ICTY, notably in the cases of Karadzic and Milosevic. Similarly, this stance was mutually acknowledged by the parties in their legal arguments during the ICJ case concerning the arrest warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), where the International Court of Justice (ICJ) held that sitting foreign ministers enjoy full immunity from prosecution in foreign courts for acts carried out in an official capacity, including serious international crimes. However, this immunity does not protect them from prosecution in certain international courts, where applicable, or after they leave office.

2.5.3. Exceptions to immunities

While various exceptions exist regarding immunities, senior officials cannot claim state immunity before an international tribunal when the international nature of that tribunal is clearly established. The SCSL is a good example to support the argument, due to the precedent in Charles Taylor case, where the SCLS confirmed his indictment and issued an arrest warrant while Taylor was the incumbent President of Liberia (Special Court for Sierra Leone, 2004, SCSL-2003-01-I). Although, there are some implications that need to be scrutinized and applied to the Ukrainian instance. Indeed, if an international criminal tribunal were to be established to address the atrocity crimes committed in Ukraine, immunities should not obstruct the prosecution of foreign state officials, including acting Heads of State. This principle is frequently advocated as a rationale for founding a tribunal for Ukraine aggression under a treaty with the UN: such a tribunal, being international, would not be obligated to

honor the immunities typically afforded to individuals under its jurisdiction. However, most notably, any waiver of state officials' immunities is understood to have been consented to, either explicitly or implicitly, by the respective state. In instance, the removal of immunities in the ICTR and ICTY cases are based on UNSC's binding resolutions, which, was approved by all member states when they ratified the UN Charter. Moreover, due to the supreme authority held by the NIMT over Germany, nullifiying German officials' immunities was a possibility, similarly to the immunities of Japanese; Moreover, Japan forcingly conceded during its surrender that war criminals should be prosecuted accordingly. In the context of tribunals formed through international agreements, states negate the invocation of their officials' immunities. Consequently, all parties to the ICC Statute assert that their officials' immunities cannot impede the ICC's jurisdiction. If we deem that immunities are generally not applicable before international courts, it remains essential to determine which courts and tribunals qualify as 'international' in nature. For retrospect, the SCSL proclaimned its 'international' status by emphasizing its establishment through actions by the UNSC under Chapter VII and an agreement between the UN and Sierra Leone, which the SCSL deemed an 'expression of the international community's will.' (Special Court for Sierra Leone, 2004, SCSL-2003-01-I), which, moreover, further differentiated itself by not being a part of Sierra Leone's judicial system. Notably, in the cases referenced by the ICC Appeals Chamber to support the view that immunities aren't applicable before international courts, a handful of tribunals we analyzed above (the ECCC, STL, EAC, KSC & SPO) are absent. Beyond the NIMT, IMTFE, ICTY, and ICTR, only the SCSL is cited, recognized for its establishment via a UNSC resolution and an agreement with the UN Secretary-General. The Appeals Chamber rationalizes that immunities are not applicable in international courts like the ICC, on the grounds that these courts, when addressing international crimes, instead of representing specific states, operate in the interest of the international community as one. This argument is not entirely persuasive, as the ICC's claim that it represents the international community as one, and not specific states, raises the complex question of the inability to determine how and when a tribunal transitions from representing individual states to embodying the broader international community. (Corten, O., & Koutroulis, V. 2022).

The factors analyzed by the author above will drastically affect how immunities are addressed, depending on the framework chosen to establish the Ukraine aggression tribunal, and its integration within Ukraine's national judicial system. A tribunal closely resembling the national system might struggle more to assert its international status and, consequently, fail to challenge the invocation of immunities, meanwhile, a tribunal with the likes to the SCSL would be better positioned to reference

established precedents for bypassing immunities. The perception of the tribunal as representing 'the international community as a whole' is not just a matter of legitimacy but also crucial for the immunity debate. This underscores the advantage of establishing the tribunal through a mechanism with the broadest multilateral support. Experts tend to agree that a tribunal instituted by the General Assembly would most convincingly be seen as an international court, acting on behalf of the global community, therewith strengthening its position against the challenge of immunities. (McDougall, C. 2022.)

2.6. Enforcement challenges

Enforcing and implementing the decisions of the Ukraine aggression tribunal, particularly in relation to executing arrest warrants, poses specific legal challenges. Initially, the thesis will investigate if Russia and additional states will be mandated to collaborate with a tribunal, further followed by scrutinizing alternative methods and potential ways of enforcing arrest warrants.

The different options to establishing an international tribunal come with a set of their own enforcement challenges. Established international law principles dictate, that a treaty cannot impose duties or grant rights to a third state, unless the later consents. In a case where the tribunal were to be formed through an agreement between Ukraine and the UN or a regional organization, Russia will be considered a third party. Therefore, third parties, and in our instance, Russia, wouldn't have legal obligation invoked by the terms of such an agreement, in regards to cooperating with the tribunal. Even if a UN resolution endorses, encourages, or suggests the formation of the tribunal, it doesn't alter Russia's position as a third party. For instance, the agreements that established the ECCC, SCSL, and STL specify that only the governments of the states which are party to these agreements are required to cooperate, not third states. Considering the latter, no state would be obliged to collaborate with the tribunal. Therefore, any involvement from states would need to be entirely voluntary, which, is not a matter *in esse.*

The circumstances vary when the tribunal is established via an agreement among several states. In such instances, states that are not signatories to the agreement, such as Russia, any allied state with nationals at risk of prosecution, and other third-parties, are not under a binding obligation of following suit. However, during negotiations, the states that are party to the agreement might choose to incorporate a clause requiring full cooperation with the tribunal. This could reference to the ICC, where member states would be obliged to arrest and reposition suspects to tribunal, contrary to those,

who would not be members. Even among states which are party to the agreement, cooperation might not be straightforward, as evidenced by historical precedents, namely, Yanukovych's case outlined previously. Practically, an arrest warrant from such a tribunal might restrict the travel options or certain routes for officials it seeks, but that is all that can be expected. Given that Russia will not only lack any obligation to cooperate but are also likely to outright reject any cooperation, this enforcement mechanisms must be deemed ineffective.

Considering the discouraging prospects for cooperation and enforcement of decisions by the special tribunal, one alternative approach is to permit trials *in absentia*. While the majority of existing international and internationalized criminal jurisdictions do not allow for proceedings in the absence of the accused, there have been notable exceptions, namely the STL, which explicitly permitted trials *in absentia*. Nonetheless, the right to be present at one's trial constitutes a core element of the assurances of a fair trial. (United Nations General Assembly, 1976, Article 14§3(d)). This right is enshrined in the statutes of the criminal jurisdictions of most tribunals (excluding the STL) discussed in chapter one. Adopting *in absentia* proceedings, therefore, would be a significant deviation from the norm and would need to carefully balance the need for effective prosecution with the rights of the accused. While the practice of conducting proceedings in absentia is permissible under international law, it is widely acknowledged that holding trials *in absentia*, particularly for high-profile cases, would significantly diminish their value and legitimacy.

2.7. Summary of Chapter

As we contend with these multifaceted legal challenges, it becomes evident that the path to establishing an international tribunal for Ukraine is not merely a question of legal mechanics but a profound exercise in navigating the interstices of international law, diplomacy, and political will. The pursuit of justice through such a tribunal, while steeped in legal precedent and international doctrine, is ultimately a reflection of the international community's commitment to accountability and the rule of law. Therefore, as we move forward, it is imperative that any approach not only addresses the legal and procedural hurdles but also aligns with the broader principles of justice, fairness, and international solidarity.

3. ORGANIZATIONAL AND ADMINISTRATIVE CHALLENGES

While the establishment of international tribunals is not a novel concept, the specific circumstances surrounding Ukraine present a unique set of organizational obstacles. The complexities of the Ukrainian situation come from various factors, including the geopolitical nuances, the nature and scale of the alleged crimes, and the international legal and political landscape that shapes the tribunal's formation and eventually, function. Mr. Robin Vincent, the first Registrar for the STL and the SCSL, where he was in charge of all aspects of the Court's administration, has elaborated on administrative and organizational challenges while establishing an international war crimes court, which would also be applicable in our case:

3.1. Funding

Funding is a trivial challenge of all tribunals. The establishment of an international tribunal, especially one for atrocity crimes committed in Ukraine, is intricately influenced by the shifting tides of political and diplomatic viewpoints. A fundamental principle in these affairs is the imperative to avoid impropriety. This includes ensuring that funding does not appear to sway the fulfillment of the decree of the tribunal. Maintaining this integrity is crucial for the tribunal's credibility and the broader perception of justice being served impartially and effectively.

The conventional approach involves integrating the tribunal's funding into the budgetary mechanisms of the UN system. While this process can be extensive and protracted, a tribunal financed by the UN benefits from a steady flow of resources it can depend on to fulfill its mandate. Many experts have made the importance of steady flow of finances absolutely vivid, as managing, or even retaining personnel and other logistical challenges with no finances has been a daunting obstacle for the proper functioning of international tribunals. It is important to set out a long-term plan, as States' enthusiasm tends to wear off.

Alternatively, the tribunal could pursue voluntary contributions from States Parties that are invested in its mission and mandate. These offerings are to be determined annually, guided by a budget the tribunal fixates. For symbolic and political reasons, the permanent location should ideally be closer to Ukraine. However, situating the tribunal within Ukraine might compromise its perceived independence and impartiality and would be under constant threat from Russia. Consequently, an

alternative location like Vilnius, Lithuania, offers a strategic compromise. It is proximate to Ukraine, facilitating access and relevance, while also providing a safer environment that is less susceptible to external threats, thereby ensuring the tribunal's integrity and uninterrupted operation. This approach, previously employed by entities like the SCSL, has proven to be more efficient than the traditional UN-funded model, but this method places the responsibility of fund-raising on the tribunal's senior staff, which, as elaborated earlier due to the inexistence of steady finances, can divert their focus from the primary tasks and potentially lead to perceptions of impropriety due to the possibility of influencing outcomes. The inherent challenge is balancing the need for efficient funding with the imperative to maintain the tribunal's integrity and independence.

Skeptics of establishing a special tribunal have emphasized not just the related technical challenges but also the daunting issue of funding: the ambiguity surrounding which nations or international bodies might be prepared to shoulder these financial burdens is a significant concern. For instance, the STL, established by a UNSC resolution, consumed almost a billion dollars in its 11-year operation. Despite this considerable expenditure, it hasn’t particularly succeeded in achieving its objectives, primarily due to inadequate funding — with Lebanon contributing a percent shy of half of the court’s funds and the remainder reliant on voluntary contributions. Lawyers highlighting these concerns also note the temporal aspect, suggesting that establishing a tribunal for Ukraine could be a time-consuming process. Drawing parallels with the STL, which took two years to become operational, they argue that establishing a tribunal for Ukraine might take several years to secure a location and staff, rather than just a few months. (Heller, J.J. 2022.)

3.2. Outreach

Engaging directly with the communities and individuals affected by the crimes is fundamental to building trust in the areas most impacted by the atrocities. Establishing this connection ensures that the tribunal resonates with the local population and the victims, who are central to its mission and need the opportunity to be heard, to share their stories, and to provide their perspectives, which can be facilitated through various media channels. Without a proper outreach program, the credibility and ultimately, the success of the tribunal could be compromised. The SCSL serves as a model in this regard, demonstrating the profound impact of a successful outreach strategy on the effectiveness and legitimacy of a tribunal's work. (Vincent. R., 2008)

3.3. Security

Security represents a substantial and persistent requirement ensuring the protection of both individuals and their residences. Threats of harassment, abduction and general ill-will are frighteningly real. Guaranteeing the close protection of key tribunal personnel and all witnesses involved is crucial. The tribunal's location is a critical factor, significantly influencing the risk assessments and the nature and extent of security measures required. In some cases, locating the tribunal on a military base may be necessary to ensure an adequate level of safety. Additionally, the deployment of United Nations or domestic armed forces must also be contemplated as part of a comprehensive security strategy to protect those involved in the tribunal's operations.

3.4. Location

The initial siting of the tribunal should prioritize practicality and efficiency. In order to prevent unnecessary prolongment accompanying choosing a permanent location, considering a temporary site should be an option. Having the primary considerations of location, international politics and appropriate security measures, holding sessions in The Hague, consequently utilizing United Nations amenities, which offer established legal infrastructure and a measure of neutrality. For symbolic and political reasons, the permanent location should ideally be closer to Ukraine. However, situating the tribunal within Ukraine might compromise its perceived independence and impartiality and pose a significant risk, due to very close proximity with Russia. Consequently, an alternative location like Vilnius, Lithuania, offers a strategic compromise. It is proximate to Ukraine, facilitating access and relevance, while also providing a safer environment that is less susceptible to external threats, thereby ensuring the tribunal's integrity and uninterrupted operation.

3.5. Summary of Chapter

As we discussed the organizational and administrative challenges of forming an international tribunal, particular complex challenges have been identified. Funding emerges as a primary concern, with the chapter examining the delicate balance between securing adequate resources and maintaining the tribunal's integrity and independence. It critiques the conventional UN funding

mechanism for its lengthy processes, while also acknowledging the potential downsides of relying on voluntary contributions from States Parties, such as the risk of perceived impropriety and financial instability. The chapter also highlights the critical role of outreach in building trust and legitimacy, particularly with the communities and individuals most affected by the crimes. Bringing examples like the SCSL, we illustrated the profound impact a successful outreach strategy can have on a tribunal's effectiveness and public perception. Ensuring security and picking a location for the tribunal were also referred to as points of organizational concern, scrutinizing which has emphasized the need for a careful, strategic approach to ensure the tribunal's effectiveness, legitimacy, and integrity.

4. THE POLITICS OF FORMING AN INTERNATIONAL TRIBUNAL

The political landscape around the potential formation of an international tribunal for crimes of aggression against Ukraine is swiftly evolving, ostensibly ensuring the existence of challenges of political nature. This is not only a reflection of the shifting geopolitical dynamics, but also an indicator of the complexity of national interests, international relations, and the collective pursuit of justice and accountability.

4.1. Political implications

The potential establishment of a Ukrainian tribunal has raised concerns among various nations about the implications for their own leadership and military actions. Notably, the United States has expressed apprehension that countries from the Global South might seek to establish similar tribunals, potentially focusing on actions such as the US invasion of Iraq. (Heller, K.J. 2022.). This scenario raises the specter of accusations against the West of selectively applying justice, only targeting certain acts of aggression while overlooking others.

This issue is further complicated by the situation in Gaza, where Israel's ongoing conflict with Hamas has prompted calls from Iran for a special tribunal to try Israel for crimes of aggression (Teller Report. 2023.), similar to what Ukraine is seeking. However, Israel's key allies, particularly the United States, are unlikely to support such a move. This stance could work in favor to the perception of selective international justice and potentially erode Ukraine's efforts to claim support from the Global South,

in particular from those sympathetic to the Palestinians. The dynamics surrounding these discussions highlight the intricate interplay of geopolitical interests, concerns about precedent, and the quest for a consistent and fair application of international law. Additionally, there is a growing consensus among diplomats and legal experts that creating a tribunal of this nature may impede the process of achieving a political resolution to the conflict and interfere with potential, but not visible on the horizon, peace talks. This is attributed to the lack of motivation for the Russian leadership to engage in negotiations when threatened with international legal proceedings. The issuance of an arrest warrant for Putin by the ICC in March has raised concerns about its influence on peace negotiations. According to this decision, the 123 countries that are signatories to the Rome Statute are now perpetually obligated to detain and surrender the Russian president to the ICC, if he enters their jurisdictions, extending the obligation even beyond his term in office. This complicates any return to diplomatic normalcy, irrespective of the results of the war. The restriction on Putin's international mobility due to the criminal charges significantly limits Russian diplomatic engagement. (Furuya et al., 2023)

4.2. Positive developments

It would be dismissive of Ukraine's efforts to suggest a lack of substantial international backing. Since January 2023, the Core Group has convened with increasing frequency to devise a framework for the creation of a tribunal and to outline its operational mechanics. This informal, yet expanding assembly currently includes 40 nations, encompassing all G7 members, nearly the entire European Union (EU), and a number of Latin American countries, demonstrating a broad coalition of support. Nevertheless, Ukraine's global initiatives to establish such a tribunal extend beyond simply moderating the body's functions. Efforts to document the atrocities committed on Ukrainian territory have been underway for over a year. The Joint Investigation Team (JIT), established in June 2022 by Lithuania, Ukraine, and Poland are at the helm of the efforts. The JIT serves as a collaborative platform for national prosecutors to share information and focus on investigating crimes against humanity and other international offenses. Its efforts have gained additional support, with more EU countries, such as Latvia, Estonia, Romania and Slovakia and the ICC joining, and the US Department of Justice entering into a cooperation agreement with the JIT. Furthermore, the ICPA provides backing to the JIT's activities, assisting it in gathering materials, which will eventually expedite the prosecution process, ensuring delivery of a lighter load on tribunal's prosecutors in regard to evidence collection, consequently leading to having facilitated a more efficient and focused legal process. A striking

advancement in this regard is also the involvement of Eurojust's Core International Crime Evidence Database, eventually leading up to the support of the EU, as formation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) was publicly announced by the President of the European Commission, Ursula von der Leyen. Affirming the statement above, in his comments on the launch of the ICPA, former Belgian Minister of Finance and the present European Commissioner for Justice, Didier Reynders elaborated, that the commencement of operations of the prosecution center was a signal to the world that those responsible, will be held accountable (Reynders, D. 2023). Integrated within Eurojust, the ICPA's primary objective is to intensify the national investigative efforts into the crime of aggression and to facilitate the preparation of cases for eventual and inevitable legal proceedings.

Numerous challenges impede the swift formation of an international tribunal, yet this does not mean we shall render the ongoing efforts futile. Much depends on the evolving political determination of the involved nations and the unfolding military events, as a shift in momentum towards Ukraine could notably strengthen its argument for the tribunal's establishment. A positive development for Ukraine is that recently, discussions have commenced on a specific and favorable legal framework for the tribunal's establishment under a UN agreement, though Ukraine is still bound to secure its partners' support. Additionally, the ICC's arrest warrant for Putin, which complicates any straightforward political re-engagement with Russia, further supports Ukraine's position.

4.3 Summary of Chapter

Throughout the discourse of the chapter, we have come to clarify that the basis of international political scenery is very fragile. The solid legal challenges interfering with the tribunal's creation, serve as a convenient shield for political reluctance. With the war's outcome still uncertain, many nations to this day are hesitant to commit to a stance that might complicate future negotiations with Russia. We highlighted the international concerns, particularly from the United States and its allies, in regard to setting precedents that could lead to similar tribunals scrutinizing their actions, as seen in the context of the US invasion of Iraq and the recent Israel's conflict with Hamas. This chapter underlined the balance between seeking justice and potential political ramifications, including the impact on peace negotiations, especially in light of the ICC's arrest warrant for Putin and its implications for international diplomacy. Although the chapter determines various obstacles, it

remains optimistic of what the future holds by emphasizing the growing international support for Ukraine and the creation of a tribunal.

CONCLUSIONS

To conclude the thesis, we may deem that the journey to formulating a tribunal is filled with an array of legal, organizational, and political challenges, similarly to the the obstacle encountered in previous international judicial endeavors, and also uniquely, presenting new complexities. Despite these formidable challenges, there is a growing consensus within the legal community and international organizations that the establishment of a tribunal for Ukraine is not only feasible, but also profoundly beneficial. An international tribunal for the crime of aggression would serve as a beacon of justice, offering a measure of redress to the victims and reinforcing the international legal order. It would also send a resounding message about the international community's tireless commitment to accountability and the rule of law, thus, again, contributing positively to the legitimacy of international prosecution.

Throughout the analysis, we have scrutinized the objective of the thesis, which was to analyze the potential legal, political, and organizational implications. Having determined an array of such, a certain amount of options to fight the obstacles, based on the fast-evolving legal jurisprudence or the retrospect in the past of international tribunals, were presented. Ultimately, the path to establishing an international tribunal for Ukraine is not merely a question of legal mechanics but a profound exercise in navigating the interstices of international law, diplomacy, and political will. The pursuit of justice through such a tribunal, while steeped in legal precedent and international doctrine, is ultimately a reflection of the international community's commitment to accountability and the rule of law.

In this light, I would like to remark, that the formation of an international tribunal for Ukraine should be viewed not as an overwhelming challenge, but as a vital opportunity. It is an opportunity to reaffirm our collective commitment to principles that transcend borders and to take a definitive stand against impunity. As the legal society and international organizations continue to navigate the complex path toward this goal, efforts reflect dedication to upholding justice, and the rule of law on a global scale. The path ahead, some part of which this thesis hopefully helps navigate is, indeed

undoubtedly complex and fraught with challenges, but it is a path that leads toward a more just and accountable international order.

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SUMMARY

Throughout the thesis, we have explored the complexities attributed to establishing an international tribunal for Ukraine, a task that extends far beyond mere legal mechanics. Our aim was to dissect the expected legal, organizational, and political challenges, underlining the connection between international law, diplomacy, and political will. Through this analysis, we sought to contribute meaningfully to the discourse on international justice and accountability for the atrocity crimes committed during the conflict in Ukraine.

We have determined that no direct predecessor serves as a perfect model for this Ukrainian tribunal, as each has undergone its unique set of circumstances and challenges. Instead, we delved into the specifics of international law, the complex political dynamics, scrutinizing its international landscape, and a broad range of organizational issues, between securing adequate funding to maintaining tribunal's independence. We were advocating for an approach that not only overcomes legal and procedural obstacles, but also upholds the international justice.

In summary, we concluded that hassling past the various obstacles is a feat worth working for, as it stands not just as a mechanism for retribution, but also for a precedent for establishment and successful operations of future international tribunals, thereby ensuring international accountability.