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Accountability Mechanisms for War Crimes Committed in Ukraine

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I. EXECUTIVE SUMMARY

This Memorandum considers three broad categories of tribunals with potential jurisdiction for prosecuting atrocity crimes in Ukraine committed during the current stage of war that Russia has been waging against Ukraine.¹

First, international (permanent and ad hoc) and hybrid courts provide jurisdiction separate from a state. The International Criminal Court (“ICC”) is an intergovernmental organization and a permanent independent and impartial tribunal capable of prosecuting the atrocities in Ukraine. It was established as a court of last resort to complement national judicial systems. It lacks universal territorial jurisdiction and may prosecute crimes committed within member states or committed by nationals of member states, or crimes referred to it by the United Nations (“UN”) Security Council (the “Security Council”). Ukraine has signed but not ratified the Rome Statute, which was adopted by the UN General Assembly (the “General Assembly”) and entered into force on July 1, 2002 (the “Rome Statute”) of the ICC, and accordingly is not a member, but has accepted its jurisdiction. Russia has also signed but not ratified the Rome Statute and in 2016 withdrew as a party from the Rome Statute. Ad hoc tribunals are likely limited in scope to the crime of aggression which in any event would require Russian cooperation. Hybrid courts allow for the mix of the advantages of a domestic court (such as access to evidence and the accused) with the advantages of an international tribunal (such as political independence), but a hybrid court possibly violates the Ukrainian constitution.²

Second, Ukrainian domestic courts may exercise subject matter jurisdiction over individuals accused of atrocity crimes which were committed within Ukraine’s borders. The primary advantages of this accountability mechanism are the presence of the accused individuals at the time of the crime within Ukraine and the access to evidence of events that occurred within Ukraine’s borders. Ukraine also has universal jurisdiction and may exercise the same authority over crimes of aggression outside its borders as other universal jurisdiction states with the added advantage of enforceability of judgments on parties present in the country. The challenge, however, is the enforceability of Ukraine’s judgments against individuals physically located in Russia, especially high-ranking military officials and Vladimir Putin. Ukraine may hold its trials *in absentia* as it did for former president Victor Yanukovich, but the outcome of a trial without the defendant present is likely to prove difficult to enforce.

Third, universal jurisdiction in other countries allows a foreign government to impose judgments on Russian officials without the alleged acts taking place within its borders. One advantage of universal jurisdiction is that victims and nongovernmental organizations (“NGOs”) may bring each case and choose a forum based on considerations beyond jurisdiction. Yet, the universal jurisdiction of foreign countries may pose an even greater challenge than the universal jurisdiction of Ukraine in enforcing those judgments against convicted parties as there are likely few if any defendants currently in those other countries, unlike the many soldiers currently in Ukraine.

¹ There may be other tribunals with jurisdiction over certain related matters that are not discussed below (for instance, the European Court of Human Rights).

² Please note that nothing contained in this Memorandum constitutes advice under Ukrainian law.

Additionally, many foreign courts are limited in the offences that are subject to universal jurisdiction, availability of evidence, access to defendants, and ability to prosecute crimes without the defendant present.

II. STATEMENT OF PURPOSE

The purpose of the *Accountability Mechanisms for War Crimes Committed in Ukraine* Legal Memorandum is the research of and advice with respect to accountability options for prosecuting perpetrators of atrocity crimes committed in Ukraine during the current stage of the war against Ukraine started by Russia on February 24, 2022. The memorandum will analyze the accessibility of various jurisdictions, across the international and domestic legal spectrum, and evaluate the viability of potential claims, considering the prevailing legal framework of each forum.³

³ There may be other tribunals with jurisdiction over certain related matters that are not discussed below (for instance, the European Court of Human Rights).

III. INTRODUCTION

In February 2014, Russia began its war against Ukraine by capturing, occupying and annexing Crimea, and capturing parts of Donbas by organizing, arming and providing military support (including by using its own military) to separatist groups in the Donetsk and Luhansk regions of Ukraine.

Beginning in November 2013, prompted by the decision of the Ukrainian Government not to sign an Association Agreement with the European Union (the “EU”), protests against the Yanukovich government started growing. It is widely acknowledged that the Yanukovich government was supported by Russia and that his decision not to conclude the agreement with the EU aimed to protect Ukraine-Russia relations, as Russia fiercely opposed any actions by Ukraine to join the EU and the North Atlantic Treaty Organization (“NATO”). Demonstrations were violently repressed, resulting in death of many protesters. In February 2014, the Ukrainian parliament voted to remove President Yanukovich and established a new government. In late February 2014, Russia instigated demonstrations against the new government in the eastern regions of the state and in Simferopol, the capital of the Autonomous Republic of Crimea. Also in February 2014, Russian military personnel without distinctive insignias and locally-resident militia members took control of the Crimean Peninsula and of key government buildings in several eastern provinces. According to a disputed Crimean status referendum held on March 16, 2014, 97% allegedly voted to join Russia.⁴ On March 18, 2014, Russia announced the annexation of Crimea and it has continued exercising effective control over Crimea since then.

In late April 2014, the Ukrainian government announced that it was no longer in control of the eastern provinces of Donetsk and Luhansk after Russian troops, intermingled with separatists, started an undeclared war in Donbas. Over the course of eight years, Ukrainian government forces and Russian-backed separatists have been fighting for control over Donetsk and Luhansk, effectively, over Donbas.⁵ The situation further escalated on February 21, 2022, when Russia officially recognized the two breakaway regions of Donetsk and Luhansk. On February 24, 2022, Russia started an ongoing full-scale invasion which in little more than a week caused “the fastest-growing refugee crisis since the Second World War,” as declared by the head of the UN refugee agency,⁶ reaching so far approximately 6.5 million refugees and more than 9000 civilian casualties, including a notable number of children.⁷

⁴ UN News, *Backing Ukraine’s territorial integrity, UN Assembly declares Crimea referendum invalid*, 1 (Mar. 27, 2014), available at <https://news.un.org/en/story/2014/03/464812-backing-ukraines-territorial-integrity-un-assembly-declares-crimea-referendum>.

⁵ Crisis Group, *Conflict in Ukraine’s Donbas: A Visual Explainer*, available at <https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer>.

⁶ United Nations, *Ukraine: UN Chief Calls for Safe Passage From Conflict Zones, Rights Body Records 1,123 Civilian Casualties, WHO Outlines Health Concerns*, Mar. 6, 2022, available at <https://news.un.org/en/story/2022/03/1113372>.

⁷ Press Release, United Nations Office of the High Commissioner for Human Rights, *Ukraine: Civilian Casualty Update (Jun. 8, 2022)*, <https://www.ohchr.org/en/news/2022/06/ukraine-civilian-casualty-update-8-june-2022>.

In response to the Russian invasion, the US and the EU, among others, have sanctioned Russia and provided military support to Ukraine. In addition, several European countries, especially Poland, have been accepting refugees fleeing from Ukraine. Multiple international judicial and non-judicial institutions have begun efforts to condemn Russia and hold it accountable for the invasion and other international crimes. The ICC has announced it will proceed with an investigation into the war in Ukraine following a referral by 43 states; the Council of Europe's Committee of Ministers decided to suspend the rights of representation of the Russian Federation in the Council of Europe on February 25, 2022 and expelled Russia on March 16, 2022; the General Assembly has passed a resolution condemning the Russian invasion; the International Court of Justice has held hearings regarding Ukraine's request to file provisional measures against Russia, and individual states have started investigations into war crimes.

IV. INTERNATIONAL AND HYBRID COURTS

A. International Criminal Court

The Office of the Prosecutor (“Prosecutor”) for the ICC announced on February 28, 2022 that it would open an investigation into potential war crimes stemming from the war in Ukraine.⁸ In a press release, the Prosecutor stated that the investigation would examine events dating back to 2014 and, given the recent expansion of the war, the investigation would include any new alleged crimes committed within the territory of Ukraine that may fall under ICC jurisdiction.⁹

The ICC, however, is a court of last resort and, as such, lacks primary jurisdiction to adjudicate crimes. The ICC lacks universal territorial jurisdiction and may prosecute crimes committed within member states or committed by nationals of member states, or crimes referred to it by the Security Council. If State Parties (as defined below) are able and willing to perform their own investigations and prosecutions, the ICC will not intervene.¹⁰ If the ICC proceeds with prosecuting atrocity crimes in Ukraine, investigating the actions of Russian individuals will be a challenging task (as it is likely that the current Russian government will oppose an ICC investigation). Even if the ICC completes the investigation and decides to proceed with trying individuals, enforcing a judgement will present additional challenges if the current Russian government remains in power.

1. Background

The ICC is governed by the Rome Statute. As of March 29, 2022, there were 123 state parties to the Rome Statute (each, a “State Party,” and together “State Parties”).¹¹ Some UN member states, including China, India, Indonesia, Iraq, Lebanon, Pakistan, and Turkey, never signed the Rome Statute.¹² Several other states, including Russia, Ukraine, and United States, signed the Rome

⁸ Press Release, International Criminal Court Office of the Prosecutor, Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation” (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁹ Press Release, International Criminal Court Office of the Prosecutor, Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation” (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

¹⁰ *Rome Statute* arts. 1 and 17 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>; Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reedy Kethireddy, & Alyssa T. Yamamoto, *Aiding and Abetting in International Criminal Law*, 104 CORNELL LAW REVIEW 1593, 1625-26 (2019), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4810&context=clr>.

¹¹ Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS, Mar. 28, 2022, available at <https://www.cfr.org/background/role-international-criminal-court>.

¹² Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS, Mar. 28, 2022, available at <https://www.cfr.org/background/role-international-criminal-court>.

Statute, but it was never ratified in their legislatures.¹³ Ukraine has signed but not ratified the Rome Statute of the ICC, and accordingly is not a member, but has accepted its jurisdiction. Russia has also signed but not ratified the Rome Statute, and in 2016 withdrew as a party from the Rome Statute.

The ICC is an independent, international criminal court, which prosecutes the most serious crimes, such as, genocide, crimes against humanity, war crimes, and crimes of aggression. Those who could be prosecuted include anyone who physically commits a war crime, anyone aiding or abetting war crimes, commanders ordering crimes or failing to stop known crimes of their subordinates, and civilian leadership found to be criminally responsible such as state leaders, ministers, or cabinet members.

2. *Jurisdiction and Admissibility*

The ICC can exercise its jurisdiction over the alleged crimes in Ukraine in three ways.¹⁴ First, any State Party to the Rome Statute, irrespective of any involvement in the alleged offense, may request the Prosecutor to carry out an investigation.¹⁵ Second, the Prosecutor may open an investigation on his own initiative after receiving authorization of the judges.¹⁶ The Prosecutor cannot, on his own motion, initiate investigations with respect to states not party to the Rome Statute unless the matter involves nationals of States Parties allegedly involved in committing Rome Statute crimes on the territory of the non-State Party in question. Third, the Security Council may refer a situation to the Prosecutor.¹⁷ The Security Council referrals may also give the ICC jurisdiction over states not party to the Rome Statute. However, a permanent member of the Security Council (*i.e.*, China, France, Russia, United States, and United Kingdom) may veto a resolution to refer a situation to the ICC.¹⁸ For instance, in June 2002, United States sought an exemption from ICC jurisdiction for United States personnel operating in UN peacekeeping operations¹⁹ and in May 2014, Russia and China vetoed the referral of Syria to the ICC.²⁰ It is almost certain that the Security Council

¹³ Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS, Mar. 28, 2022, available at <https://www.cfr.org/backgrounder/role-international-criminal-court>.

¹⁴ *Rome Statute* art. 13 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁵ *Rome Statute* art. 13 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁶ *Rome Statute* art. 13 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁷ *Rome Statute* art. 13 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁸ *Rome Statute* art. 16 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> *Rome Statute*, art. 16.

¹⁹ Human Rights Watch, *World Report*, 515-516 (2003), available at <https://www.hrw.org/legacy/wr2k3/>.

²⁰ U.N. Security Council, 7180th mtg., U.N. Doc. SC/11407 (May 22, 2014), available at <https://www.un.org/press/en/2014/sc11407.doc.htm>.

will not refer the war in Ukraine to the ICC since Russia, and likely China, would exercise their veto powers to halt any such referral. Pursuant to Article 16 of the Rome Statute, the Security Council may ask the ICC to defer investigation of a case for 12 months if it considers that the proceedings would constitute an obstruction to its powers, but such a resolution is just as unlikely due to the veto powers of the United States, United Kingdom, and France.

In addition to the above criteria, a state may accept the jurisdiction of the ICC on an ad hoc basis, by submitting a declaration pursuant to article 12(3) of the Rome Statute.²¹

Ukraine is not a State Party to the Rome Statute, but pursuant to article 12(3) of the Rome Statute it has twice accepted jurisdiction of the ICC over alleged crimes under the Rome Statute occurring on its territory. The first declaration lodged by the government of Ukraine accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from November 21, 2013 to February 22, 2014.²² The second declaration extended this time period on an open-ended basis to encompass ongoing alleged crimes committed throughout the territory of Ukraine from February 20, 2014 onwards.²³ It is aimed at the war in Eastern Ukraine and the Russian aggression.²⁴ Since 2014, the ICC has been conducting a preliminary examination into the war in Ukraine.²⁵ In the preliminary examination, the Prosecutor had found a reasonable basis to believe that crimes within the jurisdiction of the ICC were committed in Ukraine.²⁶

On February 21, 2022, Russia officially recognized two self-proclaimed separatist states in eastern Ukraine – the so-called Donetsk People’s Republic and Luhansk People’s Republic – and this time

²¹ *Rome Statute* art. 12 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

²² Press Release, International Criminal Court, Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014 (Sept. 8, 2015), <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014>.

²³ Declaration of Pavlo Klimkin, Verkhovna Rada of Ukraine, to Herman von Hebel, Registrar of International Criminal Court (Sept. 8, 2015), available at https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

²⁴ Declaration of Pavlo Klimkin, Verkhovna Rada of Ukraine, to Herman von Hebel, Registrar of International Criminal Court (Sept. 8, 2015), available at https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

²⁵ *Information for Victims Ukraine*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/victims/ukraine> (last visited Jun. 29, 2022).

²⁶ Press Release, International Criminal Court Office of the Prosecutor, Statement of the ICC Prosecutor Karim A.A. Khan QC on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

openly sent its troops into those territories.²⁷ On February 24, 2022, Russia invaded Ukraine.²⁸ On February 28, 2022, the Prosecutor announced that his office would open an investigation into potential war crimes stemming from the war in Ukraine.²⁹ On March 2, 2022, the Prosecutor made the decision to exercise jurisdiction and investigate any acts of genocide, crimes against humanity, or war crimes committed within Ukraine, after receiving referrals from 43 State Parties.³⁰ The Ukrainian declarations and State Party referrals provide the ICC with jurisdiction to investigate criminal conduct covered by the Rome Statute that occurs on the territory of Ukraine or is committed by a Ukrainian citizen.³¹

The alleged crimes must satisfy fundamental jurisdictional requirements of the Rome Statute, which are (i) temporal jurisdiction (*i.e.*, when the crimes were committed), (ii) subject-matter jurisdiction (*i.e.*, what crimes are covered), and (iii) personal jurisdiction (*i.e.*, jurisdiction over the defendant because of where the crimes were committed or who committed them). The Prosecutor must determine that the information available provides a reasonable basis to believe that a crime within ICC jurisdiction has been or is being committed.

a. Temporal Jurisdiction

In general, the ICC may exercise jurisdiction in a situation where genocide, crimes against humanity, or war crimes were committed on or after July 1, 2002.³² However, if a state ratified the Rome Statute after May 1, 2002, the ICC then has jurisdiction over that state on the first day of the month after the 60th day following the deposit by the state of its instrument of ratification, acceptance, approval, or accession.³³ For states, such as Ukraine, that accept the jurisdiction of the ICC by a declaration in accordance with Article 12(3) of the Rome Statute, the ICC may exercise jurisdiction over atrocity crimes committed in that state from the date of such

²⁷ Sammy Westfall and Claire Parker, *Why is Ukraine's Donbas Region a Target for Russian Forces?* THE WASHINGTON POST, May 3, 2022, available at <https://www.washingtonpost.com/world/2022/02/21/what-is-donbas-donetsk-luhansk-conflict/>.

²⁸ Sammy Westfall and Claire Parker, *Why is Ukraine's Donbas Region a Target for Russian Forces?* THE WASHINGTON POST, May 3, 2022, available at <https://www.washingtonpost.com/world/2022/02/21/what-is-donbas-donetsk-luhansk-conflict/>.

²⁹ Press Release, International Criminal Court Office of the Prosecutor, Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation" (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

³⁰ *Situations Under Investigations*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/situations-under-investigations> (last visited Jun. 29, 2022).

³¹ *Rome Statute* art. 12(2) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³² *Rome Statute* art. 5 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³³ *Rome Statute*, art. 126 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

declaration.³⁴ The Ukrainian declarations establish that the ICC does have temporal jurisdiction over Ukraine, as the second declaration submitted by Ukraine applies to acts committed on the territory of Ukraine since February 20, 2014.³⁵

b. Subject Matter Jurisdiction

The ICC has jurisdiction over four categories of crimes under international law: (i) genocide, (ii) war crimes, (iii) crimes against humanity, and (iv) crimes of aggression.³⁶

i. Genocide

Genocide may be prosecuted under Article 6 of the Rome Statute. The crime of genocide requires the intent to destroy in whole or in part a national, ethnic, racial, or religious group along with prohibited acts.³⁷ The following acts could constitute genocide if done so with the intent to destroy in whole or in part the group and in the context of a manifest pattern of similar conduct directed against that group or itself could affect such destruction: (i) killing Ukrainian persons, (ii) causing serious bodily or mental harm to Ukrainian persons, (iii) deliberately inflicting on Ukrainian persons conditions of life calculated to bring about physical destruction in whole or in part, (iv) imposing measures intended to prevent births within Ukrainian persons, or (v) forcibly transferring Ukrainian children to another group.³⁸

ii. Crimes Against Humanity

Crimes Against Humanity may be prosecuted under Article 7 of the Rome Statute. Russia's invasion of Ukraine likely involves crimes against humanity.³⁹ Crimes against humanity are serious violations committed with the knowledge or intent for the conduct to be part of widespread or systematic attack against a civilian population, including murder, extermination, rape, imprisonment, slavery, enforced disappearances, enslavement (particularly of women and

³⁴ *Rome Statute* art. 11(2) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³⁵ Declaration of Pavlo Klimkin, Verkhovna Rada of Ukraine, to Herman von Hebel, Registrar of International Criminal Court (Sept. 8, 2015), available at https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf.

³⁶ *Rome Statute* art. 6 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³⁷ *Rome Statute* art. 6 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³⁸ *Rome Statute* art. 6 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

³⁹ Human Rights Watch, *UN: Support Impartial Justice for War Crimes in Ukraine*, Apr. 27, 2022, available at <https://www.hrw.org/news/2022/04/27/un-support-impartial-justice-war-crimes-ukraine>.

children), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, torture, apartheid, deportation, or other inhumane acts.⁴⁰

The terms “widespread” or “systematic” apply to the attack as a whole, not individual acts such as murder or persecution.⁴¹ “Widespread” refers to the number of victims or geographical scope.⁴² “Widespread” means a large-scale attack that is massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.⁴³ A “widespread” attack can also mean an attack carried out over a small or large geographical area, but either way directed against a large number of civilians.⁴⁴

A “systematic” attack refers to the organized nature of the acts of violence through a pattern of crimes.⁴⁵ The act must be pursuant to or in furtherance of a state or organizational policy to commit an attack against a civilian population. Other factors that may be considered to determine whether an attack was systematic are the involvement of substantial public or private resources and the implication of high-level political and/or military authorities.⁴⁶ An attack that is planned, directed, or organized will constitute a “systematic” attack.⁴⁷

⁴⁰ *Rome Statute* art. 7 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁴¹ *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 94 (Mar. 31, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

⁴² *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 95 (Mar. 31, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

⁴³ *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 83 (Jun. 15, 2009), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁴⁴ *The Prosecutor v. Katanga and Ngudjolo*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, para. 394 (Sept. 30, 2008), available at http://www.worldcourts.com/icc/eng/decisions/2008.09.30_Prosecutor_v_Katanga.htm. *Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the confirmation of charges, para. 394 (Sept. 30, 2008), available at http://www.worldcourts.com/icc/eng/decisions/2008.09.30_Prosecutor_v_Katanga.htm.

⁴⁵ *Situation in the Republic of Cote D'Ivoire*, Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, para. 96 (Oct. 3, 2011), available at <https://www.legal-tools.org/doc/7a6c19/pdf>.

⁴⁶ *The Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana, paras. 23-25 (Dec. 16, 2011), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_06674.PDF.

⁴⁷ *The Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-3436, Judgment pursuant to article 74 of the Statute, para. 1109 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

iii. War Crimes

War crimes may be prosecuted under Article 8 of the Rome Statute. War crimes are prohibited conduct committed against protected persons with intent or knowledge during an armed conflict.

For international armed conflicts, such as the war between Russia and Ukraine, prohibited conduct includes grave breaches of the Geneva Conventions of August 12, 1949 (the “Geneva Conventions”) as listed in Article 8(2)(a) of the Rome Statute or other serious violations of international humanitarian law as listed in Article 8(2)(b) of the Rome Statute, including prohibitions on torture, the use of child soldiers, the killing or torture of persons such as civilians or prisoners of war, intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science, or charitable purposes.⁴⁸

The following actions by the Russian military are likely to constitute war crimes: targeting civilian infrastructure including apartment buildings, hospitals, factories, stores, churches, schools, and cultural sites, and using tactics to starve civilians into surrender or to force them to flee as refugees. For instance, the alleged atrocious crimes committed in the city of Bucha, as well as a missile attack on a shopping center in Kremenchuk, would constitute war crimes.⁴⁹ Also, the use of a weapon of mass destruction (such as a tactical nuclear weapon), which Russian President Vladimir Putin and Foreign Minister Sergei Lavrov have implied is a possibility, could constitute a war crime because of the disproportionate targeting of civilians and resulting unnecessary suffering and damage to civilian lives and property.⁵⁰

iv. Crimes of Aggression

Crimes of aggression may be prosecuted under Article 8 bis 2 of the Rome Statute if the perpetrator planned, prepared, initiated, or executed an act of aggression. This includes the use or threat of armed force by a state against the territorial integrity, sovereignty, or political independence of another state, or violations of the UN Charter.⁵¹ The Rome Statute provides distinct jurisdictional requirements for the investigation and prosecution of the crime of aggression depending on whether the crime was referred to the ICC by a State Party, the Security Council, or the investigation was launched by the Prosecutor on his own initiative.

Article 15 bis of the Statute defines the jurisdictional command applicable to situations when the ICC Prosecutor investigates and prosecutes acts of aggression either (i) through a referral by a

⁴⁸ *Rome Statute* art. 8 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁴⁹ Rory Sullivan, *Chief ICC prosecutor declares Ukraine a ‘crime scene’ after visiting Bucha to investigate Russia’s war*, THE INDEPENDENT, Apr. 14, 2022, available at <https://www.independent.co.uk/news/world/europe/icc-investigation-bucha-war-crimes-b2057997.html>.

⁵⁰ Shannon Bugos, *Putin Orders Russian Nuclear Weapons on Higher Alert*, ARMS CONTROL TODAY, Mar. 2022, available at <https://www.armscontrol.org/act/2022-03/news/putin-orders-russian-nuclear-weapons-higher-alert>.

⁵¹ *Rome Statute* art. 8 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

State Party to the Prosecutor, or (ii) on the Prosecutor’s own initiative. In these situations, the ICC may exercise its jurisdiction over the crime of aggression if it was committed by the nationals or on the territory of a State Party to the Rome Statute that has ratified the Kampala Resolution if the relevant act occurs one year after the date of ratification. The ICC is unable to exercise jurisdiction over the crime of aggression if the crime was committed by the nationals or on the territory of a State Party that did not ratify the Statute.

Article 15 of the Rome Statute allows the ICC to exercise its jurisdiction over the crime of aggression committed in the territory and by the nationals of any State Party when it is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter. In this situation, there is no requirement for the involved state to consent to the investigation or prosecution, and so the ICC may exercise its jurisdiction irrespective of whether the state in question is a party to the Rome Statute and has ratified the Kampala Resolution.

The ICC has jurisdiction over the alleged crimes in Ukraine pursuant to Ukraine’s declaration in accordance with Article 12(3) and a referral from several State Parties. However, since Russia has not ratified the Rome Statute, the ICC is unable to exercise jurisdiction over the crime of aggression in Ukraine.

c. Personal Jurisdiction

The ICC prosecutes only natural persons.⁵² The ICC cannot investigate or prosecute governments, corporations, political parties, or states.⁵³ For an individual to be prosecuted by the ICC either territorial jurisdiction or personal jurisdiction must exist. Therefore, an individual can only be prosecuted if he or she (i) commits a crime and is an individual who is a national of a State Party, (ii) commits a crime in the territory of a State Party or a state that has accepted ICC jurisdiction, or (iii) commits a crime in a state for which there has been Security Council referral.⁵⁴ Although Russian citizens are not individuals from a State Party, Ukraine accepted the jurisdiction of the ICC in accordance with Article 12(3). Therefore, the ICC may prosecute individuals who commit atrocity crimes within the territory of Ukraine.

d. Admissibility

Even when the temporal, territorial, subject matter, and personal jurisdictional requirements are satisfied, the Rome Statute limits the types of cases that may be “admissible” at the ICC. To assess whether the alleged crimes committed in Ukraine are admissible at the ICC, the Prosecutor must determine whether (i) the alleged crimes are the gravest of crimes, (ii) the investigation would be

⁵² *Rome Statute* arts. 25-26 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁵³ International Criminal Court, *Understanding the International Criminal Court*, 2020, available at <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

⁵⁴ *How the Court Works*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/about/how-the-court-works> (last visited Jun. 29, 2022).

consistent with the principle of complementarity, and (iii) the investigation would serve the interests of justice.⁵⁵

The ICC will only initiate proceedings if a crime is of sufficient gravity to justify further action by the Court.⁵⁶ The gravity of crimes is determined by the scale, nature, manner, and impact of the alleged crimes.⁵⁷ For instance, the ICC found that the killing of 12 African Union peacekeepers by Sudanese rebels, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, was an attack on the millions of civilians that the peacekeepers were sent to protect. The ICC concluded that in that instance, the gravity threshold was satisfied.⁵⁸ Such gravity analysis will have to be performed for each individual that will be investigated by the ICC. Considering the number of attacks and crimes of atrocities that have been allegedly committed in Ukraine and the number of Ukrainian civilians that have been affected by the alleged atrocity crimes, the threshold requirement of gravity is likely to be satisfied.

According to the principle of complementarity, a case is inadmissible if a state with jurisdiction over a crime is either investigating or prosecuting such crime, or the state with jurisdiction over a crime has completed the investigation and decided not to prosecute, unless the investigating state is unwilling or unable to carry out the investigation or prosecute the case.⁵⁹ As discussed in more detail below, Ukrainian courts or another tribunal may be better suited to prosecute atrocity crimes committed in Ukraine. In that case, prosecuting the same crimes in the ICC would be inadmissible.

Even if the Prosecutor has initiated an investigation and there are substantial facts to warrant a prosecution and there are no other admissibility issues, the Prosecutor must determine whether a prosecution would serve the interests of justice.⁶⁰ The Prosecutor must consider all of the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.⁶¹ Even when the jurisdictional and admissibility requirements are met, the Prosecutor has the discretion to not move forward if

⁵⁵ *Rome Statute* art. 53 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁵⁶ *Rome Statute* art. 17(1)(d) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁵⁷ *How the Court Works*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/about/how-the-court-works> (last visited Jun. 29, 2022).

⁵⁸ *The Prosecutor v. Banda and Mohammed*, Case No. ICC-02/05-03/09-121, Corrigendum of the Decision on the Confirmation of Charges, para. 27 (Mar. 7, 2011), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_02580.PDF.

⁵⁹ *Rome Statute* arts. 17-18 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶⁰ *Rome Statute* art. 53(1)(c) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶¹ *Rome Statute* art. 53(2)(c) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

prosecuting the case in the ICC would not serve the interests of justice, see the *Recent Case Study – ICC and the United States* section below.

3. *Modes of Liability*

Article 25(3)(a) of the Rome Statute provides for the modes of liability, direct and indirect, applicable before the ICC. To establish criminal responsibility for the crimes of genocide, crimes against humanity or war crimes, the alleged perpetrator must have been involved in the crime in a specific manner. There are five main modes of liability under the Rome Statute, which are: (i) those which involve commission of the crime individually, jointly with or through another person, (ii) ordering, soliciting or inducing commission, (iii) otherwise assisting or aiding and abetting the commission of the crime, (iv) contributing to the commission or attempted commission by a group of persons acting with a common purpose, and (v) responsibility as a commander or superior.⁶² The Prosecutor's policy is to focus on those who bear the greatest responsibility for the crimes, according to the evidence gathered, which is most often the higher-ranking military officers and/or the rulers who make every effort to cover up their responsibility for the crimes.⁶³ Below is a summary of the different modes of liability and the type of individuals that may be prosecuted by the ICC for atrocity crimes in Ukraine.

Individual commission of a crime involves the direct physical commission of a criminal act where an individual physically carries out a crime enumerated in the Rome Statute with a particular mental state.⁶⁴ Joint commission of a crime is when a crime is committed by an individual acting jointly with another.⁶⁵ To prove that an accused committed a crime through another individual, it must be established that: (i) he or she exercised control over the crime carried out by one or several persons, (ii) he or she had intent and knowledge pursuant to Article 30 of the Rome Statute, and a specific subjective element when required by a particular crime, and (iii) he or she was aware of the factual circumstances enabling him or her to exercise control over the crime.⁶⁶

⁶² *Rome Statute* art. 25 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶³ International Criminal Court, *Understanding the International Criminal Court*, 2020, available at <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>; Hans-Peter Kaul, *The International Criminal Court – Current Challenges and Perspectives*, 9 (Aug. 8, 2011), available at <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/289B449A-347D-4360-A854-3B7D0A4B9F06/283740/010911SalzburgLawSchool.pdf>.

⁶⁴ *The Prosecutor v. Lubanga*, Case No. ICC-01-04-01-06-803, Decision on the confirmation of charges, para. 332 (Jan. 29, 2007), available at https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

⁶⁵ *The Prosecutor v. Lubanga*, Case No. ICC-01-04-01-06-803, Decision on the confirmation of charges, para. 332 (Jan. 29, 2007), available at https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

⁶⁶ *The Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, para. 1399 (Mar. 7, 2014), available at https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

To prove indirect co-perpetration, a common plan must be established.⁶⁷ The accused individuals must be mutually aware and accept that implementing their common plan will result in the realization of the objective element of the crimes.⁶⁸ The accused individuals must also be aware of the factual circumstances that allow for joint control over the crimes.⁶⁹

To prove that an accused instigated a crime, the following elements must be fulfilled: (i) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out, (ii) the inducement has a direct effect on the commission or attempted commission of the crime, and (iii) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realization of the act or omission.⁷⁰ Article 25(3)(b) of the Rome Statute refers to ordering the commission of a crime, which means directing a person to commit an offence.⁷¹

Article 25(3)(c) of the Rome Statute dictates that aiding and abetting involves the facilitation of an offence. An individual aiding and abetting a crime must materially assist the commission of such crime, and that assistance must have furthered, advanced, or facilitated the commission of such offence.⁷²

To prove that an accused contributed to commission or attempted commission of a crime, it must be proven that: (i) a crime within the jurisdiction of the ICC has been attempted or committed, (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose, and (iii) the individual contributed to the crime in any way other

⁶⁷ *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, para. 104-135 (Jun. 9, 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF.

⁶⁸ *The Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 333 (Jan. 23, 2012), available at https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF.

⁶⁹ *The Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 333 (Jan. 23, 2012), available at https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF.

⁷⁰ *Rome Statute* art. 25(3)(b) (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>; see also *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, para. 153 (Jun. 9, 2014), available at https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF.

⁷¹ *The Prosecutor v. Mudacumura*, Case No. ICC-01/04-01/12-1-Red, Decision on the Prosecutor's Application under Article 58, para. 63 (Jul. 13, 2012), available at https://www.icc-cpi.int/CourtRecords/CR2012_07502.PDF.

⁷² *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/13, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled Judgment pursuant to Article 74 of the Statute, para. 94 (Oct. 19, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_01638.PDF.

than those set out in Article 25(3)(a) to (c) of the Rome Statute.⁷³ It must be established that: (i) the contribution was intentional, and (ii) was made with the aim of furthering the criminal activity or criminal purpose of the group or with the knowledge of the intention of the group to commit the crime.⁷⁴

To prove that a superior or a commander is responsible for the crimes of his or her subordinates, it must be established beyond reasonable doubt that: (i) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime, (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed, and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator for such act.⁷⁵ Therefore, a failure to take action by a military commander against murder and rape, for instance, may make such commander personally responsible for war crimes as a matter of command responsibility.

Russia's president, Vladimir Putin, could be held responsible for any crimes committed by Russia's military, security services and any other Russian state agencies. The ICC may also focus on the actions of other individuals, including President Putin's generals (such as Gen. Valery Gerasimov, Russia's highest-ranking uniformed officer), the Foreign Minister of Russia, Sergey V. Lavrov, and the president of the Republic of Belarus, Alexander G. Lukashenko.⁷⁶

According to Article 27, there is no immunity from prosecution or criminal responsibility for those acting in an official capacity as a head of state, member of government or parliament or as an elected representative or public official.⁷⁷ The situation is different when it comes to an official of a non-State Party. Personal immunity is a bar for the exercise of jurisdiction by the ICC regarding non-State Party officials unless the Security Council has set aside that individual's personal immunity through its power under Chapter VII of the UN Charter.⁷⁸ The ICC may not, without first obtaining a waiver of immunity, request a State Party to arrest and surrender an

⁷³ *The Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 421, (Jan. 23, 2012), available at https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF.

⁷⁴ *The Prosecutor v. Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para. 333, (Jan. 23, 2012), available at https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF.

⁷⁵ *Rome Statute* art. 28 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁷⁶ Belarus has neither signed nor ratified the Rome Statute. Therefore, the ICC will likely face the same issues relating to jurisdiction, gathering of evidence and enforcement of a verdict if it opens an investigation into possible war crimes committed by Belarus in Ukraine. See *State Parties to the ICC*, INTERNATIONAL CRIMINAL COURT PROJECT (2022), available at <https://www.aba-icc.org/about-the-icc/state-parties-to-the-icc/> (last visited Jun. 29, 2022).

⁷⁷ *Rome Statute* art. 27 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁷⁸ U.N. Charter arts. 39-51 (Oct. 24, 1945), available at <https://www.un.org/en/about-us/un-charter/chapter-7>.

official of a non-State Party, unless the Security Council referred the situation to the ICC.⁷⁹ For instance, the ICC issued two arrest warrants, one in 2009 and one in 2010, for Omar Al Bashir – Sudan’s then-sitting Head of State – for crimes committed in Darfur.⁸⁰ Disregarding the arrest warrants, Al Bashir travelled extensively in the years following those arrest warrants, including to several States Parties, such as Jordan and Malawi.⁸¹ Those State Parties did not make any attempts to arrest Al Bashir and instead claimed that Al Bashir is immune from arrest because he was the head of state.⁸² When Al Bashir travelled to Belarus, the ICC issued an official request to the government of Belarus for cooperation in the arrest and surrender of Al Bashir.⁸³ Belarus did not cooperate with the ICC.

The ICC does not try individuals unless they are present in the courtroom.⁸⁴ Even though it has been over ten years since the ICC issued arrests warrants for Al Bashir, the case will remain in the pre-trial stage until Al Bashir is arrested and transferred to the ICC.⁸⁵ Similarly, Vladimir Putin, Valery Gerasimov, Sergey Lavrov, Alexander Lukashenko, and other officials are likely to claim personal immunity. Since the Security Council has not referred this situation to the ICC and Russia is not a State Party, there is likely to be an issue of personal immunity.

4. Recent Case Study – ICC and the United States

In dealing with influential global powers, the ICC is demonstrably limited in its ability to investigate and prosecute subjects of those powers. This is true even when preliminary investigations conclude that evidence is sufficient and that the case is admissible. In fact, the ICC can and has determined that a case is “not in the interest of justice”⁸⁶, based partially on the concession that there is little cooperation expected from the states involved.

⁷⁹ *The Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_07156.PDF.

⁸⁰ *Al Bashir Case*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/darfur/albashir> (last visited Jun. 29, 2022).

⁸¹ Human Rights Watch, *ICC: Jordan Was Required to Arrest Sudan’s Bashir*, May 6, 2019, available at <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir>.

⁸² Human Rights Watch, *ICC: Jordan Was Required to Arrest Sudan’s Bashir*, May 6, 2019, available at <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir>.

⁸³ *The Prosecutor v. Al-Bashir*, Case No. ICC-02/05-01/09, Request to the Republic of Belarus for Cooperation in the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, para. 2 (Dec. 4, 2018), available at <https://www.dabangasudan.org/uploads/media/5c0bb662ebfea.pdf>.

⁸⁴ *Al Bashir Case*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/darfur/albashir> (last visited Jun. 29, 2022).

⁸⁵ *Al Bashir Case*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/darfur/albashir> (last visited Jun. 29, 2022).

⁸⁶ *Situations & Cases – Overview*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/situations-cases-overview/> (last visited May 16, 2022).

In November 2017, the Prosecutor advised the ICC to consider seeking charges for atrocity crimes committed during the war in Afghanistan by the United States Armed Forces and the Central Intelligence Agency, the Taliban, and the Afghan National Security Forces.⁸⁷ The investigation of the situation in Afghanistan stemmed from the 9/11 attacks by Al-Qaeda, and the subsequent War on Terror, led by the United States.⁸⁸ The investigation “focuse[d] on alleged atrocity crimes committed during the ongoing armed conflict which involves international military forces (International Security Assistance Force (ISAF), North Atlantic Treaty Organization (NATO) forces, U.S. forces), Afghan government forces, and armed anti-government groups such as the Taliban.”⁸⁹ After a protracted preliminary examination (June 2006 – December 2017), the ICC Pre-Trial Chamber judges declined to authorize an investigation, anticipating lack of support from the states involved.⁹⁰

Nevertheless, the decision was appealed, and in 2020 an investigation was unanimously approved.⁹¹ Following this decision, the United States not only declined to cooperate with the ICC in the investigation, but the President of the United States also put in place measures with real consequences for “those responsible for the ICC’s transgressions”⁹², declaring a National Emergency, and a range of sanctions against the ICC and numerous affiliated individuals:

I therefore determine that any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States, or of personnel of states that are United States allies and who are not parties to the Rome Statute or have not otherwise consented to ICC jurisdiction, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.⁹³

This shielding seems to extend beyond borders (for instance, as the US Executive Order does not limit the ICC’s actions as threats to national security of the United States only if carried out on United States soil, but rather if they are carried out against United States nationals, regardless of location). Actions such as these present significant barriers to the efficacy of ICC investigations.

⁸⁷ *Afghanistan*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/state/afghanistan/> (last updated May 10, 2021).

⁸⁸ *Afghanistan*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/state/afghanistan/> (last updated May 10, 2021).

⁸⁹ *Situations & Cases – Overview*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/situations-cases-overview/> (last visited May 16, 2022).

⁹⁰ *Situations & Cases – Overview*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/situations-cases-overview/> (last visited May 16, 2022).

⁹¹ *Situations & Cases – Overview*, INTERNATIONAL CRIMINAL COURT PROJECT, available at <https://www.aba-icc.org/about-the-icc/situations-cases-overview/> (last visited May 16, 2022).

⁹² Exec. Order No. 13928, 85 C.F.R. 36139 (Jun. 11, 2020), available at <https://www.federalregister.gov/d/2020-12953/p-2-->.

⁹³ Exec. Order No. 13928, 85 C.F.R. 36139 (Jun. 11, 2020), available at <https://www.federalregister.gov/d/2020-12953/p-2-->.

The preceding example shows that an investigation will only have traction if the current government of the state whose nationals are alleged perpetrators of crimes that fall within the jurisdiction of the ICC is also interested in prosecuting such nationals. If the current government is friendly towards the alleged perpetrators, the state has significant ability to shield them from the ICC. At the Security Council meeting held on June 2, 2022, the Permanent Representative of Russia to the United Nations, Vasily Nebenzya, pointed out that the United States introduced personal sanctions on the former prosecutor of the ICC, and so “crimes by United Kingdom and United States troops in Iraq and Afghanistan were de-prioritized by the new prosecutor.”⁹⁴ This indicates that it is unlikely that Russia’s current government will be open to the ICC investigation.

Moreover, a state taking measures to shield its nationals can be weaponized and used to intimidate and discourage investigators and other ICC affiliates through threats to their own freedoms, such as freedoms to travel, and the possession of assets in the state. The language of the US Executive Order is designed to demonstrate a level of power that can ignore the ICC and its processes wholesale. Considering the rhetoric put forth by Russia’s President Vladimir Putin,⁹⁵ with respect to actions of other states supporting Ukraine, it is important to consider whether Russia will declare an ICC investigation as a threat and a pretext for retaliation.

5. *Advantages of the ICC*

There are several advantages in prosecuting atrocity crimes in the ICC over doing so in a domestic court.

Independent and Impartial – The Prosecutor and the ICC judges are independent from governments and from the Security Council. Therefore, the ICC may be more impartial than a domestic court because it does not have any links to the territory or the state where the crimes were perpetrated.⁹⁶ Moreover, since the ICC is independent in carrying out its function, the Prosecutor has the power to initiate an investigation even though Russia has not ratified the Rome Statute.

Support from Other States – The war in Ukraine has resulted in the highest level of support for the ICC since its creation.⁹⁷ State Parties and non-State Parties have stepped up to support investigative efforts through financial resources and intelligence.⁹⁸ Even states that have refused

⁹⁴ UN Meetings Coverage and Press Releases, *Security Council Must Strengthen, Uphold Responsibility to Ensure Accountability When International Law Is Violated, Speakers Stress in All-Day Debate*, 1 (Jun. 2, 2022), available at <https://www.un.org/press/en/2022/sc14919.doc.htm>.

⁹⁵ *Putin Says Western Sanctions Are Akin to Declaration of War*, REUTERS, (Mar. 5, 2022), available at <https://www.reuters.com/world/europe/putin-says-western-sanctions-are-akin-declaration-war-2022-03-05/>.

⁹⁶ Antonio Cassese and Paola Gaeta, CASSESE’S INTERNATIONAL CRIMINAL LAW 267 (2013).

⁹⁷ Lauren Baillie, *Will the Ukraine War Renew Global Commitments to the International Criminal Court?* UNITED STATES INSTITUTE OF PEACE (Apr. 28, 2022), available at <https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court>.

⁹⁸ Lauren Baillie, *Will the Ukraine War Renew Global Commitments to the International Criminal Court?* UNITED STATES INSTITUTE OF PEACE, Apr. 28, 2022, available at

to cooperate with the ICC in the past, such as the United States, have been supportive of the ICC's efforts. This widespread response may strengthen the ICC's ability to deliver accountability to perpetrators and justice to victims in Ukraine.⁹⁹

Resources – The ICC may have access to more financial resources than Ukraine's domestic courts, for example. First, each State Party contributes funds to the ICC.¹⁰⁰ In 2021, the ICC's annual budget was approximately \$170 million.¹⁰¹ Second, private companies like Microsoft have agreed to support ICC efforts to store, analyze and maintain the security of collected evidence.¹⁰² Therefore, prosecuting case of alleged crimes committed in Ukraine in the ICC may allow for access to additional resources (financial and expertise) that may be readily available to domestic courts.

6. *Disadvantages of the ICC*

There are several disadvantages to bringing a case in the ICC.

Obtaining Evidence – The ICC relies on State Parties to assist with investigations.¹⁰³ However, as mentioned above, many states are not members of the ICC, including China, Russia, and the United States. Moreover, Russia withdrew from the ICC in 2016.¹⁰⁴ Russia has no legal obligation to cooperate with the ICC and it is unlikely that it would hand over suspects for trial or prosecution.

<https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court>

⁹⁹ Lauren Baillie, *Will the Ukraine War Renew Global Commitments to the International Criminal Court?* UNITED STATES INSTITUTE OF PEACE, Apr. 28, 2022, available at <https://www.usip.org/publications/2022/04/will-ukraine-war-renew-global-commitments-international-criminal-court>.

¹⁰⁰ *Rome Statute* art. 115 (International Criminal Court, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁰¹ Assembly of States Parties, *Proposed Programme Budget for 2022 of the International Criminal Court*, INTERNATIONAL CRIMINAL COURT, Aug. 16, 2021, available at https://asp.icc-cpi.int/sites/default/files/iccdocs/asp_docs/ASP20/ICC-ASP-20-10-ENG.pdf.

¹⁰² Doughty Street Chambers, *Government of Ukraine Announces the Creation of a Legal Task Force on Accountability for Crimes Committed in Ukraine*, Mar. 29, 2022, available at <https://www.doughtystreet.co.uk/news/government-ukraine-announces-creation-legal-task-force-accountability-crimes-committed-ukraine>.

¹⁰³ Katherine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 Human Rights Brief 21, 24 (2010), available at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1116&context=hrbrief>.

¹⁰⁴ Reuters, *Russia Withdraws Backing for International Criminal Court Treaty*, (Nov. 16, 2016), available at <https://www.reuters.com/article/us-russia-icc-withdrawal/russia-withdraws-backing-for-international-criminal-court-treaty-idUSKBN13B1KJ>.

Therefore, the ICC may not have the necessary access to evidence and perpetrators to proceed with this case.¹⁰⁵

Length of the Procedure – ICC cases can take several decades. For instance, Bosco Ntaganda (Former Deputy Chief of Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo) was charged for war crimes that he allegedly committed in 2002-2003.¹⁰⁶ In July 2019, the ICC Trial Chamber found Bosco Ntaganda guilty and sentenced him to 30 years of imprisonment.¹⁰⁷ In March 2021, the ICC delivered its Order on Reparations to victims against Bosco Ntaganda to be made through the Trust Fund for Victims.¹⁰⁸ Overall, it took almost 20 years to deliver justice to the victims in that case.

Cooperation from State Parties and Non-State Parties – The ICC does not have sufficient instruments that are essential in many legal systems, such as subpoena powers, to make a case. There is not a lot of *proprio motu* activity on the states to help the ICC.¹⁰⁹ When the ICC is investigating people in governments, the cooperation from those governments is often minimal.¹¹⁰ The success of bringing justice to Ukrainian victims through prosecuting atrocity crimes in the ICC will largely depend on cooperation from the other states. The mass State Party referral of the war in Ukraine to the ICC indicates that State Parties may be willing to step up and aid the ICC when it comes to arresting and transferring ICC fugitives.

Lack of Enforcement Power – The ICC also relies on State Parties to assist with enforcement. The ICC suffers from pre-trial and post-trial enforcement problem as it depends completely on State Parties to arrest and transfer defendants.¹¹¹ The absence of a police force in the ICC is one of the

¹⁰⁵ Katherine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 Human Rights Brief 21, 24 (2010), available at <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1116&context=hrbrief>.

¹⁰⁶ *Ntaganda Case*, INTERNATIONAL CRIMINAL COURT, available at <https://www.icc-cpi.int/drc/ntaganda> (last visited Jun. 29, 2022).

¹⁰⁷ International Criminal Court, Ntaganda Case Information, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, available at <https://www.icc-cpi.int/drc/ntaganda>.

¹⁰⁸ International Criminal Court, Ntaganda Case Information, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, available at <https://www.icc-cpi.int/drc/ntaganda>.

¹⁰⁹ Samaria Muhammad, Barbora Holá, and Anja Dirkzwager, *Reimagining the ICC: Exploring Practitioners' Perspectives on the Effectiveness of the International Criminal Court*, 21 INTERNATIONAL CRIMINAL LAW REVIEW 126, 139 (2021).

¹¹⁰ Samaria Muhammad, Barbora Holá, and Anja Dirkzwager, *Reimagining the ICC: Exploring Practitioners' Perspectives on the Effectiveness of the International Criminal Court*, 21 INTERNATIONAL CRIMINAL LAW REVIEW 126, 139 (2021).

¹¹¹ Sarah J. Goodman, *The Effectiveness of the International Criminal Court: Challenges and Pathways for Prosecuting Human Rights Violations*, 12 INQUIRIES JOURNAL no. 09, 2020, <http://www.inquiriesjournal.com/articles/1806/the-effectiveness-of-the-international-criminal-court-challenges-and-pathways-for-prosecuting-human-rights-violations#header12page1>; see also Samaria Muhammad, Barbora Holá, and Anja Dirkzwager, *Reimagining the ICC: Exploring Practitioners'*

main obstacles in implementing arrest warrants especially when a state is not willing to apprehend the indicted suspects since the ICC has no reliably effective means to oblige states to cooperate.¹¹² An example of this is the ICC's request to arrest and surrender Sudan's President Omar Al-Bashir, discussed above. Another example is in the case of Mahmoud Mustafa Busayf Al-Werfalli. Mr. Al-Werfalli is alleged to have directly committed and to have ordered the commission of murder as war crimes in Libya.¹¹³ Two arrest warrants have been issued for Mr. Al-Werfalli, one in August 2017 and one in July 2018.¹¹⁴ Nonetheless, the case remains in the pre-trial stage, pending Mr. Al-Werfalli's arrest or voluntary appearance before the ICC.¹¹⁵ Since Russia is not a member of the ICC, enforcing arrest warrants against suspects located on Russian territory is likely to be difficult.

Low Conviction Rates – Over the past 20 years ICC prosecutors have filed charges against military and government leaders in several states. However, the Court has had difficulties bringing many of those military and government leaders to justice. The ICC has indicted more than 40 individuals.¹¹⁶ Seventeen people have been detained, ten have been convicted of crimes, and four have been acquitted.¹¹⁷ The low conviction rates are, in part, due to the disadvantages of the ICC discussed above. Given that the war in Ukraine has been receiving unprecedented support from both State Parties and non-State Parties, this case may be more successful than some of ICC previous cases.

B. Ad Hoc Tribunal

One potential option for an accountability mechanism for perpetrators of crimes arising out of the Russian invasion of Ukraine is the establishment of an ad hoc tribunal under international law. Such a tribunal could establish jurisdiction over crimes of universal jurisdiction – war crimes, crimes against humanity, genocide, and aggression. Historically, ad hoc tribunals have been the primary route through which accountability was pursued under international criminal law. However, with respect to the Russian-Ukrainian war, an ad hoc tribunal is likely an option only if limited in scope to the prosecution of the crime of aggression. Even in such an instance, the

Perspectives on the Effectiveness of the International Criminal Court, 21 INTERNATIONAL CRIMINAL LAW REVIEW 126, 139 (2021).

¹¹² Moses Retselisitsoe Phooko, *How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court*, 1 NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 184, 186 (2011), available at <https://scholarship.law.nd.edu/ndjicl/vol1/iss1/6>.

¹¹³ International Criminal Court, Al-Werfalli Case Information, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case No. ICC-01/11-01/17, available at <https://www.icc-cpi.int/libya/al-werfalli>.

¹¹⁴ International Criminal Court, Al-Werfalli Case Information, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case No. ICC-01/11-01/17, available at <https://www.icc-cpi.int/libya/al-werfalli>.

¹¹⁵ International Criminal Court, Al-Werfalli Case Information, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Case No. ICC-01/11-01/17, available at <https://www.icc-cpi.int/libya/al-werfalli>.

¹¹⁶ Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2022), available at <https://www.cfr.org/backgrounder/role-international-criminal-court>.

¹¹⁷ Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2022), available at <https://www.cfr.org/backgrounder/role-international-criminal-court>.

tribunal would likely face several practical obstacles, as it could not rely on support and enforcement from the Security Council – a crucial aspect in the success of precedent establishments. Moreover, the lack of Russian cooperation with an ad hoc tribunal and the evidentiary challenges specific to the crime of aggression allow for arguments against the viability of this route, which is now being debated both at the academic and institutional level.

1. Background

Ad hoc tribunals in international criminal law trace their roots in the trials held in Nuremberg and Tokyo after World War II. These trials took place in two ad hoc international tribunals: the International Military Tribunal (“IMT”) established by the Nuremberg Charter, and the International Military Tribunal for the Far East (“IMTFE”) established by the Tokyo Charter. Both the IMT and the IMTFE were created, through the respective charters, by the nations that were victorious at the end of the war: the United States, the United Kingdom, France, and the Soviet Union).¹¹⁸ These tribunals have marked the history of international criminal law in many respects. First, they represented the first ever exercise of criminal law outside of national courts, affirming the concept of universal jurisdiction as opposed to territorial jurisdiction – a theory that is now widely used in the context of atrocity crimes by both national and international courts. Second, while there were prior instances of war crimes prosecutions, the IMT and IMTFE were the first instances of prosecutions for crimes against humanity and crimes against peace (now referred to as crimes of aggression). Third, the two tribunals advanced the procedural and theoretical grounds of international criminal law by addressing jurisdictional challenges and legal principles such as *nullum crimen sine lege*, *nulla poena sine lege* and individual responsibility, among others – all principles that are today addressed and codified in the Rome Statute of the ICC.¹¹⁹

Despite the historical relevance of the IMT and IMTFE, the discussion on ad hoc tribunals in today’s debate (including with regards to the war in Ukraine) generally revolves around the two courts established in the 1990s for the prosecution of crimes committed in Rwanda and in the Former Yugoslavia: the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). The two courts, still operating today and merged under the International Residual Mechanism for Criminal Tribunals (“IRMCT”), have handled the largest set of cases and defendants in the history of international criminal law and as such are widely regarded as the most successful attempts in the field thus far. In almost three decades of operations, the ICTY has indicted 161 individuals and sentenced 92, with over 10,800 trial days.¹²⁰ In the same period the ICTR indicted 93 individuals, resulting in 61 convictions.¹²¹

¹¹⁸ Antonio Cassese, INTERNATIONAL CRIMINAL LAW 229-233 (2002).

¹¹⁹ See Rome Statute, art. 22-33.

¹²⁰ International Criminal Tribunal for the former Yugoslavia, *Infographic: ICTY Facts & Figures*, available at <https://www.icty.org/en/content/infographic-icty-facts-figures>.

¹²¹ International Justice Resource Center, *ICTR*, available at <https://ijrcenter.org/international-criminal-law/icty/#:~:text=Overview%20of%20ICTR's%20Mandate%20%26%20Results&text=The%20ICTR%20in%20dicted%2093%20individuals,courts%20in%20Rwanda%20and%20France>.

The courts have subject matter jurisdiction over war crimes, crimes against humanity and genocide, as provided for in their respective statutes.¹²²

Both tribunals were established through resolutions of the Security Council pursuant to its powers under Title VII of the UN Charter.¹²³ Much of the success in establishing and funding the two courts is attributable to the fact that Title VII powers are the most expansive and coercive powers granted to any body of the UN, allowing the Security Council to address threats to international peace and security through measures it deems necessary, and compel all member states to comply with such measures.¹²⁴

The two sub-sections below outline if and how an ad hoc tribunal could be established to investigate and prosecute perpetrators of international crimes in the context of the Russian invasion of Ukraine.

2. *Ad Hoc Tribunal for the Crime of Aggression*

a. *Why Establish an Ad Hoc Tribunal for Aggression Against Ukraine?*

The establishment of an ad hoc tribunal for the crime of aggression against Ukraine is being discussed both at the academic and institutional levels. As now codified in the Rome Statute, the use of armed force by a state against the territorial integrity, sovereignty, or political independence of another state in violation of the UN Charter constitutes a crime of aggression.¹²⁵ Several analysts and academics have described how Russia's actions since the end of February 2022 represent a "textbook example" of the crime of aggression and a violation of the UN Charter,¹²⁶ and have pushed to provide for an accountability mechanism to investigate and prosecute the individuals responsible for the crime.¹²⁷

¹²² Cassese, *supra* at 335-340.

¹²³ Security Council Resolution 827 (May 25, 1993); Security Council Resolution 935 (Jul. 1, 1994).

¹²⁴ United Nations Charter, ch. 7, arts. 39-51 (Oct. 24, 1945), available at <https://www.un.org/en/about-us/un-charter/chapter-7>.

¹²⁵ See Section IV.A(1)(B)(iv) above for an overview on the crime of aggression.

¹²⁶ Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part One*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), available at <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-one/>.

¹²⁷ Carrie McDougall, *Prosecuting Putin for his Crime of Aggression Against Ukraine: Part One*, OXFORD HUMAN RIGHTS HUB (Mar. 8, 2022), available at <https://ohrh.law.ox.ac.uk/prosecuting-putin-for-his-crime-of-aggression-against-ukraine-part-one/>; see also Michael Schmitt, *Russia's "Special Military Operation" and the (claimed) right of self-defense*, ARTICLES OF WAR (Feb. 28, 2022), available at <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/>; see also Ralph Janik, *Putin's War Against Ukraine: Mocking International Law*, EJIL: TALK! (Feb. 28, 2022), available at <https://www.ejiltalk.org/putins-war-against-ukraine-mocking-international-law/>; Elizabeth Wilmshurst,

As discussed in Section IV.A above, the ICC cannot exercise jurisdiction over a crime of aggression if the act is committed by a state that is not party to the Rome Statute, unless the Security Council refers the matter to the ICC. Since Russia is not a party to the Rome Statute and can exercise its veto power in the Security Council, the ICC currently cannot investigate and prosecute crimes of aggression committed in Ukraine. Just after the beginning of Russian’s full-scale invasion on February 24, 2022, a group of nearly 40 academics, judges, prosecutors and lawyers signed a combined statement and declaration (the “Combined Statement and Declaration”) calling for the creation of a “a dedicated international criminal tribunal that should be established to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine, including those who have materially influenced or shaped the commission of that crime.”¹²⁸ The topic has been widely debated since.

The signatories of the Combined Statement and Declaration refer to the lack of ICC jurisdiction over the crime as one of the primary reasons why such court is necessary: the ad hoc tribunal would fill the gap left at the ICC by focusing on this crime only, while leaving the investigation and prosecution of other international crimes to the ICC or other hybrid and domestic courts, as the case may be. The issue was raised and supported by the Ukrainian government itself, through a statement of the Prosecutor General Iryna Venediktova: “Ukraine and Russia are not parties to the Rome Statute. Therefore, the ICC will not be able to consider the crimes of aggression, and for us this is the most important thing. That is why the question of the possible creation of an ad hoc tribunal is raised.”¹²⁹ Two aspects of this proposal must be addressed: first, how would such ad hoc tribunal be established; and second, what are the arguments in favor and against its establishment.

b. How Could an Ad Hoc Tribunal for Aggression Be Established?

In the instances addressed in Section IV.B.1 above, two tribunals (IMT and IMTFE) were established by the prevailing states at the end of the war, whereas other two (ICTY and ICTR) were established by the Security Council under its Title VII powers. Both avenues are unlikely in the Ukraine scenario. An ad hoc tribunal established by a winning coalition faces at least two major obstacles.¹³⁰ First, a necessary condition for establishing a court along the lines of the IMT and IMTFE is that Ukraine has prevailed in the war and hence the winning states are able to

Ukraine: Debunking Russia’s legal justifications, CHATHAM HOUSE (Feb. 24, 2022), available at <https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications>.

¹²⁸ Honorable Gordon Brown, *et al.*, *Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, THE OFFICE OF GORDON AND SARAH BROWN, available at <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

¹²⁹ Interfax Ukraine, *Ad hoc tribunal to allow holding accountable for crimes related to Russia’s military aggression – Venediktova*, (Mar. 3, 2022), available at <https://ua.interfax.com.ua/news/general/810253.html>.

¹³⁰ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022), available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

detain and coerce defendants and subject them to justice.¹³¹ Second, even if Ukraine will at last succeed in the defense of its territory, the war is likely to last long and the IMT and IMTFE precedents show how concrete steps in establishing a post-war court can only be entertained towards the end of a war, and could take years after that.¹³² These concerns are in addition to the limits of any ad hoc tribunal established outside of Title VII powers – mostly regarding the hardship in collection of evidence and detention of defendants – discussed in more detail in the sections below. On the other hand, the route followed in the establishment of the ICTY and ICTR, namely a binding Title VII-based resolution by the Security Council, would provide several practical advantages in terms of enforceability and powers of the tribunal. However, Russia will most likely veto any resolution in this direction (for instance, Russia did veto a Security Council resolution for the establishment of an ad hoc tribunal to investigate the incident involving Malaysia Airlines Flight MH17 along the Russia-Ukraine border and allegedly shot down by pro-Russian independentist forces in Ukraine).¹³³

The more easily available option to establish an ad hoc tribunal for the crime of aggression is through a treaty signed by a coalition of states, presumably including Ukraine, and supported through a declaration by the General Assembly, before the war ends¹³⁴ – this is the direction envisaged by the signatories of the Combined Statement and Declaration mentioned above.¹³⁵ Such a tribunal would base its jurisdictional basis on the universal jurisdiction nature of the crime involved – note, however, that whether the crime of aggression is a crime of universal jurisdiction is debated by academics and yet to be tested in international courts.¹³⁶ The target defendants for such venue could be individuals “in a position effectively to exercise control over or to direct the political or military action of a [s]tate,” taking from the standard in the Rome Statute,¹³⁷ or the

¹³¹ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

¹³² Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

¹³³ Security Council Resolution 2166 (Jul. 21, 2014), available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2166.pdf; see also Michael Ramsden, *Uniting for MH17*, Asian J. Int'l L. (Aug. 2016), available at https://www.researchgate.net/profile/Michael-Ramsden-2/publication/307529786_Uniting_for_MH17/links/5f1523d392851c1eff217cca/Uniting-for-MH17.pdf.

¹³⁴ See, Philippe Sands, *Putin's use of military force is a crime of aggression*, FINANCIAL TIMES, Feb. 28, 2022, available at <https://www.ft.com/content/cbbdd146-4e36-42fb-95e1-50128506652c>.

¹³⁵ Honorable Gordon Brown, *et al.*, *Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, THE OFFICE OF GORDON AND SARAH BROWN, available at <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>.

¹³⁶ Tom Dannenbaum, *Mechanism for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

¹³⁷ Rome Statute, art. 8bis(1).

court could take a more expansive approach to capture individuals without such level of command, as in the IMT and IMTFE precedents.¹³⁸

3. *Advantages of an Ad Hoc Tribunal for Aggression Against Ukraine*

There are several advantages in prosecuting the crime of aggression against Ukraine in an ad-hoc international tribunal rather than in hybrid (as discussed below) or domestic courts.

Immunity – An international tribunal would not face the same challenges in terms of governmental immunity that could restrict domestic courts from exercising jurisdiction over Russian officials: as decided by the International Court of Justice in the *Arrest Warrant* case, government officials are subject to proceedings before international courts that have jurisdiction over their acts.¹³⁹

Legitimacy and Support – A widespread participation in the treaty establishing the ad hoc tribunal, and a declaration by the General Assembly, would provide legitimacy and support to the court, and likely carry a higher expressive value than domestic courts.¹⁴⁰

Resources – If the treaty parties included at least two EU Member States, the tribunal could take advantage of the EU’s Joint Investigative Team’s mechanisms and resources, thus enhancing its investigative capacity.¹⁴¹

Lower Costs – The costs associated with an ad hoc tribunal limited to the investigation and prosecution over one crime are likely modest compared to the costs of the war and related crisis.¹⁴²

¹³⁸ Carrie McDougall, *Why Creating A Special Tribunal For Aggression Against Ukraine Is The Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022) available at <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>.

¹³⁹ Case Concerning the Arrest Warrant of 11 April 2000, Dem. Rep. of the Congo v. Belgium, Judgment, 2002 I.C.J Rep. 3, para 61 (Feb. 14, 2002), available at <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

¹⁴⁰ Case Concerning the Arrest Warrant of 11 April 2000, Dem. Rep. of the Congo v. Belgium, Judgment, 2002 I.C.J Rep. 3, para 61 (Feb. 14, 2002), available at <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

¹⁴¹ Carrie McDougall, *Why Creating A Special Tribunal For Aggression Against Ukraine Is The Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022) available at <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/> (noting also that the EU’s Joint Investigative Team’s mechanisms and resources played a hugely important role in the investigation of the downing of MH17).

¹⁴² Carrie McDougall, *Why Creating A Special Tribunal For Aggression Against Ukraine Is The Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022) available at <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>.

Some commentators have suggested that any international tribunal is unlikely to succeed absent Russian cooperation, given that evidence and perpetrators for the crime of aggression are mostly, if not almost exclusively, within Russian borders.¹⁴³ Cooperation would almost certainly require a government change in Russia. If such government change were to happen, Russian cooperation with an ad-hoc tribunal is much more likely than its accession in the ICC: cooperation with an ad hoc tribunal for aggression would be limited in scope and would involve a restricted number of individuals from today's government, that a new administration could use as scapegoats to rehabilitates its image.¹⁴⁴ On the other hand, a new government could certainly join the Rome Statute and grant jurisdiction to the ICC to prosecute the crime – that would however carry much larger implications, both temporal (it would grant ICC jurisdiction over future aggressions too) and geographical (the ICC, contrary to an ad hoc tribunal, would not be limited to the war in Ukraine).

4. *Disadvantages of an Ad Hoc Tribunal for Aggression Against Ukraine*

Several arguments against the creation of such ad hoc tribunal are however valid and should be considered.

Practical Limitations – The practical limits of an ad hoc tribunal are potential obstacles to its efficiency. As mentioned above, suspects and evidence would be in Russia, as the crime of aggression focuses on decisions taken at the government level rather than atrocities committed on the ground.¹⁴⁵ Russia would likely refuse cooperation (pending a change in government, as discussed above), and the Security Council could not enforce cooperation because of a Russian veto.

Ukrainian Courts – At least one academic argued that to the extent that suspects and evidence were available, Ukrainian courts would be better suited to prosecute the crime in terms of “both the message they would send and the positive effect they would have on Ukraine’s judicial system.”¹⁴⁶ From a jurisdictional perspective, domestic courts in Ukraine or a hybrid court

¹⁴³ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

¹⁴⁴ Carrie McDougall, *Why Creating A Special Tribunal For Aggression Against Ukraine Is The Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022) available at <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>.

¹⁴⁵ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

¹⁴⁶ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

exercising territorial jurisdiction over the crime would have a better legal basis than an international court, forced to rely on untested and debated universal jurisdiction for aggression.¹⁴⁷

Selectivity and Bias – Critics argue against the expressive value of an ad hoc tribunal in this instance, as it could be further proof that international justice is selective and only aims to punish non-western perpetrators, referring, for example, to the absence of a tribunal for aggression for the invasion of Iraq in 2003.¹⁴⁸

5. *Ad Hoc Tribunal for Other Crimes*

The establishment of an ad hoc tribunal to investigate and prosecute a wider array of international crimes is unlikely to happen, and it is most likely not a preferable route to achieving accountability in this war.

Contrary to the crime of aggression, as discussed in Section IV.A above, the ICC has jurisdiction to investigate and prosecute war crimes, crimes against humanity and acts of genocide in Ukraine. The ICC Prosecutor has already initiated an investigation, with the endorsement of several states and the cooperation of the Ukrainian government. Considering the ICC’s actions, there is likely no advantage in establishing a separate ad hoc tribunal to investigate the same crimes – especially because the effort would be costly, hard to coordinate, and not timely. As one commentator described it, the ICC has an advantage over such tribunals because it does not have to “reinvent the wheel” every time.¹⁴⁹ The challenges to establish an ad hoc tribunal with wide jurisdiction under international criminal law are largely the same as discussed in the context of a tribunal for aggression: there would be no Russian cooperation and it could not be created through Security Council resolution,¹⁵⁰ and it would require an international treaty and an agreement on the substantive and procedural law to be incorporated – no arguments are set forth as to why the Russian-Ukraine war would call for a different jurisprudence than the one agreed in the Rome Statute of the ICC, and if that is the case what would be the advantage of having the same process in a different venue to be created anew. In fact, the critique regarding a message of selective justice being expressed by the establishment of an ad hoc tribunal for aggression would be even stronger here, considering that the ICC is already investigating the case: if the ICC is the venue to bring

¹⁴⁷ Carrie McDougall, *Why Creating A Special Tribunal For Aggression Against Ukraine Is The Best Available Option: A Reply to Kevin Jon Heller and Other Critics*, OPINIO JURIS (Mar. 15, 2022) available at <http://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>.

¹⁴⁸ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS, (Mar. 7, 2022, available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>).

¹⁴⁹ Thomas S. Warrick, *Perseverance can bring Russian war criminals including Putin to justice*, ATLANTIC COUNCIL (Apr. 8, 2022), available at <https://www.atlanticcouncil.org/blogs/ukrainealert/perseverance-can-bring-russian-war-criminals-including-putin-to-justice/>.

¹⁵⁰ Tanya Domi, *Interview: Ukraine, Bosnia, War Crimes, And International Tribunals*, RADIOFREEEUROPE (Apr. 09, 2022), available at <https://www.rferl.org/a/ukraine-bosnia-war-crimes-prosecution/31795058.html> (claiming that there will not be an ad hoc tribunal of general jurisdiction in this case because of Russian and Chinese veto power in the Security Council).

accountability under international criminal law evenly across states, an ad hoc tribunal for crimes in this war would cut against that purpose.

C. Hybrid Courts

A third option to prosecute international crimes arising from the war in Ukraine is through the establishment of a hybrid court. Because there is flexibility in the construct of a hybrid court, this allows for a degree of tailoring that is not possible in already established mechanisms, such as the ICC or domestic tribunals. Additionally, like an ad hoc international tribunal, a hybrid tribunal could address gaps in ICC jurisdiction – in particular, with respect to prosecution for the crime of aggression.¹⁵¹ However, some interpretations of Ukraine’s constitution have concluded that a hybrid court could not be established without violating Article 125 of Ukraine’s constitution, which would be a significant impediment to the creation of a hybrid court and would suggest that an international ad hoc tribunal for the crime of aggression may nonetheless be preferable.¹⁵²

1. Background

Hybrid courts are mixed tribunals – encompassing both international and national aspects and typically operating within the jurisdiction where violations of international crimes occurred.¹⁵³ Hybrid courts are created in response to an emergency during which serious international crimes are committed and during which the domestic judiciary or existing international tribunals are unable or unwilling to address international criminal violations. There is no one model for a hybrid court. Instead, each court is tailored to the specific needs of the situation and typically represents a compromise between the parties establishing the mechanism.¹⁵⁴ However, there are several features that are common to hybrid tribunals. Typically, hybrid tribunals apply international procedural and substantive law, are staffed by both local and international personnel, and receive at least partial funding from international sources.¹⁵⁵

¹⁵¹ See Jennifer Trahan, *U.N. General Assembly Should Recommend Creation Of Crime Of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model*, JUST SECURITY (Mar. 7, 2022), available at <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>.

¹⁵² Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

¹⁵³ *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 1 (2008), available at <https://www.un.org/ruleoflaw/files/HybridCourts.pdf>.

¹⁵⁴ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 5 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁵⁵ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 5 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

Prior examples of hybrid tribunals provide guidance as to the potential establishment and implementation of a hybrid tribunal in Ukraine, including in the cases of Timor-Leste, Bosnia and Herzegovina, Sierra Leone, Cambodia, and Lebanon.

In Timor-Leste, a hybrid tribunal was created after a widespread, violent campaign by the Indonesian army and militias following a UN-supervised referendum on independence.¹⁵⁶ With no independent national government to consult, the UN Transitional Authority in East Timor (“UNTAET”) first created national courts.¹⁵⁷ Then, the Special Panels for Serious Crimes – part of the Dili District Court – was established by Section 10 of UNTAET Regulation 2000/11, as amended by Regulation 2001/25.¹⁵⁸ The hybrid panels had jurisdiction to prosecute genocide, war crimes, and crimes against humanity, torture, murder and sexual offenses committed between January 1, 1999 and October 25, 1999.¹⁵⁹ The UN managed these special panels, which were given primacy over national courts over these crimes.¹⁶⁰ The panels included both international and Timorese judges.¹⁶¹ Ultimately, before the UN mission closed and the process ended, the panels convicted over 80 individuals and incurred operating costs in excess of \$20 million.¹⁶²

The Special Court for Sierra Leone was established to provide accountability for serious, systemic human rights abuses from a conflict in Sierra Leone beginning in 1991. After peace was restored, the President of Sierra Leone requested the creation of a hybrid court in a letter to the Security Council President in June 2000, acknowledging that Sierra Leone would not have the resources, expertise, or infrastructure to prosecute crimes on its own.¹⁶³ The Special Court for Sierra Leone was established on January 16, 2002 by agreement between the UN and Sierra Leone.¹⁶⁴ The court

¹⁵⁶ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 17 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁵⁷ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 17 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁵⁸ Antonio Cassese and Paola Gaeta, *CASSESE'S INTERNATIONAL CRIMINAL LAW* 264 (2013).

¹⁵⁹ Antonio Cassese and Paola Gaeta, *CASSESE'S INTERNATIONAL CRIMINAL LAW* 264 (2013).

¹⁶⁰ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 17 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶¹ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 17 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶² *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 18 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶³ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 21 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶⁴ UN Doc. S/2000/915; *see also* SC Res. 1315 (2000).

was made up of both nationals of Sierra Leone and international judges and staff with jurisdiction over crimes against humanity, violations of Article 3 to the Geneva Conventions and Additional Protocol II, other serious violations of international humanitarian law, and some criminal offenses under domestic law.¹⁶⁵ The court brought cases against the three main factions of the conflict – the Armed Forces Revolution Council, Civil Defense Forces, and the Revolutionary United Front.¹⁶⁶

The Extraordinary Chambers in the Courts of Cambodia were established in response to egregious abuses by the Khmer Rouge in Cambodia during which a quarter of the state’s population was killed.¹⁶⁷ Cambodia sent a formal request for assistance to UN Secretary General Kofi Annan in June 1997.¹⁶⁸ The Chambers were established following negotiations with the UN by the Cambodian Parliament in 2001, and amended in 2004 to reflect a 2003 agreement with the UN.¹⁶⁹ The agreement establishing the Extraordinary Chambers finally entered into force in 2005.¹⁷⁰ The court had jurisdiction over crimes committed during 1975 to 1979 with both Cambodians and international personnel comprising the court.¹⁷¹

In 2005, the War Crimes Chamber was established to address acts of genocide, war crimes, and crimes against humanity following the break-up of the Socialist Federal Republic of Yugoslavia in 1992 to 1995.¹⁷² The Chamber was created through an agreement with the government of Bosnia and Herzegovina by the High Representative for Bosnia and Herzegovina in the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina.¹⁷³ The Chamber was created as part of the completion strategy of the ICTY from the need for the ICTY to transfer cases to national

¹⁶⁵ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 263-64 (2013).

¹⁶⁶ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 22 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶⁷ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 24 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶⁸ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 23 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁶⁹ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

¹⁷⁰ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 23 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁷¹ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

¹⁷² *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 26 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁷³ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

jurisdiction.¹⁷⁴ The Chamber exercises jurisdiction over serious war crimes, including cases that concern lower- to mid-level perpetrators referred to it by the ICTY or cases where investigations have not yet been completed.¹⁷⁵ The court includes both national and international judges, prosecutors, defense counsels, experts, and support staff.¹⁷⁶

The Special Tribunal for Lebanon was established to prosecute individuals alleged to have committed a bombing in February 2005 that killed 22 people, including Lebanon's former Prime Minister Rafik Hariri.¹⁷⁷ Lebanon's Prime Minister formally requested the creation of a tribunal "of an international character" in a letter to the UN Secretary General on December 13, 2005.¹⁷⁸ The tribunal was established upon agreement by the UN and Lebanon in 2007. The Security Council adopted a resolution, adopted on the strength of Chapter VII of the UN Charter, which contained the statute of the tribunal and agreement on the establishment of the tribunal.¹⁷⁹ The International Independent Investigation Commission, a fact-finding commission in operation between 2005 and 2009, morphed into the tribunal with the tribunal receiving all of the Investigation Commission's evidence and the last Commissioner becoming the first tribunal Prosecutor.¹⁸⁰ The court applied Lebanese criminal law on terrorism.¹⁸¹ The tribunal had mixed composition of national and international professionals.¹⁸²

¹⁷⁴ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 26 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁷⁵ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

¹⁷⁶ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

¹⁷⁷ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 25 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁷⁸ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 25 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁷⁹ See UN Doc. S/2006/893 (Nov. 15, 2006).

¹⁸⁰ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 25 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁸¹ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

¹⁸² Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 264 (2013).

2. *Establishment of a Hybrid Court for Ukraine*

It takes on average three to four years before a hybrid court becomes fully operational.¹⁸³ Planning has moved forward more quickly in instances where the hybrid tribunals have been established at the request of the state on whose territory the offenses took place.¹⁸⁴

A hybrid tribunal could be created by agreement between the UN and Ukraine, upon recommendation of the General Assembly. Both the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone were formed in this manner. Other hybrid tribunals have been established upon recommendation by the Security Council. However, Security Council recommendation seems unlikely in this case given Russia's likelihood to exercise its veto power.

Another possibility is a hybrid tribunal established as part of the Ukrainian judicial system with the support of the Council of Europe.¹⁸⁵ While the Council of Europe cannot directly establish a hybrid tribunal, Ukraine could ask the Committee of Ministers to recommend "a common policy" be adopted by member governments to support a hybrid court.¹⁸⁶ While both Ukraine and Russia are members of the Council of Europe, Russia has been suspended from the Council.¹⁸⁷

A hybrid court for Ukraine could be established as part of the judiciary of Ukraine, such as the hybrid courts in Cambodia, Kosovo, and East Timor.¹⁸⁸ However, this could raise a constitutional issue under Ukraine's constitution, as discussed in more detail below. Alternatively, the courts could be international in nature – established outside of the national judiciary, such as in Sierra Leone and Lebanon.¹⁸⁹

¹⁸³ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 15 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁸⁴ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 23 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁸⁵ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

¹⁸⁶ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

¹⁸⁷ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

¹⁸⁸ Antonio Cassese and Paola Gaeta, CASSESE'S INTERNATIONAL CRIMINAL LAW 265 (2013).

¹⁸⁹ Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

A separate question is where the seat of a hybrid court for Ukraine would sit. Most likely, this would depend on how quickly a tribunal is established and the status of the war. While there are advantages to having the seat of the court in Ukraine, such as territorial jurisdiction and access to witnesses and evidence, the court could also be established outside of Ukraine if necessary due to security or other concerns.

3. *Jurisdiction*

The statute of the hybrid court must establish the jurisdiction of the court – whether the hybrid court has concurrent or primary jurisdiction over crimes, subject matter jurisdiction, temporal jurisdiction, and basis for personal jurisdiction. Hybrid courts typically pursue individual criminal accountability for international crimes *strictu sensu* (e.g., war crimes, crimes against humanity, genocide, and torture).¹⁹⁰ Some hybrid tribunals have also been given jurisdiction to prosecute crimes under domestic law, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Court of Cambodia.¹⁹¹ As discussed above, there are impediments to an ICC prosecution of the crime of aggression. As such, a hybrid tribunal could help fill jurisdictional gaps by focusing solely on prosecutions of the crime of aggression. While a hybrid court for Ukraine could have broader jurisdiction, given existing ICC referral, it is likely not necessary for a hybrid court to address these crimes. One exception would be if there is a need to address crimes of lower-level perpetrators, similar to the role that the War Crimes Chamber in Bosnia and Herzegovina played in relation to the ICTY.

Personal jurisdiction will likely need to be linked to territorial jurisdiction – for example, a hybrid court could be established through agreement between Ukraine and the UN to prosecute crimes committed within the territorial jurisdiction of Ukraine. The strongest basis for personal jurisdiction will be prosecuting crimes committed by perpetrators on Ukrainian soil. There still may be personal jurisdiction if crimes are committed in Ukraine but by perpetrators who were outside of Ukraine.¹⁹² This is important for theories of command responsibility or for the crime of aggression, which is a leadership crime. For example, the Special Court for Sierra Leone prosecuted Charles Taylor for aiding and abetting war crimes and crimes against humanity in Sierra Leone.

Overlapping with the question of who the hybrid tribunal *can* prosecute is the question of who the hybrid tribunal should *focus* on prosecuting. Relatedly, the hybrid tribunal may decide to limit its mandate to specific individuals. In the case of Cambodia, the mandate was limited to senior leaders

¹⁹⁰ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 6 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁹¹ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 6 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

¹⁹² Kirsten Ainley and Mark Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts*, 23 (2019), available at http://eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf.

who were “most responsible for the crimes committed.”¹⁹³ However, the Supreme Court Chamber ruled that the criterium of “senior leaders” or others “most responsible” was not jurisdictional, but rather an “investigatorial and prosecutorial policy to guide the independent discretion . . . as to how to best target their finite resources.”

4. *Advantages of a Hybrid Court*

One of the primary advantages of a hybrid court is its mixed nature – it combines the advantages of domestic prosecution with those of an international tribunal.

Resources – Hybrid courts often receive international funding and comprise of a mix of international and national staff. This directs resources that may not be available in a purely international court.

Domestic Legal Barriers – Hybrid courts may help overcome domestic legal barriers, such as amnesty or sovereign immunity. As some international law scholars have noted, there may be some uncertainty about whether status or functional immunity would apply in a hybrid court.¹⁹⁴ However, both the Special Court for Sierra Leone and the ICC have held that status immunity does not apply to the prosecution of international crimes by international courts. In the case of the Special Court for Sierra Leone, this provides further support for the view that a hybrid tribunal, particularly if created with the support of the General Assembly, would be able to prosecute crimes regardless of status immunity.¹⁹⁵

Political Independence – An international element may help overcome a perception of bias or lack of independence that could exist if prosecution were to occur only at the domestic level in Ukraine.¹⁹⁶

Proximity to Victims and Evidence – Many hybrid tribunals are located in the jurisdiction where the crimes occurred. This provides greater proximity to the victims and relevant evidence than those that are located elsewhere.

¹⁹³ John D. Ciorciari and Anne Heindel, *Chapter 6 CASES 003 & 004—THE POLITICS OF PERSONAL JURISDICTION: “No Gain in Keeping, No Loss in Weeding Out”*, in *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA*, 167, 169 (University of Michigan Press, 2014).

¹⁹⁴ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

¹⁹⁵ Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

¹⁹⁶ *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS 4 (2008), available at <https://www.un.org/ruleoflaw/files/HybridCourts.pdf>

5. *Disadvantages of a Hybrid Court*

There are also disadvantages of establishing a hybrid court in comparison to prosecuting crimes at the international or domestic level.

Ukrainian Constitutional Concerns – A hybrid court may violate Article 125 of the Ukrainian constitution, which prohibits a “special or extraordinary court”¹⁹⁷ and declares that “[t]he establishment of extraordinary and special courts shall not be permitted.”¹⁹⁸ Legal jurists in Ukraine agree that the prohibition is on hybrid courts *within* Ukrainian courts and would not limit the jurisdiction of international courts.¹⁹⁹ However, without amendment of the Ukrainian constitution, this could provide a significant impediment to the establishment of a hybrid tribunal. As some scholars have noted, amendment to Ukraine’s constitution appears unlikely. Article 157 bans any constitutional amendments under conditions of martial law or a state of emergency.²⁰⁰ Martial law was imposed in Ukraine on February 24, 2022, and revoking martial law would reduce the Ukrainian government’s ability to respond to the Russian invasion.²⁰¹ Other readings of Ukraine’s constitution may allow a hybrid court to be established if it were sufficiently international and removed from Ukraine’s domestic legal system. However, this would in essence create a tribunal more akin to an ad hoc international court, which has its own shortcomings.

Selectivity – A hybrid tribunal may be vulnerable to criticisms that the international community has selectively decided which crimes to prosecute. As some scholars have pointed out, this would

¹⁹⁷ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

¹⁹⁸ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

¹⁹⁹ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²⁰⁰ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²⁰¹ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

be particularly the case for a treaty-based tribunal led by the US and UK given their invasion of Iraq in 2003 and the lack of prosecution for the crime of aggression then.²⁰²

Security – Hybrid courts located in the jurisdiction where the crimes occurred may face security and witness protection concerns.²⁰³ Hybrid tribunals have been established with their seat outside of the jurisdiction where the crimes occurred when there have been heightened security concerns. For example, the Special Tribunal for Lebanon has its seat near The Hague rather than in Lebanon.²⁰⁴

²⁰² Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022) available at <https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>.

²⁰³ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 79 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

²⁰⁴ *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals*, International Center for Transitional Justice [ICTJ], at 80 (2018), available at https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

V. JURISDICTION OF THE UKRAINIAN DOMESTIC COURTS²⁰⁵

Ukraine is the closest state to the evidence and eyewitnesses of atrocity crimes with a lot of potential defendants within its territory. The Ukrainian domestic courts present an advantageous course for accountability of at least some war crimes in Ukraine. Ukraine has already demonstrated its ability to prosecute Russian soldiers for atrocities committed in Ukraine swiftly and effectively. However, the enforceability of Ukrainian jurisdiction presents significant challenges to prosecuting the crime of aggression and other war crimes by Russian forces. Although, there are many crimes of the same nature to be prosecuted, the task of prosecuting high-level military leaders in Russia likely remains out of reach for Ukrainian domestic courts.

1. *Sources of Ukrainian Law*

The main sources of criminal law in Ukraine are the Criminal Code of Ukraine (the “Ukrainian Criminal Code”) and the Criminal Procedural Code of Ukraine.

2. *Permitted Claims; Offences Covered*

The Ukrainian Criminal Code provides several avenues to prosecute war crimes committed in Ukraine, for which the local Ukrainian courts have jurisdiction.

A claim for “planning, preparation, or waging of aggressive war or armed conflict” and “conducting an aggressive war or military operations”²⁰⁶ can be brought under Article 437 of the Ukrainian Criminal Code. Such claims can be brought even if the crime was committed by a foreigner as the act of planning or/and conducting war is a special grave crime against Ukraine.²⁰⁷

The actions of Russian soldiers could be qualified as breach of war laws and customs of war under Article 438 of the Ukrainian Criminal Code. Article 438 is relevant in the following situations (i) where military actions of Russian soldiers have caused kills and wounds to civilian population or damage to civilian infrastructure, (ii) use of prohibited ammunition, (iii) use of Ukrainian flags and other signs by the Russian forces (wrong-flag operations), and (iv) mobilization (drafting) of civilians in occupied territories.²⁰⁸

Other hostile actions against civilians such as rapes, murders, robberies, and looting would fall under Article 438 of the Ukrainian Criminal Code which establishes that the Geneva Conventions

²⁰⁵ The Shearman & Sterling LLP attorneys who prepared this Memorandum are not admitted to practice law in Ukraine. The below description is based on our research of the laws of Ukraine.

²⁰⁶ *Criminal Code of Ukraine* art. 437 (Ukraine, 2001), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

²⁰⁷ *Criminal Code of Ukraine* art. 437 (Ukraine, 2001), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

²⁰⁸ *Criminal Code of Ukraine* art. 438 (Ukraine, 2001), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

prohibit such actions against civilians and Article 152 of the Ukrainian Criminal Code which relates the crime of rape.

Actions by individuals who do not belong to the regular Russian army (e.g., members of so-called “DNR” and “LNR” formations, “Vagner” private military company etc.) would qualify as crimes of high treason (for Ukrainians) under Article 111 of the Ukrainian Criminal Code, establishment of illegal military or armed groups under Article 260 of the Ukrainian Criminal Code or mercenaries under Article 447 of the Ukrainian Criminal Code.

Investigation of all mentioned crimes (except crimes under Article 260 of the Criminal Code) falls under the jurisdiction of Security Service of Ukraine under procedural supervision of the Prosecutor General’s Office of Ukraine. Iryna Venediktova, the Ukrainian Prosecutor General, already commenced investigating war crimes in Ukraine. Nonetheless, an investigation could be commenced by any governmental agency. As of April 14, 2022, Ukraine amended its Criminal Procedural Code to address proceedings during times of martial law. The changes primarily expanded pre-trial investigation and the right to detain individuals during such period. The amendment was passed to increase efficiency and promote timely implementation of criminal proceedings during martial law.

3. *Potential Defendants*

Article 437 of the Ukrainian Criminal Code establishes that those who commit an offense on the territory of Ukraine can be prosecuted in the Ukrainian courts.²⁰⁹ Article 8 of the Ukrainian Criminal Code also establishes universal jurisdiction, thereby expanding subject matter jurisdiction to noncitizens not residing permanently in Ukraine.²¹⁰ Ukraine includes the crime of aggression in its domestic law, so through universal jurisdiction, Vladimir Putin and other high-ranking Russian political and military leaders can be brought as defendants under the Ukrainian Criminal Code.²¹¹ Further, liability for the crime of aggression under Article 437 of the Ukrainian Criminal Code is not limited to people in leadership positions, thereby allowing for Russian soldiers to also be prosecuted.²¹²

The European Commission proposed to reinforce the mandate of Eurojust (The European Union’s Agency for Criminal Justice Cooperation) to collect and preserve evidence of war crimes. Eurojust will create back-up servers for evidence stored in Ukraine and share that evidence with relevant

²⁰⁹ *Criminal Code of Ukraine* art. 437 (Ukraine, 2001), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

²¹⁰ *Criminal Code of Ukraine* art. 8 (Ukraine, 2001), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/criminal_code_0.pdf.

²¹¹ Office of Legal Affairs of the United Nations https://www.un.org/en/ga/sixth/72/universal_jurisdiction/ukraine_e.pdf.

²¹² Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SECURITY, (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/#:~:text=There%20are%20four%20possible%20jurisdictional%20paths%20worth%20considering,Ukraine%29%2C%20or%20a%20domestic%20court%20exercising%20universal%20jurisdiction.>

domestic and international authorities.²¹³ Eurojust is one of several organizations working to secure evidence on servers outside of Ukraine. While Ukraine will be limited in its access to evidence of the crime on aggression outside its borders, evidence of specific acts taken by Russian troops within its borders will be accessible if secured timely and backed up on servers outside Ukraine.

4. *Relevant Cases*

During 2015-2016 a case for aggression under the Ukrainian Criminal Code was tried in Ukraine. Two ex-members of the armed forces of the Russian Federation were prosecuted for aggression-related crimes arising from their participation in the ranks of the self-proclaimed Luhansk People's Republic in 2015.²¹⁴

In 2019, the federal court of Ukraine found the former president Victor Yanukovich guilty of treason and complicity in the crime of aggression. The trial took place *in absentia*. Even though he was sentenced to thirteen years of prison, he continues to live in Russia and could not be detained.²¹⁵ The case is relevant here, because it shows one of the drawbacks of seeking accountability through the Ukrainian domestic courts, namely challenges with detaining the defendants and imposing judgments.

Recently, Ukraine's Prosecutor General, Iryna Venediktova, announced that more than 10,700 war crimes are being investigated and 600 suspects have been identified. A Russian sergeant had been charged with the murder of an elderly civilian in Chupakhivka, in the north-east of Ukraine. Two other Russian soldiers are expected to be charged for targeting civilian buildings, and another Russian soldier has been identified as suspect in committing rape and murder.²¹⁶ These recent cases demonstrate the enforceability of Ukrainian jurisdiction for war crimes committed by troops on the ground, but likely fall short of holding high-level military leaders outside Ukraine's borders accountable.

²¹³ European Commission, *Russian war crimes in Ukraine: Commission proposes to reinforce the mandate of Eurojust to collect and preserve evidence of war crimes*, (Apr. 25, 2022), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2549.

²¹⁴ Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY, (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/#:~:text=There%20are%20four%20possible%20jurisdictional%20paths%20worth%20considering,Ukraine%29%2C%20or%20a%20domestic%20court%20exercising%20universal%20jurisdiction.>

²¹⁵ Alexander Komarov and Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY, (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²¹⁶ Solon Solomon, *Ukraine: Ordinary Russian Soldiers Face War Crimes Charges But the Big Fish are Likely to Avoid Punishment – Here's Why*, THE CONVERSATION, (May 12, 2022), available at <https://theconversation.com/ukraine-ordinary-russian-soldiers-face-war-crimes-charges-but-the-big-fish-are-likely-to-avoid-punishment-heres-why-181181>.

5. *Advantages of Ukraine as a Forum*

Subject Matter Jurisdiction – The benefits of prosecuting atrocity crimes in Ukraine are that the domestic courts in Ukraine have jurisdiction over the matter. Unless there is a referral from the Security Council, the ICC for instance does not have jurisdiction over the crime of aggression, so a separate tribunal would be necessary for any indictment.

Access to Evidence – While lacking access to evidence pertinent to high-level leaders back in Russia, Ukraine has greatest access of any jurisdiction to evidence of crimes committed by troops on the ground. As seen in recent trials, at least these crimes can be prosecuted by Ukrainian domestic courts.

6. *Disadvantages of Ukraine as a Forum*

There are a few drawbacks for prosecuting atrocity crimes in Ukrainian domestic courts.

Immunity – An obstacle for bringing claims in Ukrainian domestic courts would be the issues of immunities and the related principle of *par in parem imperium non habet* (the principle that “equals have no sovereignty over each other,” i.e. states cannot stand in judgment of one another).²¹⁷ Prosecuting cases outside the domestic courts of the accused could lead to legal difficulties due to immunities such as head of state immunity and other status immunities, applicable to heads of government and foreign ministers.²¹⁸ These immunities will be inapplicable if the claims are brought to an international court.²¹⁹ Furthermore, the so-called “functional immunities,” applicable to all state officials for acts undertaken in their official capacity, could be an issue for domestic courts in prosecuting acts of aggression.²²⁰ Thus, claims against Vladimir Putin and other senior Russian officials will face challenges if brought in domestic courts. There is a substantial support of the proposition that status immunities do not apply if the atrocity crimes are

²¹⁷ Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia’s Aggression Against Ukraine*, JUST SECURITY, (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/#:~:text=There%20are%20four%20possible%20jurisdictional%20paths%20worth%20considering,Ukraine%29%2C%20or%20a%20domestic%20court%20exercising%20universal%20jursidiction.>

²¹⁸ Alexander Komarov and Oona Hathaway, *Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY, (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²¹⁹ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022) available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

²²⁰ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022) available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

prosecuted by international courts.²²¹ On the other hand, status immunities are related to the current status of the individual as a head of state, head of government, or foreign minister. Thus, status immunities cease to exist upon leaving office. In this regard it is worth noting that the statutes of limitations are not generally applicable to international crimes as it is reflected in Article 49 of the Ukrainian Criminal Code.²²²

Trials In Absentia – Relying on the Ukrainian courts, could lead to Russians failing to appear for the hearings, and difficulties of obtaining custody of and detaining many defendants.²²³ For instance, the prosecution against the former President Victor Yanukovich has been criticized because the trial was held in the absence of the defendant. Such trials *in absentia* raise human rights concerns. Similar trials might be criticized by the international community.²²⁴ Furthermore, Ukrainian courts face challenges of imposing their own judgments, which will lead to a general loss of accountability despite cases of successful prosecution.²²⁵

Evidence Related to the Crime of Aggression – It will be difficult to gather evidence. The Ukrainian Prosecutor General will need support from the international community with funding, proper evidence collection and handling of the evidence.²²⁶ Most of the evidence will be in Russia because the crimes of aggression focus on decisions and plans that are made at a high level during

²²¹ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022) available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

²²² Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY, (Mar. 10, 2022), available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/#:~:text=There%20are%20four%20possible%20jurisdictional%20paths%20worth%20considering,Ukraine%29%2C%20or%20a%20domestic%20court%20exercising%20universal%20jurisdiction.>

²²³ Alexander Komarov and Oona Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY, (Apr. 5, 2022), available at <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/>.

²²⁴ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

²²⁵ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

²²⁶ Alexander Komarov and Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY, (Apr. 11, 2022), available at <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>.

meetings of Russian officials.²²⁷ Furthermore, the Russian invasion is still ongoing and that may create separate challenges in prosecuting atrocity crimes in domestic courts.

²²⁷ Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, OPINIOJURIS, (Mar. 3, 2022), available at <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

VI. UNIVERSAL JURISDICTION

Universal jurisdiction is a principle that provides jurisdiction to a state over crimes against international law even when the crime occurred outside of that state's territory and neither the perpetrator nor the victim was a national of that state. Universal jurisdiction applies to two categories of offenses: (i) certain crimes that are universally considered heinous and repugnant, and (ii) crimes committed in locations that are beyond the exclusive authority of any state.²²⁸ There is a debate over what range of crimes that are subject to universal jurisdiction, but at the very least, grave breaches of the Geneva Conventions, which constitute war crimes, are universally considered subject to universal jurisdiction.²²⁹ Several states have incorporated the concept of universal jurisdiction into their domestic legislation, criminal codes, case law, or a combination thereof. This section provides an overview of potentially promising fora for pursuing accountability outside of Ukraine and beyond international and hybrid courts and tribunals.

A. Germany²³⁰

1. Domestic Law Permitting Universal Jurisdiction

Germany is notable for maintaining some of the least restrictive universal jurisdiction requirements for cases relating to international crimes in the entirety of the European Union.²³¹ The basis for

²²⁸ Max Planck Institute for Comparative Public Law and International Law, *Criminal Jurisdiction of States under International Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, March, 2011, C.4.22, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1021?prd=MPIL>.

²²⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31, available at <https://www.refworld.org/docid/3ae6b3694.html>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85, available at [https://www.refworld.org/docid/3ae6b37927.html#:~:text=Refworld%20%7C%20Geneva%20Convention%20for%20the,at%20Sea%20\(Second%20Geneva%20Convention\)](https://www.refworld.org/docid/3ae6b37927.html#:~:text=Refworld%20%7C%20Geneva%20Convention%20for%20the,at%20Sea%20(Second%20Geneva%20Convention);); Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135, available at [https://www.refworld.org/docid/3ae6b36c8.html#:~:text=Refworld%20%7C%20Geneva%20Convention%20Relative%20to,of%20War%20\(Third%20Geneva%20Convention\)&text=The%20Convention%20was%20adopted%20by,April%20to%2012%20August%201949](https://www.refworld.org/docid/3ae6b36c8.html#:~:text=Refworld%20%7C%20Geneva%20Convention%20Relative%20to,of%20War%20(Third%20Geneva%20Convention)&text=The%20Convention%20was%20adopted%20by,); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Dec. 8, 1949, 75 U.N.T.S. 287, available at <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280158b1a>.

²³⁰ The summary in this section does not constitute advice on German laws. It is based on research by lawyers not admitted to practice in Germany.

²³¹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

universal jurisdiction in Germany can be found in Section 1²³² of the Code of Crimes against International Law (*Volkerstrafgesetzbuch*) (the “CCAIL”).²³³

2. *Permitted Claims; Offences Covered*

The CCAIL accomplishes three main goals: (i) it defines war crimes, crimes against humanity, and genocide in accordance with the Rome Statute, thereby enacting the crimes set forth in the Rome Statute²³⁴ in German domestic legislation, (ii) it incorporates additional provisions on command responsibilities,²³⁵ and (iii) vests the Office of the Federal Prosecutor in Germany (the “Federal Prosecutor”) with significant discretion in deciding whether to investigate or not investigate cases “without any link to Germany.”²³⁶ The CCAIL does not establish torture as a standalone offense but leaves the crime of torture open to be charged as a crime against humanity or as a war crime.²³⁷

Germany additionally permits universal civil jurisdiction through the use in civil law systems of *action civiles*.²³⁸ However, *action civiles* are simply civil actions attached to criminal proceedings.²³⁹ Traditional bases of jurisdiction for civil actions would likely also be available to victims bringing civil claims in Germany under the Civil Code of Germany.²⁴⁰ Among these causes of action would be those found in tort law.²⁴¹

²³² *Code of Crimes against International Law* sec. 1 (Germany, 2002), available at https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html.

²³³ *Code of Crimes against International Law* sec. 1 (Germany, 2002), available at https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html.

²³⁴ *See Rome Statute of the International Criminal Court* (1998), available at [RS-Eng.pdf \(icc-cpi.int\)](https://www.icc-cpi.int).

²³⁵ *Code of Crimes against International Law* sec. 4 (Germany, 2002), available at https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html.

²³⁶ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018) (citing T. Beck & C. Ritscher, *Do Criminal Complaints Make Sense in (German) International Criminal Law? A Prosecutor’s Perspective*, 13 JICJ 229 (2015)).

²³⁷ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 107-108 (2018).

²³⁸ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 104 (2018).

²³⁹ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 104 (2018).

²⁴⁰ *See German Civil Code* (2013), available at https://www.gesetze-im-internet.de/englisch_bgb/.

²⁴¹ *See Ulrich Magnus & Klaus Bitterich Dr., Tort and Regulatory Law in Germany*, 19 TORT AND REGULATORY LAW 115 (2007).

3. *Potential Defendants*

The Federal Prosecutor may choose to initiate an investigation if there is an initial suspicion that a crime falling under the CCAIL has been committed, regardless of whether the victim is of German nationality.²⁴² At least in principle, this means that the Federal Prosecutor may bring a case on behalf of any victim. If either a suspect or a victim of such a crime is a German national, under the passive personality principle,²⁴³ or if a suspect is present on German territory, under the active personality principle,²⁴⁴ then the Federal Prosecutor is obligated to investigate.²⁴⁵ If a defined suspect can be identified, then investigations will be directed against such suspect.²⁴⁶

In other instances, structural investigations are a potential tool in identifying suspects. These investigations entail full investigatory powers that are not yet directed against a specific person or persons but that exist for the purpose for collecting evidence on and investigating the specific structures within which alleged international crimes have been committed.²⁴⁷ Structural investigations consider that international crimes are typically found within certain structures and contexts and promote the view that evidence about both the structure and context is necessary to conduct investigations once specific individuals can be identified.²⁴⁸ The commission and execution of a structural investigation enables the Federal Prosecutor to take swift actions if a suspect enters Germany,²⁴⁹ generates evidence that can facilitate future proceedings in a non-German context, including in a different state or in an international court,²⁵⁰ and can even lead to an investigation of, and subsequent warrant, against a specific defendant outside of Germany so long as there is an initial suspicion that said defendant has committed a crime contravening the

²⁴² Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 178 (2018).

²⁴³ Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L. J. 1, 2 (1993).

²⁴⁴ Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L. J. 1, 8h (1993).

²⁴⁵ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 178 (2018).

²⁴⁶ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 178 (2018).

²⁴⁷ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 179 (2018).

²⁴⁸ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 179 (2018).

²⁴⁹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 179 (2018).

²⁵⁰ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 179 (2018).

CCAIL.²⁵¹ In fact, there is currently an ongoing investigation into suspected war crimes and crimes against humanity committed by Russian forces during the war in Ukraine.²⁵²

4. *Relevant Cases*

Germany has a clear line of cases based on universal jurisdiction. In 1997, it became the first state where a person was successfully convicted for genocide based on the principles of universal jurisdiction.²⁵³ In connection with the Yugoslav conflict, the Federal Prosecutor pursued charges against Nikola Jorgić, the leader of a paramilitary group that committed various crimes in the former Yugoslavia against people of Muslim origin.²⁵⁴ In finding jurisdiction in the case, the German court declared that the principle of universal jurisdiction constituted a “sensible nexus with Germany” for application of German law to illegal actions committed in a foreign territory.²⁵⁵ The case was notable for its status as the first war crimes trial in Germany since the final judgment issued by the Nuremberg tribunal half a century prior.²⁵⁶

This precedent for establishing jurisdiction is applicable to the ongoing war in Ukraine insofar as how a “sensible nexus with Germany” could be established to various consequences stemming from the war. First, as of March 4, 2022, Germany had registered around 316,000 Ukrainian refugees.²⁵⁷ This will cause Germany to incur long-term costs in aiding refugees.²⁵⁸ Moreover, purely on the basis of its domestic and foreign policy, one commenter has argued that the Russian

²⁵¹ Wolfgang Kaleck & Patrick Kroger, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 180 (2018).

²⁵² Bojan Pancevski, *Germany Opens Investigation Into Suspected Russian War Crimes in Ukraine*, THE WALL STREET JOURNAL, Mar. 8, 2022, available at <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-08/card/germany-opens-investigation-into-suspected-russian-war-crimes-in-ukraine-bNCphaIWE30f2REH8BCi>.

²⁵³ *The Prosecutor v. Nikola Jorgić*, INTERNATIONAL CRIMES DATABASE, available at <https://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>

²⁵⁴ *The Prosecutor v. Nikola Jorgić*, INTERNATIONAL CRIMES DATABASE, available at <https://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>

²⁵⁵ *The Prosecutor v. Nikola Jorgić*, INTERNATIONAL CRIMES DATABASE, available at <https://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>

²⁵⁶ *The Prosecutor v. Nikola Jorgić*, INTERNATIONAL CRIMES DATABASE, available at <https://www.internationalcrimesdatabase.org/Case/1088/Jorgi%C4%87/>

²⁵⁷ Mathis Richtmann, *Ukraine War: How Germany Pays for Refugees* DW, Apr. 4, 2022, available at <https://www.dw.com/en/ukraine-war-how-germany-pays-for-refugees/a-61479216>

²⁵⁸ Mathis Richtmann, *Ukraine War: How Germany Pays for Refugees* DW, Apr. 4, 2022, available at <https://www.dw.com/en/ukraine-war-how-germany-pays-for-refugees/a-61479216>

invasion “upended” Germany.²⁵⁹ The changes include an overhaul of its energy policy,²⁶⁰ a complete shift in its diplomatic stance toward Russia,²⁶¹ and a renewal of its status as a military force in the world.²⁶²

Following the case against Nikola Jorgić, Germany introduced the CCAIL in 2002.²⁶³ The CCAIL expanded universal jurisdiction and explicitly implemented the principle in a broad form, which affected the outcomes of cases in Germany that followed its passage.

During the Iraq conflict, criminal complaints were filed in Germany against various high-level US officials, including both Secretary of Defense Donald Rumsfeld and former CIA Director Tenet for the torture of prisoners of war in Iraq and at the US naval base at Guantanamo Bay.²⁶⁴ The cases were linked to Germany explicitly through the presence of US military bases and witnesses in Germany.²⁶⁵ While the claims were ultimately dismissed, the cases did begin to cement a blueprint for utilizing the CCAIL to pursue prosecutions and can guide observers in understanding the perspectives of the Federal Prosecutor. In the first case, in 2004/2005, the Federal Prosecutor argued that Germany had no jurisdiction in the matter due to ongoing US court martial trials against soldiers and low-ranking officers in the torture cases stemming from actions at Abu Ghraib.²⁶⁶ And in the second 2006/2007 case the case was dismissed because there was no reasonable likelihood of a conviction in Germany.²⁶⁷

Like the prior case against Nikola Jorgić, a reasonable person could argue that the ongoing war in Ukraine is linked to Germany explicitly through the presence of Ukrainian refugees in Germany,

²⁵⁹ Alec MacGillis, *How the Russian Invasion of Ukraine Upended Germany*, PROPUBLICA, Mar. 11, 2022, available at <https://www.propublica.org/article/how-the-russian-invasion-of-ukraine-upended-germany>.

²⁶⁰ Alec MacGillis, *How the Russian Invasion of Ukraine Upended Germany*, PROPUBLICA, Mar. 11, 2022, available at <https://www.propublica.org/article/how-the-russian-invasion-of-ukraine-upended-germany>.

²⁶¹ Alec MacGillis, *How the Russian Invasion of Ukraine Upended Germany*, PROPUBLICA, Mar. 11, 2022, available at <https://www.propublica.org/article/how-the-russian-invasion-of-ukraine-upended-germany>.

²⁶² Alec MacGillis, *How the Russian Invasion of Ukraine Upended Germany*, PROPUBLICA, Mar. 11, 2022, available at <https://www.propublica.org/article/how-the-russian-invasion-of-ukraine-upended-germany>.

²⁶³ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

²⁶⁴ *Rumsfeld Torture Cases*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, available at <https://www.ecchr.eu/en/case/rumsfeld-torture-cases/>.

²⁶⁵ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

²⁶⁶ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

²⁶⁷ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

which would constitute witnesses in similar fashion to the cases against US officials.²⁶⁸ However, the outcome of any cases stemming from the war in Ukraine may face potential obstacles in relation to the outcomes of the cases against US officials. However, the 2004/2005 case was dismissed based on lack of jurisdiction because of ongoing US court martial trials; this scenario does not yet exist in Russia and is unlikely to develop in the foreseeable future. Unlike the 2006/2007 case, which was dismissed because there was no reasonable likelihood of a conviction in Germany, actions may be brought against Russian soldiers on a more reasonable basis than the actions against then-US government officials like then-Secretary Rumsfeld. So long as actions are directed against individuals who have been arrested and are being held in Germany, and who are not part of the upper levels of the Russian government, this precedent should not present any obstacle to conducting a trial through the CCAIL.

In a later case, the Federal Prosecutor commenced two trials in 2010 concerning Rwanda and the Eastern Democratic Republic of Congo.²⁶⁹ In the first trial, a Hutu major was convicted and sentenced for genocide as codified in the German Criminal Code before entry into force of the CCAIL for crimes committed in Rwanda in April 1994.²⁷⁰ And in the second, two leading figures of a Hutu militia then residing in Germany were convicted for war crimes.²⁷¹ These Rwandan trials can serve as a model for international criminal proceedings in Germany concerning the war crimes committed in Ukraine. The question of whether a genocide is occurring in Ukraine remains a matter open to interpretation.²⁷² However, a large international consensus would support the notion that Russian actions in Ukraine constitute genocide.²⁷³ Even if genocide is not a potential avenue for prosecution, the Rwandan trials set various standards for prosecuting war crimes.²⁷⁴ Like in Ukraine,²⁷⁵ the Hutu militia group FDLR are alleged to have utilized sexualized violence against the Congolese civilian population and to have plundered, killed, and inflicted grievous bodily

²⁶⁸ See Markus Ziener, *Ukrainian Refugees in Berlin: 'I Feel Guilty Being in Safety'*, LA TIMES, Mar. 11, 2022, available at <https://www.latimes.com/world-nation/story/2022-03-11/ukrainian-refugee-in-berlin-i-feel-guilty-being-in-safety>.

²⁶⁹ *Groundbreaking Trial in Germany*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, available at <https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany/>.

²⁷⁰ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 178 (2018).

²⁷¹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 177 (2018).

²⁷² George Wright, *Ukraine War: Is Russia Committing Genocide?*, BBC NEWS, Apr. 13, 2022, available at <https://www.bbc.com/news/world-europe-61017352>.

²⁷³ Elizabeth Whatcott, *Compilation of States' Statements Calling Russian Actions in Ukraine "Genocide"*, JUST SECURITY, May 20, 2022, available at <https://www.justsecurity.org/81564/compilation-of-countries-statements-calling-russian-actions-in-ukraine-genocide/>.

²⁷⁴ *Groundbreaking Trial in Germany*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, available at <https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany/>.

²⁷⁵ Human Rights Watch, *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HRW, Apr. 3, 2022, available at <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

injuries upon civilians.²⁷⁶ The Rwandan proceedings even provide a basis for liability for overseeing combatants who commit crimes (“command responsibility”), as the defendant in one of the German Rwandan proceedings was not accused of committing the acts themselves but merely failing to prevent subordinates from carrying out the illegal acts.²⁷⁷

In addition, Germany engaged in criminal proceedings connected to crimes committed during the Syrian civil war. These trials are summarized in the table below:

Germany ²⁷⁸			
<i>Defendant</i>	<i>Jurisdictional Basis</i>	<i>Crimes</i>	<i>Result</i>
Aria L. (<i>ISIS</i>)	Active personality principle – Perpetrator is a German national	Desecrated two corpses – War crimes	Sentenced to two years in prison on July 12, 2016
Abdelkarim El. B. (<i>ISIS</i>)	Active personality principle – Perpetrator is a German national	Desecrated a corpse – War crimes, membership in a terrorist organization, and violation of the Military Weapons Control	Sentenced to eight and a half years in prison on November 8, 2016
Suliman A.S. (<i>alleged Jabhat al-Nusra</i>)	Universal jurisdiction	Kidnapped a UN observer – Aiding a war crime	Sentenced to three and a half years in prison on September 20, 2017
Ibrahim Al F. (<i>Free Syrian Army</i>)	Universal jurisdiction	Allegedly oversaw torture, abduction, and personally tortured several people who resisted	Trial started on May 22, 2017

²⁷⁶ *Groundbreaking Trail in Germany*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, available at <https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany/>.

²⁷⁷ *Groundbreaking Trail in Germany*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, available at <https://www.ecchr.eu/en/case/groundbreaking-trial-in-germany/>.

²⁷⁸ Human Rights Watch, “*These are the Crimes we are Fleeing*”: Justice for Syria in Swedish and German Courts, HRW, Oct. 3, 2017, available at <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

		the looting of their belongings – War crimes	
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The Syrian tribunals exemplify an approach to universal jurisdiction to prosecute crimes against international law outside of German borders even though neither victim nor perpetrator are German nationals. The current German investigation into suspected war crimes in Ukraine relies on the precedent of universal jurisdiction developed in the Syrian proceedings.²⁷⁹

5. *Advantages of Germany as a Forum*

Pure Universal Jurisdiction – The principle of prosecutorial discretion outlined in Section VI.A.3 is true in cases of pure universal jurisdiction.²⁸⁰ Even if a defendant argued that the German prosecutor only has authority to investigate cases with a link to Germany, the effects of the ongoing war between Russian and Ukraine and of the international crimes being committed therein are felt in Germany.²⁸¹ Persuasive language from the office of the Federal Prosecutor, as applied to the Syrian civil war in the prior decade, provides a reasonable basis for this claim.²⁸² During that war, the Federal Prosecutor stated in a published article that German investigations regarding Syrians were necessary not only as part of a peace-building process but also because of the effects that international conflicts have on international crimes in Germany.²⁸³ Continuing along this line of reasoning, the Federal Prosecutor argued that, because of the questions surrounding whether an international forum would ever be able to exercise jurisdiction to try international crimes, that national prosecutorial units, including in Germany, should seek every opportunity to bring perpetrators before courts.²⁸⁴ In reflecting its words through action, the Federal Prosecutor demanded and an international arrest warrant was issued in late 2016 against an ISIS leader for the latter's commission of war crimes and genocide against a religious minority during August 2014.²⁸⁵

²⁷⁹ *Germany Launches Probe into Suspected War Crimes in Ukraine*, AL-JAZEERA, Mar. 8, 2022, available at <https://www.aljazeera.com/news/2022/3/8/germany-launches-probe-into-suspected-war-crimes-in-ukraine>.

²⁸⁰ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 182 (2018).

²⁸¹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 182 (2018).

²⁸² Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 182 (2018).

²⁸³ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 183 (2018).

²⁸⁴ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 183 (2018).

²⁸⁵ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 183 (2018).

Arrest Warrants – The Federal Prosecutor may demand arrest warrants.²⁸⁶ Assuming that the warrants are issued by the investigation judge at the German Federal Supreme Court (*Bundesgerichtshof*),²⁸⁷ then it is possible that the execution of such an arrest warrant outside of Germany, with extradition following, may follow depending on the legal assistance obligations that exist between Germany and the other state involved.²⁸⁸ A very advanced system for this type of judicial cooperation currently exists among the member states of the European Union – the European Arrest Warrant (the “EWA”).²⁸⁹ The EWA represents “a judicial decision issued by a [EU] member state with a view to the arrest and surrender by another [EU] member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”,²⁹⁰ and obliges other EU member states to execute arrest warrants issued by another member state.²⁹¹

Experience – Germany has unique structural advantages inherent in its prior experience investigating and prosecuting Syrian war crimes, and effective investigative units will likely be key to successful litigation with respect to the crimes being committed in Ukraine.²⁹² In Germany, the federal police maintains a specialized unit called the Central Unit for the Fight against War Crimes and Further Offenses to the Code of Crimes against International Law (*Zentralstelle für die Bekämpfung von Kriegsverbrechen und weiteren Straftaten nach dem Völkerstrafgesetzbuch*).²⁹³ In addition, Germany also maintains a specialized war crimes unit tasked with prosecuting international crimes under the CCAIL.²⁹⁴

²⁸⁶ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 184 (2018).

²⁸⁷ See *Bundesgerichtshof*, BUNDESGERICHTSHOF, available at https://www.bundesgerichtshof.de/DE/Home/home_node.html.

²⁸⁸ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 184 (2018).

²⁸⁹ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 185 (2018).

²⁹⁰ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 185 (2018).

²⁹¹ The Council of the European Union, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member*, Art. 1(1) (European Union, 2002) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>.

²⁹² Human Rights Watch, “*These are the Crimes we are Fleeing*”: Justice for Syria in Swedish and German Courts, HRW, Oct. 3, 2017, available at <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

²⁹³ Federal Criminal Police Office, *Central Unit for the Fight against War Crimes and Further Offenses Pursuant to the Code of Crimes against International Law*, BUNDESKRIMINALAMT, Apr. 14, 2011, available at https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html.

²⁹⁴ Office of the Federal Prosecutor General, *Crimes under the Criminal Code*, GENERALBUNDESANWALT, available at <https://www.generalbundesanwalt.de/de/voelker.php>.

6. *Disadvantages of Germany as a Forum*

No Trials in Absentia – In contrast to other states, trials *in absentia* are not permissible under German law,²⁹⁵ thereby decreasing the likelihood of individual investigations into suspects leading to formal accusations or trials in front of German courts.²⁹⁶

Ongoing Cases – Currently, cases are ongoing in Ukraine with respect to prosecuting war crimes committed by Russian soldiers during the course of the war.²⁹⁷ In the cases against American officials for crimes committed at Abu Ghraib, the Federal Prosecutor argued that Germany had no jurisdiction in the matter due to ongoing US court martial trials. The same argument could be made with respect to the current proceedings in Ukraine.

Lack of Independent Civil Basis – Germany permits universal civil jurisdiction through the use in civil law systems of *action civiles*.²⁹⁸ However, the burden of proof can be quite high in these cases and the states that allow for some basis of universal civil jurisdiction risk being “deluged by cases[.]”²⁹⁹ Moreover, an *action civiles* will not be successful unless the underlying criminal case is also successful.³⁰⁰

B. United Kingdom³⁰¹

1. Domestic Law Permitting Universal Jurisdiction

There is no single body of law in England and Wales that sets out offences to which universal jurisdiction applies. Most of the offences and relevant procedures and scope are set out in various legislation, as described further below. Common law also enhances and sets limits on the scope of universal crimes in the UK. The following sections apply to offences committed in the UK or outside the UK (including in Ukraine) by a person of any nationality, and proceedings may be taken in any place in the UK as if the offence had been committed in that place.

²⁹⁵ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 187 (2018).

²⁹⁶ Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165, 187 (2018).

²⁹⁷ *Ukraine Court Sentences Russian Soldier to Life Imprisonment*, AL-JAZEERA, May 23, 2022, available at <https://www.aljazeera.com/news/2022/5/23/kyiv-court-sentences-russian-soldier-to-life-imprisonment>.

²⁹⁸ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 114 (2018).

²⁹⁹ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 114 (2018).

³⁰⁰ Steven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103, 114 (2018).

³⁰¹ The summary in this section does not constitute advice on UK laws. It is based on research by lawyers not admitted to practice in the United Kingdom.

Section 1 of the Geneva Conventions Act 1957 (the “Geneva Convention Act”)³⁰² makes it an offence for any person, whatever his or her nationality to commit a grave breach of the Geneva Conventions (which are included as schedules in the Act).

Section 134 of the Criminal Justice Act 1988 (the “Criminal Justice Act”)³⁰³ implements the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Section 51 of the International Criminal Court Act 2001 (the “International Criminal Court Act”) makes it an offence for a person to commit genocide, a crime against humanity or a war crime. Nationality or residency limits apply to the prosecution of these offences (described further below).

Section 1 of the Taking of Hostages Act 1982 makes it an offence for a person, whatever his nationality, to take a hostage.

The UK government has published a note on the UK’s approach to the investigation and prosecution of crimes of universal jurisdiction.³⁰⁴ Crimes of universal jurisdiction can be reported to the police in the same way as any other offence. The war crimes team of the Metropolitan Police Counter Terrorism Command is responsible for the investigation of all allegations of war crimes, crimes against humanity, genocide, and torture. The Crown Prosecution Service, Special Crime and Counter Terrorism Division is responsible for prosecuting any such crimes. Both the Metropolitan Police and the Crown Prosecution service take their decisions independently. However, while maintaining their operational independence, both authorities may, where appropriate, reach out to the Foreign and Commonwealth Office for advice on diplomatic questions.

The consent of the Attorney General for England and Wales (the “Attorney General”) is required to initiate proceedings against offences under section 1 of the Geneva Convention Act, section 134 of the Criminal Justice Act, and section 53 of the International Criminal Court Act. The UK government’s note explains that the Attorney General acts independently of the government, but he or she may consult relevant government ministers on matters that are relevant to the public interest (including, for example, international relations and national security).

It is also possible for an individual private citizen or a private organization or entity to seek a private arrest warrant and bring a private prosecution.³⁰⁵ However, the consent of the Director of Public Prosecutions for England and Wales (the “Director of Public Prosecutions”) is required

³⁰² *Geneva Conventions Act 1957* art. 1 (United Kingdom, 1957), available at <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/52>.

³⁰³ *Criminal Justice Act 1988* art. 134 (United Kingdom, 1988) available at <https://www.legislation.gov.uk/ukpga/1988/33/section/134>.

³⁰⁴ HM Government, Note on the investigation and prosecution of crimes of universal jurisdiction, UNITED KINGDOM NATIONAL ARCHIVES, May 21, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.

³⁰⁵ *Prosecution of Offences Act 1985* art. 6 (United Kingdom, 1985) available at <https://www.legislation.gov.uk/ukpga/1985/23/section/6>.

before an arrest warrant is issued for grave breaches of the Geneva Conventions, torture, and hostage-taking.³⁰⁶ The UK government has provided separate guidance on applications for the consent of the Director of Public Prosecutions.³⁰⁷

2. *Permitted Claims; Offences Covered*

In the UK, universal jurisdiction applies to the following offences, which may have taken place in Ukraine:

Grave Breaches of the Geneva Conventions – It is an offence to commit a grave breach of the Geneva Conventions (as set out in the schedules of the Geneva Conventions Act). Grave breaches include: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³⁰⁸ In addition, it is also an offence to aid, abet, or procure the commission by any other person of a grave breach of the Geneva Conventions.

Torture – It is an offence for a public official or a person acting in an official capacity to intentionally inflict severe pain or suffering on another in the performance or purported performance of his or her duties. It is also an offence for a person to intentionally inflict severe pain or suffering on another at the instigation or with the consent or acquiescence of a public official or of a person acting in an official capacity where the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents or acquiesces to it.³⁰⁹

War Crimes, Crimes against Humanity, and Genocide – It is an offence to commit genocide, a crime against humanity or a war crime, and it is also an offence to engage in conduct ancillary to such offences.³¹⁰ An ancillary offence includes: (i) aiding, abetting, counselling or procuring the

³⁰⁶ *Magistrates' Courts Act 1980*, art. 1(4A) (United Kingdom, 1980), available at <https://www.legislation.gov.uk/ukpga/1980/43/section/1>.

³⁰⁷ HM Government, Note on the investigation and prosecution of crimes of universal jurisdiction, UNITED KINGDOM NATIONAL ARCHIVES, May 21, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.

³⁰⁸ *Geneva Conventions Act 1957* art. 50 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 51 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 130 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 147 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 11 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 85 (United Kingdom, 1957); *Geneva Conventions Act 1957* art. 6 (United Kingdom, 1957).

³⁰⁹ *Criminal Justice Act 1988* art. 134 (United Kingdom, 1988), available at <https://www.legislation.gov.uk/ukpga/1988/33/section/134>.

³¹⁰ *International Criminal Court Act 2001* sec. 51-52 (United Kingdom, 2001), available at <https://www.legislation.gov.uk/ukpga/2001/17/section/51>.

commission of an offence, (ii) inciting a person to commit an offence, (iii) attempting or conspiring to commit an offence, or (iv) assisting an offender or concealing the commission of an offence.

Hostage-Taking – It is an offence to detain any other person as a hostage and to compel a state, international governmental organization or person to do or abstain from doing any act that threatens to kill, injure or continue to detain the hostage.³¹¹

The crime of aggression is not recognized in the UK, and therefore, Russia’s actions in Ukraine cannot be tried in the UK as a crime of aggression. None of the forms of criminal law or pieces of legislation in the UK include an offence related to the crime of aggression. In addition, no such crime has been recognized judicially (*i.e.*, there is no ‘common law’ crime of aggression that has been recognized by the courts). Further, the UK has not ratified the Kampala amendments to the Rome Statute on the crime of aggression.

The Supreme Court of the UK (the “Supreme Court”)³¹² has considered whether aggression is a crime under English law. While the Supreme Court recognized that the crime of aggression exists under customary international law, the Supreme Court found that aggression is not a crime in the domestic law of England and Wales.³¹³ This has been applied in later cases. For example, in a private prosecution where a crime of aggression was alleged, the [Attorney General] refused permission on the basis that the crime of aggression is not known to the law of England and Wales, and the divisional court refused permission for judicial review of the refusal to issue a summons.³¹⁴

UK legislation also does not provide for universal civil jurisdiction for crimes under international law. The Supreme Court has held that Article 14 of the Torture Convention (which is implemented in the UK by section 134 of the Criminal Justice Act) does not provide for universal civil jurisdiction in relation to torture. The Supreme Court also held that there is no evidence that states have recognized or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law.³¹⁵

³¹¹ *Taking of Hostages Act 1982* sec. 1 (United Kingdom, 1982), available at <https://www.legislation.gov.uk/ukpga/1982/28>.

³¹² In this memorandum, references to the Supreme Court of the UK also include a reference to the Appellate Committee of the House of Lords, which was the highest court in the UK prior to October 2009 when the Supreme Court replaced it.

³¹³ *R v. Jones et al.* (Mar. 29, 2006) U.K.H.L. 16, available at <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones.pdf>.

³¹⁴ A private prosecution was brought against certain members of the UK Government for the international crime of aggression concerning the UK Government’s actions in Iraq in 2003 on the basis that a crime of aggression existed under English law. The Attorney General refused permission for the private prosecution on the basis that the crime of aggression was unknown to English law, and the court refused to issue summons for the private action. The private prosecutor appealed to the Divisional Court seeking judicial review, but the Divisional Court refused permission for judicial review. *See Regina v. Westminster Magistrates’ Court* (Jul. 31, 2017) U.K.H.C., available at <https://www.judiciary.uk/wp-content/uploads/2017/07/r-oao-al-rabbat-v-westminster-magistrates-court.pdf>.

³¹⁵ *Jones v. Saudi Arabia* (2006) U.K.H.L. 26 paras. 25 and 27, available at <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf>; *Belhaj and Another v. Straw*

Civil claims may still be brought under domestic tort law for alleged tortious actions that occurred in Ukraine (for example, claims against tortious actions such as battery, assault, unlawful imprisonment, negligence, etc.). However, claims related to torts that occurred outside the UK are less likely to proceed successfully as English courts will only hear the claim if the court has personal and subject-matter jurisdiction. Personal jurisdiction may be difficult to establish if the tort took place in Ukraine and none of the parties involved are UK citizens or residents. In addition, the applicable law may not be English law as the applicable law is more likely to be the law of Ukraine which is where the actions or events constituting the tort in question occurred.³¹⁶

3. *Potential Defendants*

In relation to offences that relate to hostage-taking, torture, and grave breaches of the Geneva Conventions, an investigation can be opened into any person regardless of their nationality if the other elements of the offence are met. In general, for an arrest warrant to be issued or for a suspect to be charged, the accused must be present in the UK or his or her presence must be anticipated.³¹⁷ In particular, for a private prosecution, an application for consent from the Director of Public Prosecutions should only be made when there is a reasonable belief that a suspect will be entering the UK within 14 days of the application.³¹⁸ Trial *in absentia* is possible at the trial judge's discretion.³¹⁹ Therefore, it may be difficult to prosecute a suspect who has committed an offence in Ukraine, but who is unlikely to enter the UD or who has no connection to the UK.

and Others (2017) U.K.S.C. 3 para. 108, *available at* <https://www.supremecourt.uk/cases/docs/uksc-2014-0264-judgment.pdf>.

³¹⁶ Under the Private International Law (Miscellaneous Provisions) Act 1995, there are general rules that govern the determination of the applicable law. For example, for a cause of action related to personal injury to an individual or death resulting from personal injury, the applicable law is the law of the state where the individual was when the injury was sustained. For a cause of action relating to damage to property, the applicable law is the law of the state where the property was when it was damaged. In any other case, the general rule is that the applicable law is the law of the state in which the most significant element or elements of the events occurred. *Private International Law (Miscellaneous Provisions) Act 1995* sec. 11, *available at* <https://www.legislation.gov.uk/ukpga/1995/42/section/11>.

³¹⁷ For example, the UK Government's guidance explains that the Metropolitan Police Counter Terrorism Command (the unit responsible for investigating crimes of universal jurisdiction) will carry out a scoping exercise that includes assessing whether the suspect is present in the UK and whether there is a reasonable prospect of the suspect coming to the UK. HM Government, *Note on the investigation and prosecution of crimes of universal jurisdiction*, UNITED KINGDOM NATIONAL ARCHIVES, 11-16 (May 21, 2018), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.

³¹⁸ HM Government, *Note on the investigation and prosecution of crimes of universal jurisdiction*, UNITED KINGDOM NATIONAL ARCHIVES, 17-18 (May 21, 2018), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.

³¹⁹ *Regina v. Jones* (2002) U.K.H.L. 5 para. 13, *available at* <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd020220/jones-1.htm>.

There are limits to who can be a defendant for charges of war crimes, crimes against humanity or genocide. While the relevant legislation applies to offences committed outside the UK, it only applies to offences committed by: (i) a UK national, (ii) a UK resident (including a person who later becomes resident in the UK and is resident at the time the proceedings are brought), or (iii) a person subject to UK service jurisdiction within the meaning of the Armed Forces Act 2006.³²⁰ Unless a suspect that has committed an offence in Ukraine is a UK national or a UK resident (or is likely to become a UK resident in the future), it will be difficult to prosecute the suspect for war crimes, crimes against humanity or genocide in the UK. There are also supplementary provisions about the responsibility of commanders and other superiors who can be found to have aided, abetted, counselled, or procured the commission of an offence of genocide, a crime against humanity or a war crime in certain circumstances.³²¹ However, the nationality and residency limits apply to ancillary offences as well, so prosecution is only likely to proceed against commanders or superiors who are UK citizens or residents.

Claims against certain defendants may be limited by the principle of state immunity. Under the State Immunity Act 1978 (the “State Immunity Act”),³²² a sovereign or other head of state (as well as members of his family forming part of his household and his private servants) enjoys full personal immunity from civil and criminal jurisdiction and all forms of arrest and detention.³²³ The immunity applies regardless of whether they are visiting the UK on an official or a private visit and whether or not their acts that are under investigation were done in an official or a private capacity. However, the immunity only applies to individuals if they hold the relevant office, but not afterwards. Common law has also extended the immunity to other very senior government figures that are responsible for foreign relations of a state. For example, the Magistrates’ Court rejected an application for an arrest warrant against the Israeli Defense Minister when he was visiting the UK.³²⁴ The Magistrates’ Court has also refused to issue an arrest warrant against the Chinese Trade Minister who was visiting the UK as a member of an official delegation.³²⁵ Therefore, even if acting senior Russian government figures were to enter the UK, the courts would likely reject an application for an arrest warrant.

³²⁰ *International Criminal Court Act 2001* sec. 51 (United Kingdom, 2001); *International Criminal Court Act 2001* sec. 52 (United Kingdom, 2001); *International Criminal Court Act 2001* sec. 67 (United Kingdom, 2001); *International Criminal Court Act 2001* sec. 67A (United Kingdom, 2001); *International Criminal Court Act 2001* sec. 68 (United Kingdom, 2001).

³²¹ *International Criminal Courts Act 2001* (United Kingdom, 2001), available at <https://www.legislation.gov.uk/ukpga/2001/17/part/5>.

³²² *State Immunity Act 1978* sec. 20 (United Kingdom, 1978), available at <https://www.legislation.gov.uk/ukpga/1978/33>.

³²³ Except in relation to the narrow exceptions from immunity set out for civil jurisdiction in sections 2 to 11 in Part 1 of the State Immunity Act 1978, see *State Immunity Act 1978* art. 33 (United Kingdom, 1978), available at <https://www.legislation.gov.uk/ukpga/1978/33>; Section 16(1) expressly confirms that nothing in Part 1 of the State Immunity Act 1978 applies to criminal proceedings, see *State Immunity Act 1978* sec. 16(1) (United Kingdom, 1978).

³²⁴ *Re Mofaz* (2004) Bow Street Magistrates’ Court 128 ILR 709 (Feb. 12).

³²⁵ *Re Bo Xilai* (2005) Bow Street Magistrates’ Court unreported decision (Nov. 8).

A former head of state or senior figure of government is also immune from civil and criminal jurisdiction in relation to acts performed, either in his own state or elsewhere, in the exercise of his functions as a head of state (*i.e.*, immunity *ratione materiae*).³²⁶

The Supreme Court has held that this immunity does not apply in relation to torture for acts that occurred after the relevant states had become signatories to the Torture Convention.³²⁷ Under the Torture Convention, existing domestic courts of all the signatory states are authorized and required to take jurisdiction internationally for the crime of torture. An essential feature of the crime of torture is that it must be committed “by or with the acquiescence of a public official or other person acting in an official capacity”, and as a result, all defendants in torture cases will be state officials. If immunity *ratione materiae* were to apply, then there would be no case where a successful prosecution can be brought unless the relevant state is prepared to waive its rights to immunity, since all officials or someone in an official capacity would be entitled to immunity. In relation to civil jurisdiction, the Supreme Court has ruled that immunity *ratione materiae* applies in relation to civil proceedings even in relation to torture.³²⁸

4. *Relevant Cases*

Ongoing Investigations against Suspects for Crimes Committed during the 1994 Genocide in Rwanda

The UK has arrested five suspects over their alleged involvement in the genocide in Rwanda. Rwandan authorities had requested extradition, but in July 2017, the UK High Court declined to order extradition on the basis that the suspects would be at risk of a denial of a right to a fair trial (and for two suspects extradition was barred by the rule against double jeopardy).³²⁹ The Metropolitan Police is investigating the allegations.³³⁰ This ongoing investigation suggests that suspects that are in the UK may continue to be investigated in the UK, and the UK authorities may be reluctant to accede to extradition requests where there are concerns that the suspects would be denied a right to a fair trial.

Kumar Lama (2016)

A victim of torture during the Nepalese civil war launched a complaint to the Metropolitan Police Counter Terrorism Command. Kumar Lama was arrested in January 2013, under section 134 of

³²⁶ *Diplomatic Privileges Act 1964* art. 39 (United Kingdom, 1964), available at <https://www.legislation.gov.uk/ukpga/1964/81>.

³²⁷ *R v. Bartle et al.* (1999) U.K.H.L. 17, available at <https://www.bailii.org/uk/cases/UKHL/1999/17.html>.

³²⁸ *Jones v. Saudi Arabia* (2006) U.K.H.L. 26, available at <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf>.

³²⁹ *Rwanda v Nteziryayo et al.* (2017) E.W.H.C. 1912, available at <https://www.judiciary.uk/wp-content/uploads/2017/07/rwanda-v-nteziryayo-and-others-judgment-20170728.pdf>.

³³⁰ Kevin Rawlinson and agencies, *Met Police Investigate Five Men Over Rwandan Genocide Claims*, *THE GUARDIAN*, Apr. 8, 2019, available at <https://www.theguardian.com/uk-news/2019/apr/09/met-police-investigate-five-men-over-rwandan-genocide-claims>.

the Criminal Justice Act, and was charged for two incidents of torture. The incidents were allegedly committed while Lama was a commander of the Goringhela barracks during the Nepalese civil war. Lama was acquitted by a jury of one of the two counts of torture in August 2016 and was acquitted of all charges in September 2016. The trials faced procedural problems, including in relation to evidence which was mostly located in Nepal and a lack of sufficiently qualified translators to hear the evidence of Nepalese witnesses.³³¹ For offences committed in Ukraine, which are to be tried in the UK, it is important to ensure that evidence has been collected and appropriate translators are available.

Faryadi Sarwar Zardad (2005)

Faryadi Sarwar Zardad was arrested in the UK in July 2003 and was charged with offences of torture and hostage-taking. In relation to the charge of torture, the court found that Zardad was a de facto public official and therefore he was a public official or a person acting in an official capacity in terms of section 134(1) of the Criminal Justice Act. While the first jury was a hung jury, the second jury found Zardad guilty of conspiracy to torture and conspiracy to take hostages and was sentenced to 20 years' imprisonment on each count. Zardad appealed against the conviction on a ground relating to the direction given by the trial judge as to how the jury should approach the issue of a previous inconsistent statement by a witness, but the court dismissed the appeal.³³² In December 2016, Zardad was released on parole and was deported to Afghanistan.

Augusto Pinochet (2000)

Augusto Pinochet was arrested in the UK in October 1998 and committed for extradition to Spain where he would stand trial for torture and conspiracy to commit torture. Pinochet claimed immunity from prosecution under the State Immunity Act, but as discussed above, this was rejected by the Supreme Court as the Supreme Court held that immunity *ratione materiae* could not apply to torture committed after the year in which the UK ratified the Torture Convention. The Home Secretary, who was responsible for the final decision in relation to extradition, determined that Pinochet should not be extradited to Spain on the basis of ill health. This case is generally seen as an important case internationally for universal jurisdiction since Pinochet was detained in a foreign state for crimes against humanity that he had committed in his own state, without his own state having issued a warrant or request for extradition. The case provides a useful example if former Russian government officials that are linked to alleged acts of torture in Ukraine enter the UK although it should be noted that this case applies only to the offence of torture where immunity *ratione materiae* does not apply.

5. *Advantages of the UK as a Forum*

There are several benefits to bringing a claim in the UK for a universal jurisdiction crime:

³³¹ Owen Bowcott, *Nepalese officer cleared of torturing suspected Maoist detainees*, *THE GUARDIAN*, Sept. 6, 2016, available at <https://www.theguardian.com/law/2016/sep/06/nepalese-officer-col-kumar-lama-cleared-torturing-maoist-detainees>.

³³² *R v. Faryadi Sarwar Zardad* (2007) E.W.C.A. Crim 279.

Range of Offences – It is possible to bring proceedings for a range of offences (including torture, grave breaches of the Geneva Conventions, war crimes, crimes against humanity, genocide, and hostage-taking) that have been committed outside the UK.

Availability of Private Prosecutions – It is possible to bring private prosecutions for the offences of torture, grave breaches of the Geneva Conventions, and hostage-taking.

Significant Experience – The UK authorities (including the Metropolitan Police, the Crown Prosecution Services, and the courts) have significant experience with universal jurisdiction crimes, and there is relevant case law and official guidance, which makes the process more transparent and consistent.

Existing Investigations in Ukraine – The UK authorities are already investigating war crimes in Ukraine, and the UK has dispatched war crimes experts to Ukraine to support Ukraine with investigations into atrocities.³³³ The UK has not previously carried out structural investigations into war crimes (such as the investigations carried out in Germany and Sweden), and therefore, it does not seem like this is part of a formal structural investigation, but rather is intended to provide additional support and expertise to Ukrainian officials.

6. *Disadvantages of the UK as a Forum*

There are also certain drawbacks that need to be considered before bringing a case in the UK:

Attorney General Consent – The consent of the Attorney General is required for the Crown Prosecution Services to bring proceedings for torture, grave breaches of the Geneva Convention, and hostage-taking, as well as war crimes, crimes against humanity, and genocide.

Private Prosecutions – Bringing a private prosecution requires the consent of the Director of Public Prosecutions. Applications for the consent of the Director of Public Prosecutions should not be made while there is an ongoing Metropolitan Police scoping exercise or investigation. The UK police are already investigating allegations of war crimes in Ukraine, and therefore, it is very likely that a private prosecution would not be granted consent until the police have finished their investigation. If an application is made and consent is granted, the Crown Prosecution Services can consider taking over the prosecution. Private prosecutions are expensive and are not covered by legal aid.

No Control over Proceedings – Victims have no standing in criminal proceedings brought by the Crown Prosecution Services, and therefore will not have control over the proceedings (although courts can make a compensation order for victims without the victim having submitted an application so victims can still receive compensation).

Residency Requirement – For war crimes, crimes against humanity, and genocide, the accused must be a UK citizen or a resident of the UK at the time the offence was committed. It is also

³³³ Press Release, “UK dispatches war crimes experts to help Ukraine with investigations”, UK Government press release dated Apr. 29, 2022, <https://www.gov.uk/government/news/uk-dispatches-war-crimes-experts-to-help-ukraine-with-investigations>.

possible to bring proceedings later if the accused becomes a resident of the UK, but a temporary visit to the UK is not sufficient. Therefore, if an accused is not a UK citizen and there is no prospect that the accused will become a resident of the UK, the ability to bring proceedings for war crimes, crimes against humanity, or genocide is restricted. In relation to other universal jurisdiction crimes (grave breaches of the Geneva Conventions, torture, and hostage-taking), the nationality and residency of the accused do not matter. However, the UK authorities are unlikely to issue an arrest warrant unless the accused is in the UK or is imminently expected to arrive in the UK. Further, while a trial *in absentia* is possible at the judge’s discretion, such trials are rare and may be against public interest in proceedings relating to universal jurisdiction crimes.

Immunity – Immunity ratione personae applies to an acting head of state and to acting senior figures of government and restricts the ability to bring proceedings against such defendants. *Immunity ratione materiae* applies to acts performed by officials in the exercise of their official functions and restricts the ability to bring proceedings against officials who acted in the exercise of their official functions. This immunity does not apply in relation to proceedings for torture.

Civil Jurisdiction – Civil claims could be brought, but it is unlikely that a UK court will accept jurisdiction to hear such cases as the courts are more likely to consider that the courts of the state where the tort occurred or damage occurred are the most appropriate venue for such claims.

C. France³³⁴

1. Domestic Law Permitting Universal Jurisdiction

French national law provides for universal jurisdiction over specified offenses emanating from international conventions ratified by France. Article 689 of the French Code of Criminal procedure (“CCP”)³³⁵ defines the mechanism of universal jurisdiction over offenses committed outside of France when an international convention gives jurisdiction to French courts to deal with this offense³³⁶ in the following terms:

“Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute,

³³⁴ The summary in this section does not constitute advice on French laws. It is based on research by lawyers not admitted to practice in France.

³³⁵ *Code of Criminal Procedure 1957* (France, 2022), available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000006138114/#L. EGISCTA000006138114.

³³⁶ France ratified the four Geneva Conventions on Jun. 28, 1951, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment on Feb. 18, 1986.

or when an international Convention gives jurisdiction to French courts to deal with the offence”³³⁷

Article 689-1 of the CCP sets out the conditions for the exercise of universal jurisdiction by French courts, and provides that persons guilty of committing any of the offences described in Section VI.C.2³³⁸, whatever their nationality, if they are present in France, can be prosecuted and tried by French courts on the following terms:

“In accordance the international agreements referred to in the following articles, any person who has committed one of the crimes listed in these articles outside the territory of the French Republic may be prosecuted and convicted by the French courts if s/he is in France. The provisions of the present article apply also to any attempt to commit these crimes, whenever such is punishable by law.”³³⁹

According to Article 689-1 of the CCP, exercise of universal jurisdiction in France requires the presence of the suspect within national territory at the time proceedings are initiated, and precludes the initiation of proceedings in the absence of that person.³⁴⁰ However, as applied, this principle differs from one crime to another. It is also limited by the need to incorporate international agreements giving jurisdiction to the national judges into French law.³⁴¹

In April 2022, French prosecutors had opened four investigations into war crimes, in Ukraine under the principle of universal jurisdiction³⁴², including one into the March 16 slaying of French-Irish journalist Pierre Zakrzewski near Kyiv³⁴³. Article 689-11 CCP allows national prosecutors to

³³⁷ *Code of Criminal Procedure 1957* art. 689 (France, 2009), available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000021486423.

³³⁸ *Code of Criminal Procedure 1957* art. 689.2-689.9 (France, 2022), available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000006138114/#LEGISCTA000006138114.

³³⁹ *Code of Criminal Procedure 1957* art. 689-1 (France, 1999), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006577254/.

³⁴⁰ Secretariat, *Permanent Mission of France to the United Nations*, U.N. Doc. AT/sec No. 214 (Apr. 27, 2010), available at https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf.

³⁴¹ Secretariat, *Permanent Mission of France to the United Nations*, U.N. Doc. AT/sec No. 214 (Apr. 27, 2010), available at https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf.

³⁴² Stacy Meichtry, *French Prosecutors Open War-Crimes Probe in Ukraine*, WALL STREET JOURNAL, Apr. 5, 2022, available at <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-04-05/card/french-prosecutors-open-war-crimes-probe-in-ukraine-mLlqrzSeOCykvua8zfop-mLlqrzSeOCykvua8zfop>.

³⁴³ France 24, *What does it take to prosecute war crimes?*, available at <https://webdoc.france24.com/ukraine-justice-crimes-war/> (last visited Jun. 30, 2022).

conduct an investigation outside of French territory if the alleged perpetrator legally resides in France.³⁴⁴

2. *Permitted Claims; Offences Covered*

Articles 689 and 689-1 of the CCP require that an international agreement be incorporated into French domestic law. The provisions of the agreement must give national courts the jurisdiction to prosecute and sentence the person suspected of committing the offences addressed in the agreement. The following crimes are penalized by French law under universal jurisdiction principles: torture and other cruel, inhuman or degrading treatment or punishment;³⁴⁵ enforced disappearances;³⁴⁶ crimes against cultural property during armed conflict;³⁴⁷ terrorism and financing terrorism;³⁴⁸ offenses committed with nuclear materials;³⁴⁹ unlawful acts against the safety of maritime navigation;³⁵⁰ seizure of aircraft and other crimes related to aviation;³⁵¹ EU

³⁴⁴ *Code of Criminal Procedure* art. 689-11 (France, 2020), available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/.

³⁴⁵ *Code of Criminal Procedure* art. 689-2 (France, 1984).

³⁴⁶ *Code of Criminal Procedure* art. 689-13 (France, 2006).

³⁴⁷ *Code of Criminal Procedure* art. 689-14 (France, 1999).

³⁴⁸ *Code of Criminal Procedure* art. 689-3 (France, 1979); *Code of Criminal Procedure* art. 689-9 (France, 1998); *Code of Criminal Procedure* art.689-10 (France, 2000).

³⁴⁹ *Code of Criminal Procedure* art. 689-4 (France, 1980).

³⁵⁰ *Code of Criminal Procedure* art. 689-5 (France, 1988).

³⁵¹ *Code of Criminal Procedure* art. 689-6 (France, 1970); *Code of Criminal Procedure* art. 689-7 (France, 1988).

corruption crimes;³⁵² crimes within the jurisdiction of the ICC;³⁵³ and specific road transport offenses.³⁵⁴

In addition to the international agreements incorporated into French law through the list provided in the CCP, French authorities also have jurisdiction over: (i) persons allegedly responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,³⁵⁵ and (ii) persons allegedly responsible for acts of genocide or other serious violations of international humanitarian law committed in 1994 in the territory of Rwanda and, in the case of Rwandan citizens, in the territory of neighboring states.³⁵⁶ French law has recognized the ad hoc universal jurisdiction of the French courts to try offences specific to those two tribunals. The universal jurisdiction of the French courts is therefore limited *ratione materiae*, *temporis* and *loci* by the provisions of these two resolutions. With regard to the universal jurisdiction of French judges, these two laws give them, on the one hand, the ability to prosecute perpetrators of or accomplices to the offences defined within the Statutes of the two International

³⁵² *Code of Criminal Procedure* art. 689-8 (France, 1996).

³⁵³ *Code of Criminal Procedure* art. 689-11 (France 1998). Apart from the cases provided for in subtitle I of title I of book IV for the application of the convention on the statute of the International Criminal Court, opened for signature in Rome on Jul. 18, 1998, may be prosecuted and judged by the French courts, if habitually residing in the territory of the Republic, any person suspected of having committed one of the following offenses abroad:

1° The crime of genocide defined in Chapter I of Subtitle I of Title I of Book II of the Penal Code;

2° The other crimes against humanity defined in Chapter II of the same Subtitle I, if the acts are punishable by the legislation of the State where they were committed or if this State or the State of which the suspected person has the nationality is a party to the aforementioned convention;

3° The war crimes and offenses defined in articles 461-1 to 461-31 of the same code, if the acts are punishable by the legislation of the State where they were committed or if this State or the State whose person suspected has the nationality is a party to the aforementioned convention.

³⁵⁴ *Code of Criminal Procedure* art. 689-12 (France, 2006). Regulation (EC) No 561/2006 of the European Parliament and of the Council of Mar. 15, 2006 on the harmonisation of certain social legislation relating to road transport led to the introduction in France, through article 689-12 of the CCP, of a “quasi-universal” jurisdiction provision for certain road offences.

³⁵⁵ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia* (United Nations, 2007), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Law no. 95-1 of Jan. 2, 1995 adapting the French legislation to the provisions of the United Nations Security Council Resolution 827 of May 25, 1993 establishing an international tribunal to try persons alleged to be responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia after Jan. 1, 1991, unofficial translation.

³⁵⁶ Law no. 96-432 of May 22, 1996 adapted the French legislation to the provisions of the United Nations Security Council Resolution 955 of Nov. 8, 1994 to establish an international tribunal to try persons alleged to be responsible for genocide or other grave breaches of international humanitarian law committed between Jan. 1, 1994 and Dec. 31, 1994 on the territory of Rwanda and, in the case of Rwandan citizens, on the territory of neighboring States; see *Statute of the International Criminal Tribunal for Rwanda* (United Nations, 2010), available at http://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

Criminal Tribunals³⁵⁷ if they are found in France. On the other hand, they also allow the Tribunals to transfer cases to French courts.³⁵⁸

On August 9, 2010, France incorporated the Rome Statute into the CCP. Article 689-11 of the CCP gives jurisdiction to French courts over a person habitually residing in France who has committed one of the offenses listed in the Rome Statute, provided that the offense is punishable in the state in which it was committed or in the state of the person's citizenship, if the state is a party to the Rome Statute.³⁵⁹

3. *Potential Defendants*

To exercise universal jurisdiction over the above-listed crimes, certain requirements need to be met. The French legal system imposes a different set of requirements depending on the type of crime. Torture, enforced disappearance, and crimes committed in Rwanda and the former Yugoslavia are easier to investigate and prosecute, whereas the requirements for crimes under the Rome Statute crimes are stricter.³⁶⁰

a. Presence / Residence of the Accused

As a general principle, any person present in French territory can be prosecuted under the principle of universal jurisdiction.³⁶¹ However, this principle differs from one crime to another. For torture, enforced disappearance, and crimes committed in Rwanda and neighboring states and in the former Yugoslavia, French authorities have jurisdiction if the suspect is present on French territory.³⁶² The interpretation of when the accused must be present – at the time of filing the complaint or at the time of the opening of an investigation – is not settled. The Supreme Court held in 2007 that the presence of the accused is required at the time of the opening of an investigation.³⁶³ For crimes

³⁵⁷ Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993); Security Council Resolution 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

³⁵⁸ Permanent Mission of France to the United Nations, General Comment No. 214, The Scope and Application of the Principle of Universal Jurisdiction (Apr, 27, 2010), *available at* https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf

³⁵⁹ *Code of Criminal Procedure* art. 689-11 (France, 2020), *available in French at* https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/.

³⁶⁰ Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in France*, 13 (Feb. 2019), *available at* <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

³⁶¹ *Code of Criminal Procedure* art. 689-1 (France, 1999), *available in French at* https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006577254/.

³⁶² *Code of Criminal Procedure* art. 689-2 (France, 1999), *available in French at* https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006577254/; *Code of Criminal Procedure* art. 689-13 (France, 2013) *available in French at* https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000027809234/.

³⁶³ Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 10, 2007, n° 04-87245 (Fr).

falling within the jurisdiction of the ICC and crimes against cultural property the alleged perpetrator must legally reside in France.³⁶⁴

b. Double Criminality

For crimes falling within the jurisdiction of the ICC, the double criminality principle is required in order for French authorities to have jurisdiction.³⁶⁵ Thus, if the state where the crimes were perpetrated is not party to the Rome Statute, it must have criminalized the ICC crimes under its jurisdiction. Since March 23, 2019, this condition is no longer required for the crime of genocide.³⁶⁶ French authorities also require double criminality for extradition requests. Thus, the Supreme Court denied extradition requests to Rwanda on the basis that Rwanda had not criminalized genocide and crimes against humanity at the time the offenses took place.³⁶⁷

c. Subsidiarity

For torture, enforced disappearance, and crimes against cultural property the principle of subsidiarity does not apply. French courts do not have to make sure that there is no other jurisdiction, international or national, competent to try the case before assuming jurisdiction.³⁶⁸

For crimes that fall within the jurisdiction of the ICTR or the ICTY, at the request of the residual mechanism, French courts must withdraw the case and refer it to the mechanism.³⁶⁹

For crimes falling within the jurisdiction of the ICC, the prosecutor must make sure that no national or international court has asserted its jurisdiction over the case or has asked for the extradition of the suspect.³⁷⁰ In practice, the police unit specialized in war crimes and crimes against humanity

³⁶⁴ *Code of Criminal Procedure* art. 689-11 (France, 2020), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/; *Code of Criminal Procedure* art. 689-14 (France, 2018) available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037198314.

³⁶⁵ *Code of Criminal Procedure* art. 689-11 (France, 2020), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/.

³⁶⁶ Introduced by Loi n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1) (Law no. 2019-222 of Mar. 23, 2019 on the 2018-2022 programme and justice reform, unofficial translation), Article 63 IV.

³⁶⁷ Cour de cassation [Cass.] [supreme court for judicial matters] crim., Feb. 26, 2014, No. 13 (Fr.).

³⁶⁸ Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in France*, 17 (Feb. 2019), available at <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

³⁶⁹ *Law n° 95-1* art. 3 (France, 1995); *Law n° 96-432* art. 1 para. 2 (France, 1996).

³⁷⁰ *Code of Criminal Procedure* art. 689-11 (France, 2020), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/; See also Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 4, 2011, n° 10-87760.

(l'office central de lutte contre les crimes contre l'humanité, hereinafter "OCLCH") only investigates crimes when the ICC does not have jurisdiction (Syria, Iraq, etc.).³⁷¹

Therefore, French courts may exercise its jurisdiction over the alleged crimes in Ukraine in four ways: (i) torture, enforced disappearance, and crimes committed in Rwanda and neighboring states and in the former Yugoslavia, if the suspect is present on French territory; (ii) crime of genocide, if the alleged perpetrator legally resides in France; (iii) crimes against cultural property if the alleged perpetrator legally resides in France; and (iv) crimes against humanity and war crimes, if the alleged perpetrator legally resides in France and Ukraine must have criminalized these crimes under its domestic jurisdiction because Ukraine is not a State Party to the Rome Statute. The prosecutor also must make sure that no national or international court has asserted its jurisdiction over the case or asked for the extradition of the suspect. The prosecutor must expressly ask the ICC to decline its jurisdiction over the case. If the ICC is already investigating the case, French authorities will withdraw their jurisdiction.

4. *Relevant Cases*

On November 24, 2021, the cour de cassation, France's highest court for civil and criminal matters, blocked charges against a Syrian man who had been accused of being an accomplice to crimes against humanity committed by the government of President Bashar al-Assad in Syria.³⁷² The cour de cassation ruled that French prosecutors are not competent to investigate and prosecute an alleged Syrian war criminal due to the lack of a definition in Syrian law of crimes against humanity.³⁷³ The cour de cassation decision in the case of Abdulhamid C. blocked crimes against humanity in Syria because Syria had not criminalized crimes against humanity domestically and Syria is not a party to the Rome Statute.

The case involved Abdulhamid C., a former member of the Syrian intelligence services, who served between 2011 and 2013 as a reservist in the State Security Services in Damascus – a unit known for violent suppression of demonstrations against the rule of Bashar al-Assad. He was arrested in France in February 2019 after a joint investigation by French and German authorities and charged for his alleged participation in crimes against humanity committed between March 2011 and August 2013. Abdulhamid C. allegedly aided in the arrest and torture of opponents to the Assad government. The court said it could not prosecute "complicity in crimes against

³⁷¹ Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in France*, 17 (Feb. 2019), available at <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

³⁷² Library of Congress, *France: High Court Blocks Charges Against Syrian Man Accused of Complicity in Crimes Against Humanity*, 2021, available at <https://www.loc.gov/item/global-legal-monitor/2021-12-28/france-high-court-blocks-charges-against-syrian-man-accused-of-complicity-in-crimes-against-humanity/>.

³⁷³ Cour de cassation [Cass.] [supreme court for judicial matters] crim. Nov. 24, 2021, Court of Cassation Appeal No. 21-81.344, ECLI:EN:CCASS:2021:CR01269, available at https://www.courdecassation.fr/decision/619de43eb458df69d4022a18?sort=date-desc&items_per_page=20&search_api_fulltext=&expression_exacte=&date_du=&date_au=&judilibre_chambre=&judilibre_type=&judilibre_matiere=&judilibre_publication=&judilibre_solution=&op=Trier.

humanity” against a former Syrian soldier on French soil.³⁷⁴ It said that French prosecutors could only prosecute crimes against humanity if they were part of criminal law in Syria as well as France.

The cour de cassation ruled that charges against the defendant could not be pursued. The ruling was based on Article 689-11 of the CCP, which states that crimes against humanity can only be prosecuted in France under the condition of the existence of dual criminality. In other words, French prosecutors can only prosecute this conduct if the state in which the crimes were committed either expressly criminalizes crimes against humanity, or is party to the Rome Statute and has thus criminalized the conduct by ratifying the treaty (even without implementing legislation).³⁷⁵ This provision was the principal basis of the cour de cassation’s ruling, as Syria has not ratified the Rome Statute, nor does Syrian law recognize crimes against humanity.

This case appears to be the first time that Article 689-11 of the CCP has been applied. While critics argue that the cour de cassation’s ruling was no surprise given the legislation’s strict requirements, many fear that it sends out a “message of impunity” to perpetrators of crimes against humanity, as perpetrators often act within the limits of their own states’ legislation. On September 22, 2021, an amendment to a bill on judicial reform was submitted in the French parliament that would have removed both the requirement of “double incrimination” (the requirement that the crime being prosecuted also be recognized as a crime in the state in which it was committed) and the requirement that the suspect be a resident of France for prosecutions for crimes against humanity to proceed.³⁷⁶ This amendment was defeated, however, as the French government fears that these changes would negatively affect France’s diplomatic relations by opening the floodgates of charges for crimes against humanity against foreign nationals, including leaders of allied states.³⁷⁷

5. *Advantages of France as a Forum*

There are several benefits to bringing a claim in France for a universal jurisdiction crime:

Prosecutorial Discretion – An investigation may be initiated either by the judicial police, including the OCLCH, a prosecutor, a victim(s), or NGOs, under the conditions defined by the CCP.³⁷⁸

³⁷⁴ Cour de cassation [Cass.] [supreme court for judicial matters] crim. Nov. 24, 2021, Court of Cassation Appeal No. 21-81.344, ECLI:EN:CCASS:2021:CR01269, available at https://www.courdecassation.fr/decision/619de43eb458df69d4022a18?sort=date-desc&items_per_page=20&search_api_fulltext=&expression_exacte=&date_du=&date_au=&judilibre_chambre=&judilibre_type=&judilibre_matiere=&judilibre_publication=&judilibre_solution=&op=Trier

³⁷⁵ Roger Lu Phillips and Aweiss Al Dobouch, *France is Not a Safe Haven for Human Rights Abusers – Despite High Court Opinion*, JUST SECURITY, Dec. 9, 2021, <https://www.justsecurity.org/79473/france-is-not-a-safe-haven-for-human-rights-abusers-despite-high-court-opinion/>.

³⁷⁶ Roger Lu Phillips and Aweiss Al Dobouch, *France is Not a Safe Haven for Human Rights Abusers – Despite High Court Opinion*, JUST SECURITY, Dec. 9, 2021, <https://www.justsecurity.org/79473/france-is-not-a-safe-haven-for-human-rights-abusers-despite-high-court-opinion/>.

³⁷⁷ *France: High Court Blocks Charges Against Syrian Man Accused of Complicity in Crimes Against Humanity*, available at <https://www.loc.gov/item/global-legal-monitor/2021-12-28/france-high-court-blocks-charges-against-syrian-man-accused-of-complicity-in-crimes-against-humanity/>.

³⁷⁸ *Code of Criminal Procedure* art. 1 (France, 2011); *Code of Criminal Procedure* art. 80-3 (France, 2004).

Under the French legal system, victims and NGOs can trigger the opening of investigations by filing a complaint to a public prosecutor or by submitting a civil party petition to an investigating judge. Therefore, individuals can file a criminal complaint³⁷⁹ if they have personally suffered a harm directly caused by an offense from the Russian-Ukraine war.³⁸⁰ Victims do not need to be French to be a civil party in the criminal proceedings, and they do not need to be represented by a lawyer to file a complaint. NGOs can file a complaint if they are acting on behalf of a victim or in their own right.³⁸¹ For torture, enforced disappearance, and crimes committed in Rwanda and neighboring states and in the former Yugoslavia, French jurisdiction is not dependent on the discretionary power of the prosecutor.³⁸² That means any victim claiming to have suffered harm from a crime from the Russian-Ukraine war, including torture, enforced disappearance, and crimes committed in Rwanda and neighboring states and in the former Yugoslavia may petition to become a civil party by filing a petition with the competent investigating judge.³⁸³ This also applies to certain NGOs. NGOs can become a civil party without being a victim of the crimes or without representing a victim. Once accepted as a civil party, NGOs have the same rights as any other civil party. However, for crimes falling within the jurisdiction of the ICC and crimes against cultural property, the prosecutor has the discretion to decide whether to open and to close an investigation.³⁸⁴

Victim Rights and Participation – Victims have certain rights³⁸⁵ at investigation stage and trial stage. For example, victims have the right to be informed³⁸⁶ and to become a civil party at investigation stage.³⁸⁷ Victims also have the right to become a civil party and to apply for reparation in the form of monetary damages against the convicted perpetrator at any time during

³⁷⁹ *Code of Criminal Procedure* art. 1 (France, 2011), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000024496929#:~:text=L'action%20publique%20pour%20l,d%C3%A9termin%C3%A9es%20par%20le%20pr%C3%A9sent%20code.

³⁸⁰ *Code of Criminal Procedure* art. 2 (France, 2011); See also Cour de Cassation, Chambre criminelle, 12 September 2000, n° 00-80587.

³⁸¹ *Code of Criminal Procedure* art. 2-1 (France, 2020); *Code of Criminal Procedure* art. 2-24 (France, 2020).

³⁸² Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in France*, 17 (Feb. 2019), available at <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

³⁸³ *Code of Criminal Procedure* art. 85 (France, 2020), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038312069#:~:text=Toute%20personne%20qui%20se%20pr%C3%A9tend,%2D1%20et%20706%2D42.

³⁸⁴ *Code of Criminal Procedure* art. 689-11 (France, 2020); *Code of Criminal Procedure* art. 689-11 (France, 2020).

³⁸⁵ *Code of Criminal Procedure* art. 10-2 (France, 2022), available in French at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000031050394#:~:text=A%20tous%20les%20stades%20de,par%20l'autorit%C3%A9%20judiciaire%20comp%C3%A9tente.

³⁸⁶ *Code of Criminal Procedure* art. 1 (France, 2011); *Code of Criminal Procedure* art. 80-3 (France, 2004).

³⁸⁷ *Code of Criminal Procedure* art. 10-2 (France, 2022); *Code of Criminal Procedure* art. 85 (France, 2019); *Code of Criminal Procedure* art. 88 (France, 1993); *Code of Criminal Procedure* art. 89 (France, 2019).

the trial until the closing of the debates. Civil parties who are already part of the procedure since the investigation stage do not have to apply again for civil party status at trial.³⁸⁸

Reparation for Victims in Criminal Proceedings – Civil parties may apply for reparation against the convicted perpetrator for the harm suffered in the form of financial compensation or any other appropriate means. Those means can include restorative justice measures when appropriate.³⁸⁹ Pursuant to Article 2 of the CCP, individuals who obtain status as civil parties can claim reparation within the criminal proceedings for damages suffered if he or she has personally suffered damage directly caused by the offense.³⁹⁰ Since March 2017, victims and accused can communicate to discuss the consequences of a crime.³⁹¹ Any claim for monetary damages made by a civil party against an accused will be adjudicated by the three judges of the criminal court after the court has made a decision on the criminal action. A jury is not involved in this determination.³⁹² The court determines the sum to be paid to the victim(s), taking into account considerations of equity and the financial situation of the convicted party.³⁹³ In cases where the criminal action resulted in acquittal or exemption from penalty, the civil party may still apply for compensation for the damage caused by the accused insofar as it derives from the matters of which he or she was accused.³⁹⁴ The criminal court may order the accused to pay financial compensation when civil

³⁸⁸ Cour de Cassation, Chambre criminelle, 12 September 2000, n° 00-80587.

³⁸⁹ *Code of Criminal Procedure* art. 10-2 (France, 2022), available in French at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000031050394/#:~:text=A%20tous%20les%20stades%20de,par%20l'autorit%C3%A9%20judiciaire%20comp%C3%A9tente.

³⁹⁰ *Code of Criminal Procedure* art. 3 (France, 2011), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000024496788#:~:text=L'action%20civile%20p%C3%A9nale,faits%20objets%20de%20la%20poursuite.

³⁹¹ Circulaire du 15 mars 2017 relative à la mise en oeuvre de la justice restaurative applicable immédiatement suite aux articles 10-1, 10-2 (et 707 du code de procédure pénale, issus des articles 18 et 24 de la loi n° 2014-896 du 15 août 2014, Annexe I, Exemples de mesures de justice restaurative (Directive of Mar. 15, 2017 related to the enforcement of restorative justice immediately applicable following Articles 10-1, 10-2 and 707 of the code of criminal procedure, created by Articles 18 and 24 of the law n°2014-896 of Aug. 15, 2014, Annex I, examples of restorative justice measures, unofficial translation).

³⁹² *Code of Criminal Procedure* art. 371 (France, 2011), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006576334/.

³⁹³ *Code of Criminal Procedure* art. 375 (France, 1993), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006576344/.

³⁹⁴ *Code of Criminal Procedure* art. 372 (France, 1994), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006576338/.

responsibility can be established and the damages resulted from the acts which were the subject of the accusation.³⁹⁵

6. *Disadvantages of France as a Forum*

There are also certain drawbacks that need to be considered before bringing a case in France:

Presence of the Alleged Perpetrator – For crimes falling within the jurisdiction of the ICC, the first investigative act will be to demonstrate the presence or residence of the suspect in French territory. In practice, it is hard to find evidence of the suspect’s presence on French territory. There has not yet been any universal jurisdiction case where social media has been introduced as evidence at trial. Indeed, the case law on universal jurisdiction concerns Rwandan cases, and is based mainly on testimonies and documentary evidence. Moreover, the interpretation of when the accused must be present – at the time of filing the complaint or at the time of the opening of an investigation – is not settled.³⁹⁶ If the entire investigation of an offense from the Russian-Ukraine war is subject to having established the presence of the accused, there is a great risk that no prosecution would ever be undertaken.

Double Criminality – French law imposes double criminality in the crimes falling within the jurisdiction of the ICC (except for genocide)³⁹⁷. Since Ukraine is not party to the Rome Statute, it must have criminalized the ICC crimes (except for genocide) under Ukraine’s jurisdiction. That means if Ukraine had not criminalized the crimes against humanity and the war crimes at the time the offenses took place, French authorities will not have jurisdiction.

Criminal Investigations – In French law, the initiation of criminal investigations is not automatic. The CCP does not establish an obligation to prosecute these crimes.³⁹⁸

D. **Israel**³⁹⁹

1. *Domestic Law Permitting Universal Jurisdiction*

Israel’s domestic criminal law provides for universal jurisdiction to prosecute crimes against humanity, war crimes, crimes covered by international conventions that Israel is a party to, and other crimes that are recognized in customary international law. Israel has exercised this

³⁹⁵ Cour de cassation [Cass.] [supreme court for judicial matters] crim. Dec. 2, 2009, No. 08.

³⁹⁶ Open Society Justice Initiative, *Universal Jurisdiction Law and Practice in France*, 17 (Feb. 2019), available at <https://www.justiceinitiative.org/uploads/b264bc4f-053f-4e52-9bb8-fccc0a52816a/universal-jurisdiction-law-and-practice-france.pdf>.

³⁹⁷ *Code of Criminal Procedure* art. 689-11 (France, 2020), available in French at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038358433/.

³⁹⁸ *Code of Criminal Procedure* art. 689 (France, 2009); *Code of Criminal Procedure* art. 689-1 (France, 1999).

³⁹⁹ The summary in this section does not constitute advice on Israeli laws. It is based on research by lawyers not admitted to practice in Israel.

jurisdiction in the past, prosecuting individual Nazi soldiers for the crimes against humanity and war crimes committed during the Holocaust.

However, it is unlikely that Israel will exercise its universal jurisdiction to prosecute crimes committed by Russians in Ukraine. While the law and precedent described below provide a theoretical guideline for prosecuting these crimes, Israel has taken a relatively soft approach to condemning Russia's actions in Ukraine. Importantly, Israel has recently voiced opposition to exercising universal jurisdiction, and has only exercised jurisdiction in the limited examples of prosecuting Nazis after World War II. Accordingly, while the following domestic laws provide a theoretical approach for prosecuting crimes committed in Ukraine, it is unlikely that Israel will be a suitable jurisdiction.

a. Penal Law

Under Section 16 of Israel's Penal Law (the "Penal Code"), Israel has universal jurisdiction to prosecute crimes that it has undertaken to punish by international convention:

16. (a) Israeli penal law shall apply to foreign offences which Israel, by multilateral international conventions, has undertaken to punish even if they are committed by a person who is not an Israeli national or resident of Israel regardless of where they were committed.

(b) The restrictions imposed by section 14(b)(2) and (c) shall regulate the incidence of Israeli penal law also under this section.⁴⁰⁰

The limited exceptions are:

14. (b) Where the offence is committed within the territory under the jurisdiction of another state, Israeli law shall apply to it only if:

... (2) under the law of that state there is no defense to criminal liability for that offence;

... (c) There shall not be imposed for that offence a heavier penalty than could have been imposed under the law of that state.⁴⁰¹

b. Case Law

Israel is a quasi-common law state, and rulings by one court are binding on lower courts.⁴⁰² Israel's courts have applied the principle of universal jurisdiction in only a handful of cases, finding that a domestic law intended to punish Nazis and Nazi collaborators for crimes committed during the

⁴⁰⁰ *Penal Law* sec. 16 (Israel, 1977).

⁴⁰¹ *Penal Law* sec. 14 (Israel, 1977).

⁴⁰² *Basic Law: the Judiciary* sec. 20 (Israel, 1984).

Holocaust was consistent with principles of universal jurisdiction found in Israel's domestic laws and customary international law.

Specifically, in 1961 and 1962 Israel prosecuted Adolf Eichmann under the Nazi and Nazi Collaborators (Punishment) Law of 1950 (the "Nazi and Nazi Collaborators Law"), which gives it jurisdiction to prosecute Nazis over crimes committed during the Holocaust, including throughout Europe. The Jerusalem district court, which heard the case in the first instance, ruled that such a law – and Israel's jurisdiction over Eichmann for his acts committed outside of Israel – were consistent with Israel's universal jurisdiction. The district court determined that Israel had jurisdiction to prosecute Eichmann for war crimes and genocide based on Geneva Conventions.⁴⁰³ The supreme court of Israel affirmed the judgment, and emphasized that Israel has jurisdiction under customary international law to prosecute, among other things, crimes against humanity:

[T]here is full justification for applying here the principle of universal jurisdiction, since the international character of "crimes against humanity" (in the wide meaning of the term) dealt with in this case is no longer in doubt, while the unprecedented extent of their injurious and murderous effects is not to be disputed at the present time. In other words, the basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another State or is stateless – applies with even greater force to the above-mentioned crimes. ...

We sum up our views on this subject as follows: Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant. This being the case, it is immaterial that the State of Israel did not exist at the time the offences were committed.⁴⁰⁴

This case law is theoretically on-point with regards to potential crimes committed in Ukraine—as in the Eichmann case, customary international law and Israel's domestic laws support the exercise of jurisdiction to prosecute individuals committing war crimes and crimes against humanity.

c. Manual on Rules of Warfare

Additionally, the principles of universal jurisdiction are noted in Israel's Manual on the Rules of Warfare:

There are especially serious crimes, however, such as war crimes, crimes against humanity and others, the perpetration of which is injurious to the human race as a whole, not merely

⁴⁰³ See CrimC (DC Jm.) 40/61 *Attn'y General v. Eichmann*, 5722 (1961) (Isr.) ("Eichmann Dist. Ct.") at para. 24.

⁴⁰⁴ See CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.) at para. 12.

to the national laws of that state. International justice imposes a duty on all states to act to prevent the commission of such crimes and bring their perpetrators to justice.

To that end, states are entitled to bring the perpetrators to trial in their own national courts, even if the crime itself was committed outside their jurisdiction. This judicial rule is known as universal jurisdiction.⁴⁰⁵

2. *Permitted Claims; Offences Covered*

As detailed above, Israel can exercise jurisdiction over two types of claims: (i) claims set forth in multilateral conventions under which Israel is a party (from Israel's Penal Law), and (ii) crimes against humanity (from the *Eichmann* trial and the Manual on the Rules of Warfare). The relevant crimes under multilateral conventions include genocide, crimes against humanity, war crimes and membership of a hostile organization.⁴⁰⁶

The court in the *Eichmann* case further suggested that, under customary international law, crimes against humanity, which are “acts ... of a ‘universal’ criminal character and entail individual criminal responsibility,”⁴⁰⁷ “include[] the murder, extermination, starving, and deportation of a civilian population on the one hand, and the persecution on national, racial, religious, or political grounds on the other.”⁴⁰⁸ The Court also clarified that war crimes are “the group of acts, committed by members of the armed forces of the enemy, which are contrary to the ‘laws and customs of war.’”⁴⁰⁹

The prosecution of foreign offenses in Israel must be brought by the Attorney General of Israel or with the Attorney General's written consent, “upon his determination that such is in the public interest.”⁴¹⁰

3. *Potential Defendants*

As the *Eichmann* case shows that, in theory, Israel can exercise its universal jurisdiction over *individuals* who commit offenses including war crimes and crimes against humanity. Extending this principle to Ukraine, Israel would be able to prosecute individual actors (e.g., Russian military, leaders, politicians, etc.) who commit such crimes. However, given that Israel has not attempted

⁴⁰⁵ Military-Advocate General's Corps Command, IDF School of Military Law, *Rules of Warfare on the Battlefield*, 2d Ed (2006) (Isr.) (“Manual on Rules of Warfare”).

⁴⁰⁶ CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.).

⁴⁰⁷ CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.).

⁴⁰⁸ CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.) at para. 12.

⁴⁰⁹ CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.) at para. 12.

⁴¹⁰ *Penal Law* art. 5737 para. 9(b) (Israel, 1977).

to exercise universal jurisdiction over anyone except for Nazi soldiers, it is unlikely that Israel would exercise jurisdiction over Russians acting against Ukraine.

4. *Relevant Cases*

The *Eichmann* case represents the primary example of Israel exercising its universal jurisdiction to prosecute an extraterritorial crime. As detailed above, Eichmann was prosecuted pursuant to the Nazi and Nazi Collaborators Law, which the courts ruled was consistent with Israel's principles of universal jurisdiction. Eichmann was found guilty under the Nazi and Nazi Collaborators Law of crimes against the Jewish People, crimes against humanity, war crimes, and membership of a hostile organization,⁴¹¹ Israel also brought criminal charges under the Nazi and Nazi Collaborators Law against John Demjanjuk in 1987, sentencing Demjanjuk to death in 1988, but Demjanjuk was ultimately acquitted after evidence came out on appeal that Demjanjuk may not have been the suspected "Ivan the Terrible."⁴¹²

It does not appear that Israel has exercised its universal jurisdiction outside of these limited cases. Accordingly, while these cases support an exercise of universal jurisdiction to prosecute crimes against humanity and war crimes, it is unclear whether Israel would exercise such jurisdiction in Ukraine.

5. *Advantages of Israel as a Forum*

There are just a handful of potential benefits to bringing a claim in Israel for a universal jurisdiction crime:

Range of Offenses – It is possible to bring proceedings for a range of offenses, including war crimes, crimes against humanity, membership in a hostile organization, and any other crimes that Israel has agreed to enforce through international convention.

Relevant Case Law – Israel has prosecuted several individuals using universal jurisdiction, and accordingly, there is case law and helpful Israeli supreme court citations on-point.

6. *Disadvantages of Israel as a Forum*

However, it is likely that the drawbacks to bringing a claim in Israel for universal jurisdiction crimes outweigh these potential benefits:

Limited Use of Universal Jurisdiction – As noted above, it does not appear that Israel has exercised its universal jurisdiction outside of prosecuting individuals under the Nazi and Nazi Collaborators Law. Accordingly, it is unlikely that Israel would exercise its universal jurisdiction now in the case

⁴¹¹ CrimA (DC Jm.) 336/61, *Attn'y General v. Eichmann* 16 PD 2033 (1962) (Isr.) and was executed on Jun. 1, 1962, see Elie Honig, *60 Years Ago, We Saw the Face of Evil*, CNN, Oct. 15, 2021 (<https://www.cnn.com/2021/10/14/opinions/adolf-eichmann-trial-anniversary-honig/index.html>).

⁴¹² See Lisa J. Del Pizzo, *Not Guilty--but Not Innocent: An Analysis of the Acquittal of John Demjanjuk and Its Impact on the Future of Nazi War Crimes Trials*, 18 B.C. Int'l & Comp. L. Rev. 137, 137-139 (1995).

of Ukraine, particularly since there is not a particularized domestic law (like the Nazi and Nazi Collaborators Law) directly on point.

Israel's Opposition to Universal Jurisdiction – Israel has voiced its opposition to the exercise of universal jurisdiction as recently as October 2021. In a statement to the United Nations, Sarah Weiss Ma'udi, Legal Advisor for the Permanent Mission of Israel to the United Nations, wrote:

It is essential that the principle of Universal Jurisdiction be applied in a manner consistent with other principles of international law, including the principles of state sovereignty, reciprocity, and immunity. In this regard, Israel is of the view – similar to that expressed by many other states -- that, to date, in international law, there is no exception or limitation to immunity in criminal proceedings against state officials in foreign courts when a State official asserts immunity. ... The misuse and abuse of the principle of universal jurisdiction threatens the stability of international relations, as well as the sovereign equality of States, key elements in international law and international relations.⁴¹³

This stance on universal jurisdiction indicates that it is unlikely that Israel would exercise its universal jurisdiction to prosecute crimes committed by Russian soldiers in Ukraine.

Israel's Stance on Ukraine – Israel has been relatively slow to support Ukraine in the current war. Israel was initially hesitant to sanction Russia or send military aid to Ukraine, potentially because of concerns about security arrangements with Russia in Syria.⁴¹⁴ However, in recent weeks, Israel has reportedly stepped up its support for Ukraine, calling for Russia's ouster from the U.N Human Rights Council, increasing its humanitarian aid, considering increasing military aid to Ukraine, and signaling that it believes that Russia has committed war crimes.⁴¹⁵ However, while it appears that Israel's response to the ongoing war is improving, its lag in taking many of the measures that other states have taken to support Ukraine and condemn Russia suggests that Israel would not act alone (or first) in exercising its universal jurisdiction to prosecute war crimes or the like.

⁴¹³ *Statement of Sarah Weiss Ma'udi*, United Nations Sixth Committee on the Scope and Application of the Principle of Universal Jurisdiction, Oct. 21, 2021, available at https://www.un.org/en/ga/sixth/76/pdfs/statements/universal_jurisdiction/14mtg_israel.pdf.

⁴¹⁴ Elliot Abrams and Gideo Weiss, *Why Israel Has Been Slow to Support Ukraine*, CFR, Apr. 8, 2021, available at <https://www.cfr.org/article/why-israel-has-been-slow-support-ukraine>.

⁴¹⁵ See Michael Oren, *Israel's Encouraging Turn Toward Ukraine*, WSJ, Apr. 22, 2022, <https://www.wsj.com/articles/israels-encouraging-turn-toward-ukraine-donations-defense-russia-nazi-war-jews-11650656959>; Barak Ravid, *Israel Weighs Expanding Military Aid to Ukraine after U.S. Request*, Axios, May 4, 2022, available at <https://www.wsj.com/articles/israels-encouraging-turn-toward-ukraine-donations-defense-russia-nazi-war-jews-11650656959>

E. Sweden⁴¹⁶

1. Domestic Law Permitting Universal Jurisdiction

Swedish law applies universal jurisdiction to a very broad category of crimes compared to most states. The Swedish Criminal Code provides for universal jurisdiction for any crime with a minimum sentence of four years.⁴¹⁷

The Swedish Act on Crime responsibility for Genocide, Crimes Against Humanity and War Crimes (the “Universal Crimes Act”)⁴¹⁸ codified the Rome Statute, and sets out offences in relation to genocide, crimes against humanity, and war crimes. Under the Swedish Criminal Code, universal jurisdiction applies to the crimes listed in the Universal Crimes Act.⁴¹⁹

In addition, any crime that carries a prison sentence of at least six months can also be prosecuted on the basis of universal jurisdiction if the accused is present in Sweden.⁴²⁰ Jurisdiction can also be extended to cases where the accused was resident in Sweden at the time of the offence or subsequently became resident or citizen or is a citizen of a Nordic state and is present in Sweden.⁴²¹

For crimes set out in the Universal Crimes Act, the presence or residence of a suspect in Sweden is not required, but in practice, an investigation will not be initiated if the absence of the suspect prevents the crime from being effectively investigated. Prosecutors have significant discretion over opening an investigation, for example, if s/he deems that it is “manifest that it is not possible to investigate the offence”.⁴²² A prosecutor may also refrain from investigating or may discontinue an investigation if: inquiry would incur costs not in reasonable proportion to importance of matter or offence and offence would not lead to a penalty more severe than a fine.

⁴¹⁶ The summary in this section does not constitute advice on Swedish laws. It is based on research by lawyers not admitted to practice in Sweden.

⁴¹⁷ *Criminal Code* ch. 2 sec. 3(7) (Sweden, 1962), available in Swedish at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700.

⁴¹⁸ *Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes* (Sweden, 2014), available in Swedish at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2014406-om-straff-for-folkmord-brott-mot_sfs-2014-406.

⁴¹⁹ *Criminal Code* ch. 2 sec. 3(6) (Sweden 1962).

⁴²⁰ *Criminal Code* ch. 2 sec. 2(3) (Sweden, 1962).

⁴²¹ *Criminal Code* ch. 2 sec. 2(3), 2(1) and 2(2) (Sweden, 1962).

⁴²² *Code of Judicial Procedure* ch. 23 sec. 1(2) (Sweden, 1998), available in Swedish at https://www.lagboken.se/Lagboken/start/processratt/rattegangsbalk-1942740/d_41333-sfs-1998_605-lag-om-andring-i-rattegangsbalken.

Prosecutors are obliged to prosecute a crime if there is sufficient evidence.⁴²³ The obligation to prosecute applies regardless of the wishes of the parties (for example, even if the victim does not elect to press charges, the prosecutor must prosecute the crime).⁴²⁴ However, to prosecute crimes committed in a foreign state, the government must give approval before the prosecutor can file an indictment.⁴²⁵ The law does not provide any criteria so this discretion is wide and the law does not set out any procedure to challenge the government's decision.

The War Crimes Unit of the Swedish Police is involved in investigating international crimes, and for universal jurisdiction cases, the prosecutor is always ultimately in charge of the investigation and the decision to initiate. The Swedish Prosecutor's Office (*Åklagarmyndigheten*) includes a specialized group of prosecutors that deals with crimes of universal jurisdiction.⁴²⁶

An "aggrieved person", which the law defines as a person against whom the offence was committed or who was affronted or harmed by it, can become a party to the case if prosecution is initiated.⁴²⁷ During the investigation and trial stages, aggrieved persons have certain rights under law, including a right to information, a right to free legal representation, a right to interpretation and translation, etc.

A victim can initiate a private prosecution only if the prosecutor has declined to investigate his or her complaint.⁴²⁸ Government approval is still required before private prosecutions can proceed against crimes committed in a foreign state.⁴²⁹

2. *Permitted Claims; Offences Covered*

As described above, Swedish law applies universal jurisdiction to a broad range of crimes based on statutory minimum sentences. For alleged crimes that have occurred in Ukraine, the following crimes may be prosecuted in Sweden: genocide, crimes against humanity, and war crimes (covered by the Universal Crimes Act).

⁴²³ *Code of Judicial Procedure* ch. 20 sec. 6 (Sweden, 1998).

⁴²⁴ The Swedish Government's proposition 1984/85:3 on abstention from prosecution (Sw. Prop. 1984/85:3 om åtalsunderåtelse) (English translation not available, available in Swedish at https://www.riksdagen.se/sv/dokument-lagar/dokument/proposition/om-atsunderlatelse_G8033). In Sweden, when laws are adopted, the government must provide a bill explaining the reason for the law and its provisions, and the preparatory documents related to the bill are a source of law that the courts can use to interpret the law.

⁴²⁵ *Criminal Code* ch. 2 sec. 5 (Sweden, 1962).

⁴²⁶ Polisen, *Swedish Police Efforts*, available at <https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/>.

⁴²⁷ *Code of Judicial Procedure* ch. 20 sec. 8(4) (Sweden, 1962).

⁴²⁸ *Code of Judicial Procedure* ch. 20 sec. 8(1) (Sweden, 1962). Chapter 20 Section 8(1).

⁴²⁹ *Criminal Code* ch. 2 sec. 5 (Sweden, 1962).

Certain crimes, such as torture and enforced disappearance, are not included under Swedish criminal law as stand-alone crimes, but torture may be characterized as serious assault and enforced disappearance may be characterized as kidnapping, and as both of these offences have minimum sentences of more than four years, they can be prosecuted on the basis of universal jurisdiction.

In relation to the crime of aggression, Sweden ratified the Kampala amendments to the Rome Statute on the crime of aggression on January 26, 2022. However, there is no relevant criminal provision under Swedish law in relation to aggression, and therefore, it is not possible to begin prosecutions for the crime of aggression in Sweden in relation to what is happening in Ukraine.

3. *Potential Defendants*

As noted above, for crimes set out in the Universal Crimes Act, the presence or residence of a suspect in Sweden is not required. However, this is limited in practice because an investigation will likely not be initiated if the absence of the suspect prevents the crime from being effectively investigated. In addition, if a crime with a sentence between six months and four years is prosecuted, the accused must be present in Sweden.

For war crime investigations and prosecutions related to alleged crimes in Syria and Iraq, many of the accused have been present in Sweden as they have applied for asylum. It is unlikely that a similar situation will arise in relation to asylum seekers from Russia. It may therefore be difficult for the prosecutor to bring a prosecution where the accused is unlikely to enter Sweden or another Nordic state.

The Swedish Criminal Code sets forth that fundamental principles of international law or international agreements that are binding on Sweden can restrict the application of Swedish law.⁴³⁰ Therefore, immunities that are recognized by international law apply in Sweden. Further, the preparatory documents for the Universal Crimes Act clarify that immunities regulated by international law (including customary international law) are applicable.⁴³¹ This means that it may be difficult to prosecute Russian government officials with responsibility over military activities in Ukraine.

In addition, the government's approval is required for prosecutions of foreign officials and representatives of international organizations.⁴³²

⁴³⁰ *Criminal Code* ch. 2 sec. 7 (Sweden, 1962).

⁴³¹ In Sweden, when laws are adopted, the government has to provide a bill explaining the reason for the law and its provisions, and the preparatory documents related to the bill are a source of law that the courts can use to interpret the law; see *Criminal Liability for Genocide, Crimes Against Humanity and War Crimes* 14:146 (Sweden, 2013), available in Swedish at <https://www.regeringen.se/49bb7d/contentassets/c7eeff0e35f24df0b824f0b9693ff89d/straffansvar-for-folkmord-brott-mot-manskligheten-och-krigsforbrytelser-prop.-201314146>.

⁴³² *Criminal Code* ch. 2 sec. 7a (Sweden, 1962).

4. *Relevant Cases*

The cases below show the importance of collecting and retaining video evidence of all alleged crimes in Ukraine. The cases also show that not all evidence may be sufficient to prosecute all crimes, and in some cases, an accused may be charged with a lesser crime for lack of sufficient evidence. Therefore, while collecting and processing potential evidence in Ukraine, it is important to keep in mind that the evidence could be used in criminal proceedings where rules on evidence are strict. The cases also show the tendency of prosecutions to be brought only against accused who are present in Sweden. However, the ongoing case against Nouri shows that a case can be prepared in advance of the accused travelling to Sweden if there is reason to suspect that the accused might enter Sweden. The cases also show that the Swedish authorities are willing and able to prosecute all combatants who commit war crimes or crimes against humanity regardless of which state, government or group they are aligned with.

Mouhannad Droubi (2016)

Mouhannad Droubi, a Syrian citizen who was in Sweden as a refugee, was arrested in October 2014 on charges of committing a war crime and gross assault. The arrest and indictment were made on the basis of a video filmed by Droubi and uploaded to Facebook. The video showed Droubi and others assaulting a man who appeared to be fighting for the government forces. While the decision went through several appeals, the final judgment in August 2016 sentenced Droubi to eight years' imprisonment.

Haisam Omar Sakhanh (2017)

Haisam Omar Sakhanh, a Syrian citizen who had been granted asylum in Sweden, was arrested in 2016 and charged with war crimes committed in Syria. The evidence came from a video showing an execution of seven captured soldiers who were fighting for the government, and Sakhanh was identified as one of the alleged executioners. Sakhanh was sentenced to life in prison, and although Sakhanh appealed, the Swedish Supreme Court denied his leave to appeal, and he will serve his life sentence.

Mohammed Abdullah (2017)

Mohammed Abdullah was a refugee in Sweden, and in 2016, he was arrested and was accused of committing war crimes in Syria. He was later released as he denied taking part in the fighting and there was insufficient evidence to prove that he had been involved in fighting. Additional evidence was brought in the form of a photo of Abdullah posting with his foot on a pile of corpses. The prosecutor was unable to prove that Abdullah had been involved with harming the people in the photo, and the prosecution had to drop the murder charge, but Abdullah was sentenced to eight months in prison for war crimes (violating the personal dignity of the dead).

Hamid Nouri murder, crimes against humanity and war crimes (ongoing)

Hamid Nouri, a former prison official and prosecutor, was arrested when he arrived in Sweden for family reasons for allegedly carrying out the mass execution and torture of political prisoners in Iran in 1988. A witness to the alleged crimes received a tip about Nouri's trip to Sweden, and with

the support of lawyers, witness testimony was gathered and a criminal complaint was prepared. When the date of Nouri's flight was known, the complaint was submitted to Swedish prosecutors. The trial ended in April 2022 and the judge has set July 14, 2022 as the date for the verdict. The prosecutors called for a life sentence for crimes against humanity and war crimes. This case is an example where the accused was arrested in Sweden during a personal visit. If a person accused of war crimes in Ukraine has known links or connections to Sweden, it is worth considering whether to prepare evidence and a complaint in advance of that person entering Sweden.

Investigations into senior officials in the government of Syria (ongoing)

It has been reported that Sweden is considering complaints against senior officials in the government of Syria in relation to alleged torture and murder of detainees at detention centers. The complaint that was brought in February 2019 against 25 named senior intelligence officers as well as officials that are not yet known by name. There is currently no public information available about any charges.

Structural investigation by Swedish Public Prosecutor's Office in relation to Syria (ongoing)

In October 2015, the Swedish Prosecutor's Office opened a structural investigation into alleged war crimes in Syria. There are limited details available in the public domain public about the procedure for opening and carrying out a structural investigation. However, based on comments from the Prosecutor's Office made to Human Rights Watch, structural investigations are broad preliminary investigations.⁴³³ These investigations do not have specific suspects, but are instead used to gather evidence that could be used in proceedings in Sweden or in other states. The Swedish Prosecutor's Office has also announced that it is launching an investigation into war crimes committed in Ukraine.⁴³⁴

5. *Advantages of Sweden as a Forum*

There are several benefits to bringing a claim in Sweden for a universal jurisdiction crime that has occurred in Ukraine.

Broad Range of Offences Subject to Universal Jurisdiction – Sweden applies universal jurisdiction to a very broad range of offences which may have been committed in Ukraine (including grave breaches of the Geneva Convention, war crimes, crimes against humanity, genocide).

⁴³³ Human Rights Watch, *These are the Crimes We are Fleeing: Justice for Syria in Swedish and German Courts*, Oct. 2, 2017, available at <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

⁴³⁴ Press Release, "Swedish preliminary investigation initiated on suspected war crimes in Ukraine", Sweden Government press release dated Apr. 5, 2022, available in Swedish at <https://www.aklagare.se/nyheter-press/pressmeddelanden/2022/april/svensk-forundersokning-inledd-om-misstankta-krigsbrott-i-ukraina/>.

Obligation to Prosecute – Prosecutors in Sweden have an obligation to prosecute where there is sufficient evidence (although this obligation applies even if a victim does not wish to press charges).

Experience – The Swedish police and the Swedish Prosecutor’s Office have dedicated war crimes teams, and they have significant experience investigating and prosecuting war crimes and crimes against humanity, including crimes committed in Syria and Iraq.

Victims’ Involvement – Victims can be actively involved in the investigation and the trial, and they have important rights that are protected under the law. Ukrainians who have sought asylum or refuge in Sweden will have these rights protected and can be actively involved if they so wish.

Structural Investigations – The Swedish Prosecutor’s Office has announced that it has already launched a “structural investigation” into crimes in Ukraine. The investigation will be collecting evidence that may be used in future proceedings in Sweden, in the courts of another state, or in an international court. The war crimes units of the police and the Swedish Prosecutor’s Office will therefore already have evidence related to alleged crimes in Ukraine and will have a framework for processing further evidence and complaints.

6. *Disadvantages of Sweden as a Forum*

There are also drawbacks that need to be considered before bringing a case in Sweden.

Certain Crimes Not Recognized – Torture and enforced disappearance are not stand-alone crimes in Sweden, and while they can be prosecuted as other crimes, it is unsatisfactory that these important universal crimes are not recognized as stand-alone crimes in Sweden.

Presence of the Accused Required – While the application of universal jurisdiction is broad, in practice, the presence of the accused is an important factor in relation to bringing a successful prosecution. Therefore, Sweden may be considered as an appropriate venue for prosecuting an accused with connections to Sweden or who is likely to enter Sweden in the future.

Government Approval – Prosecutors can begin investigations at their own discretion, and an indictment requires the approval of the government. There are no guidelines in relation to such an approval, and approval is entirely at the government’s discretion.

Immunities – International laws and customs related to immunity apply in Sweden, and therefore, prosecuting government officials may be limited. Sweden has so far not prosecuted any senior government officials although it currently has an ongoing investigation based on a complaint that was filed in February 2019 targeting high-ranking Syrian intelligence officials.

F. Finland⁴³⁵

1. Domestic Law Permitting Universal Jurisdiction

Section 7 of Chapter 1 of the Criminal Code of Finland,⁴³⁶ sets out the basic principle of universal jurisdiction. Under Section 7, Finnish law applies to crimes committed outside Finland which are punishable under an international agreement that is binding on Finland or another statute or regulation that is binding on Finland (these crimes are called “international crimes”). Section 7 notes that further provisions on the application of Section 7 shall be issued by decree. The Decree on the application of Chapter 1, section 7 of the Criminal Code sets out the specific offences that are deemed international crimes.⁴³⁷

Under Section 11(1) of Chapter 1 of the Criminal Code, the international crimes that can be prosecuted in Finland regardless of where they were committed do not have to be offences that are punishable under the law of the state where the crime were committed.⁴³⁸

Criminal investigations of crimes that have been committed abroad (including international crimes) require a prosecution order by the Prosecutor General of Finland (*valtakunnansyyttäjä*).⁴³⁹

Investigations are conducted by the police, which is the general investigating authority.⁴⁴⁰ Serious crimes such as war crimes are investigated by the National Bureau of Investigation (*Keskusrikospoliisi*) rather than local police.

Once the investigations are complete, the injured party, the suspect, and any other person whose rights, interests or obligations may be affected, may submit a final statement to the police in relation to the sufficiency of the criminal investigation, the assessment of the evidence, the legal

⁴³⁵ The summary in this section does not constitute advice on Finnish laws. It is based on research by lawyers not admitted to practice in Finland.

⁴³⁶ *Criminal Code* art. 39 (Finland, 1889), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

⁴³⁷ Decree on the application of Chapter 1, section 7 of the Criminal Code, 627/1996, non-binding English translation provided by the Finnish Ministry of Justice, page 3, available at <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1996/19960627>).

⁴³⁸ Section 11(1), which sets out the provisions that are subject to dual criminality, does not include a reference to the international crimes under Section 7; chapter 1, Section 11, Criminal Code, non-binding English translation with amendments up to 766/2015 included provided by the Finnish Ministry of Justice; see *Criminal Code* art. 39 (Finland, 1889), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

⁴³⁹ *Criminal Code* ch. 1 sec. 12 (Finland, 1889), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

⁴⁴⁰ *Criminal Investigation Act* ch. 2 sec. 1(1) (Finland, 2011), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/2011/20110805>.

issues, or other circumstances important to the consideration of the matter.⁴⁴¹ Once the criminal investigation is concluded, the matter will be submitted to the prosecutor for consideration of charges.⁴⁴²

The prosecutor will consider whether the suspected offence is punishable according to law, whether the right for its prosecution is time-barred, and whether probable grounds exist to support the guilt of the suspect.⁴⁴³ If the prosecutor goes ahead with charging the suspect, the prosecutor will bring a charge by delivering a written application for a summons to the registry of the district court.⁴⁴⁴

Injured parties have certain rights in relation to an investigation (such as a right to information, right to legal representation, right to request investigation measures, right to request a civil claim, right to receive the case file, etc.). The statute does not include a legal definition of an injured party, but generally, an injured party is a person whose interests have been directly injured by an offence or a person who is entitled to a legal claim. Non-governmental organizations generally would not be injured parties.

When a criminal charge is brought for an offence, a civil claim arising from the offence can be heard in connection with the criminal charge, and if such a claim is made separately, the provisions on civil procedure apply.⁴⁴⁵ An injured party also has the right to request the prosecutor who has brought the criminal charge to pursue the injured party's civil claim, and if the prosecutor pursues the civil claim, the prosecutor must lodge an appeal also against the decision on the civil claim of the injured party when lodging an appeal against the decision on the criminal charge.⁴⁴⁶

In general, the prosecution of criminal cases is the responsibility of the prosecutor, but if the prosecutor decides not to prosecute or decides to withdraw charges or interrupt or close investigations, an injured party may bring a charge for a criminal offence.⁴⁴⁷

⁴⁴¹ *Criminal Investigation Act* ch. 10 sec. 1 (Finland, 2011), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/2011/20110805>.

⁴⁴² *Criminal Investigation Act* ch. 10 sec. 1 (Finland, 2011), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/2011/20110805>.

⁴⁴³ *Criminal Procedure Act* ch. 1 sec. 6 (Finland, 1997), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1997/19970689>). Under section 6a, a decision to prosecute cannot be taken if the prerequisites are not met. In addition, the Prosecutor General may waive prosecution if the injured party has not requested that charges be brought.

⁴⁴⁴ *Criminal Investigation Act* ch. 5 sec. 1 (Finland, 2011), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/2011/20110805>.

⁴⁴⁵ *Criminal Procedure Act* ch. 3 sec. 1 (Finland, 1997), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1997/19970689>.

⁴⁴⁶ *Criminal Procedure Act* ch. 3 sec. 9 (Finland, 1997), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1997/19970689>.

⁴⁴⁷ *Criminal Procedure Act* ch. 1 sec. 14 (Finland, 1997), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1997/19970689>.

2. Permitted Claims; Offences Covered

Under the Decree on the application of Chapter 1, Section 7 of the Criminal Code, the following offences are deemed international crimes and may be relevant for prosecuting crimes that were committed in Ukraine:⁴⁴⁸

- Crimes against humanity, aggravated crimes against humanity, war crimes and aggravated war crimes as defined in the Rome Statute of the ICC or any other corresponding punishable criminal act that is deemed a grave breach of the Geneva Conventions as well as the Protocol Additional to the Geneva Conventions;
- Genocide and the preparation of genocide referred to in the Convention on the Prevention and Punishment of the Crime of Genocide;
- Torture for the purpose of obtaining a confession, assault, aggravated assault, or other punishable act that is deemed torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In relation to the crime of aggression, Finland ratified the Kampala amendments to the Rome Statute on the crime of aggression on December 30, 2015. The crime of aggression is set out in Chapter 11, Section 4a of the Criminal Code.⁴⁴⁹ However, the Decree on the application of Chapter 1, Section 7 of the Criminal Code 627/1996 was not amended to include the crime of aggression as an international crime to which universal jurisdiction applies. This was decided on the basis that, from the perspective of international law, the crime of aggression is currently not unequivocally viewed as a crime that can be brought in a state's national court.⁴⁵⁰ Therefore, it is

⁴⁴⁸ Decree on the application of Chapter 1, section 7 of the Criminal Code, 627/1996, non-binding English translation provided by the Finnish Ministry of Justice, page 3, available at <https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1996/19960627>). The Decree also includes other offences such as: counterfeiting currency; certain narcotics offences; seizure of aircraft; criminal traffic mischief; crimes against internationally protected persons; taking of hostages; nuclear device offences; terrorism offences; chemical weapons offences; safety of maritime navigation offences; biological weapons offences, etc.

⁴⁴⁹ *Criminal Code* ch. 11 sec. 4a (Finland, 1889), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

⁴⁵⁰ See the government's proposal to parliament on the ratification of the Kampala amendments and related amendments to the law (available in Finnish at https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Documents/he_289+2014.pdf). The government did concede that, even though universal jurisdiction does not expressly apply to the crime of aggression, it is a serious crime that the immunity of former heads of state might not apply in a national court. In addition, see the opinion of the Legal Affairs Committee, where the Committee noted that expanding universal jurisdiction in Finnish national courts to include the crime of aggression would expand the scope of criminal liability beyond the jurisdiction of the ICC. The ICC's jurisdiction is limited to states that have ratified the Kampala amendments on the crime of aggression. In addition, the crime of aggression is different from the other offenses in the Rome Statute since it requires an assessment of the accused state's alleged crime of aggression in light of the UN Charter. Based on these arguments, amongst others, the Legal Affairs Committee found that it was reasonable of the government to not apply universal jurisdiction to the crime of aggression (English

not possible to bring a case in Finland in relation to an alleged crime of aggression that was committed in Ukraine.

3. *Potential Defendants*

Neither Chapter 1, Section 7 of the Criminal Code, nor the Decree on the application of Chapter 1, Section 7, includes any restrictions in relation to who can be charged with an international crime. In particular, there is no requirement for the suspect to be present in Finland or a resident of Finnish territory. However, in practice, the prosecutor is likely to consider whether the suspect is present in Finland before starting a prosecution (in particular, publicly announced cases involving international crimes have so far been in relation to suspects that have been present in Finland at the time the investigation was commenced).

Procedurally, the accused's presence is important in criminal trials in Finland. It is not possible to proceed with a trial *in absentia* unless: (i) the accused has agreed that the matter can proceed in his or her absence (in which case the sentence can be at most six months' imprisonment), or (ii) the matter is one that can be examined and adjudicated upon without the accused's presence and the accused has been informed that the matter may be adjudicated despite his or her absence (in which case the maximum sentence is a fine or imprisonment of up to three months and a penalty of up to EUR 10,000).⁴⁵¹

Finland has ratified the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The head of a foreign state, the head of the government, the Minister for Foreign Affairs and other persons of high rank in the capacity of a delegation or special mission have all immunities that are accorded to them under international law and custom.⁴⁵²

The Criminal Code also sets forth that Finnish authorities are bound by any restrictions to the application of criminal law that are set out in an international treaty that is binding on Finland or another statute or regulation that is internationally binding on Finland. Further, any restrictions on the scope of application of Finnish law based on generally recognized rules of international law also apply.⁴⁵³ Therefore, it may be difficult to bring a case in Finland against government officials that are involved in alleged crimes that were committed in Ukraine, at least until those government officials are no longer in office.

translation not available, available in Finnish at
https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/LaVL_4+2015.aspx.

⁴⁵¹ *Criminal Procedure Act* ch. 8 sec. 11-12 (Finland, 1997), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1997/19970689>.

⁴⁵² *Act on the Privileges and Immunities of International Conferences and Special Missions* sec. 5 (Finland 1973), available in Finnish at <https://www.edilex.fi/lainsaadanto/19730572>.

⁴⁵³ *Criminal Code* ch. 1 sec. 15 (Finland, 1889), available in Finnish at <https://www.finlex.fi/fi/laki/ajantasa/1889/18890039001>.

4. *Relevant Cases*

The cases described below show that Finnish prosecutors and courts are familiar with prosecuting war crimes in Rwanda, Iraq, and Liberia. The cases demonstrate the importance of collecting sufficient evidence, which is already underway in relation to alleged crimes committed in Ukraine and will make it easier to investigate and prosecute such crimes in Finland.

Francois Bazaramba (2010)

Francois Bazaramba was a pastor in Rwanda, and he sought asylum in Finland in 2003. Bazaramba was held in detention from 2007, and in June 2009, he was charged with genocide and 15 counts of murder. In June 2010, the court found Bazaramba guilty of genocide as well as the murder of at least five persons. Bazaramba received a life sentence. Bazaramba appealed the decision, but the Helsinki Court of Appeal upheld his life sentence and the Finnish Supreme Court declined to hear a further appeal. The courts have rejected several parole bids from Bazaramba.

Ammar Jebbar-Salman and Hadi Habeeb Hilal (2016)

In two separate cases, the Finnish courts reviewed cases where a person associated in a military or semi-military capacity with the Islamic State group published photos of themselves holding an enemy combatant's severed head on social media. Ammar Jebbar-Salman was convicted of war crimes and was sentenced to conditional imprisonment of one year and four months. Hadi Habeeb Hilal was also convicted of war crimes and sentenced to conditional imprisonment of one year and four months.

Iraqi Twins (2017)

The Finnish court rejected charges against Iraqi twins of murders in connection with terrorism, war crimes, and aggravated assault in connection with terrorism. The key piece of evidence was a video released by the Islamic State group, in which a person who looked like one of the twins appeared in connection with mass murders committed in 2014 against unarmed soldiers. A witness testified that the person in the video was one of the twins and that both twins had taken part in the relevant offences. The court rejected the charges on the basis that sufficient proof had not been provided that the twins had committed the relevant offences.

Gibril Massaquoi (2022)

Gibril Massaquoi was arrested in 2020 and was charged with committing war crimes in connection with Liberia's two civil wars between December 1989 and August 2003. Massaquoi had been present in Sierra Leone during the civil war that began in 1991 and had provided evidence to the Special Court for Sierra Leone. Massaquoi was relocated to Finland as part of a witness protection program, which provided immunity for crimes committed in Sierra Leone (but not Liberia). The Finnish court heard local testimony in Liberia, and in April 2022, the court acquitted Massaquoi of all charges on the basis that sufficient evidence had not been provided to show that he had committed the alleged crimes or that he had even been in Liberia at the relevant time.

5. *Advantages of Finland as a Forum*

There are several benefits to bringing a claim in Finland for a universal jurisdiction crime that has been committed in Ukraine.

Broad Range of Offences Subject to Universal Jurisdiction – The Finnish Criminal Code applies universal jurisdiction to a range of offences which are relevant to offences that may have been committed in Ukraine (including war crimes, breaches of the Geneva Conventions, crimes against humanity, genocide, and torture).

Prior Experience – The Finnish authorities have prior experience with universal jurisdiction crimes, and the court has been willing to go to the jurisdiction in question to hear local testimony.

Victims' Involvement – Victims or injured parties are closely involved in the investigation and the trial and have important rights under the law. Ukrainians that have sought asylum or refuge in Finland will be able to avail themselves of these rights and can be involved in the investigation and trial if they so wish.

Availability of Private Prosecutions – It is possible to bring private prosecutions where the public prosecutor has declined to proceed with a prosecution.

6. *Disadvantages of Finland as a Forum*

There are also drawbacks that need to be considered before bringing a case in Finland.

Prosecution Order Required – A prosecution order is required from the Prosecutor General to begin a criminal investigation of crimes that have been committed abroad.

Presence of Defendants – The prosecutor is less likely to proceed with a prosecution where the defendant is not present in Finland, and criminal procedural law in Finland requires the defendant to be present at trial except in very narrow circumstances. Therefore, Finland may be considered as an appropriate venue for prosecuting an accused with connections to Finland or who is likely to enter Finland in the future.

Immunities – Finnish criminal law recognizes all relevant international treaties and customary law in relation to immunities, and therefore, it may be difficult to bring cases against heads of state or public officials who committed offences in the exercise of their public functions.

G. Other

In addition to the six states above, several other states, including Italy and Spain, have been surveyed as potential avenues for pursuing accountability under the concept of universal jurisdiction.

1. Italy⁴⁵⁴

Italian courts have no jurisdiction over crimes committed in Ukraine under the applicable Italian laws, as they take place outside of Italian territory, and Italy has not recognized the universal jurisdiction of war crimes, crimes against humanity and genocide.

As a matter of Italian criminal law, Italian courts have no extraterritorial jurisdiction: Article 8 of the Code of Criminal Procedure applies the principle of *loci commissi delicti*, according to which a court only has jurisdiction over crimes committed within their territorial subdivision.⁴⁵⁵ Likewise, Articles 6 and 7 of the Criminal Code provide that Italian criminal law applies to crimes committed in Italy, and a select list of crimes against the Italian state committed by aliens abroad.⁴⁵⁶ Crimes committed by foreign citizens against foreign citizens outside of Italian territory are not within Italian jurisdictional reach.

Moreover, Italy has not recognized the universal jurisdiction of war crimes, crimes against humanity, and genocide. Despite being a party to the Rome Statute, which requires (under the principle of complementarity) member states to adequate their domestic laws to allow for the prosecution of those crimes,⁴⁵⁷ Italy has yet failed to do so.⁴⁵⁸ As a consequence, contrary to other domestic systems, no prosecution or investigation for war crimes, crimes against humanity and genocide can take place in Italy (unless it constitutes a crime committed within Italian territory, as discussed above).

2. Spain⁴⁵⁹

The Organic Law 6/1985 (the “Organic Law”) conferred on Spanish courts universal jurisdiction over genocide and any offense that Spain is obliged to prosecute under international treaties,⁴⁶⁰

⁴⁵⁴ The summary in this section does not constitute advice on Italian laws. It is based on research by lawyers not admitted to practice in Italy.

⁴⁵⁵ *Codice di procedura penale* act. 8 (Italy, 1988).

⁴⁵⁶ *Codice di procedura penale* act. 6-7 (Italy, 1988).

⁴⁵⁷ *Rome Statute* preamble (International Criminal Court, 1998).

⁴⁵⁸ See Claudia Morelli, *L'Italia senza giurisdizione sui crimini contro l'umanità e di Guerra*, Altalex (Mar. 14, 2022), available at <https://www.altalex.com/documents/news/2022/03/14/italia-senza-giurisdizione-sui-crimini-contro-umanita-e-di-guerra>.

⁴⁵⁹ The summary in this section does not constitute advice on Spanish laws. It is based on research by lawyers not admitted to practice in Spain.

⁴⁶⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force Jun. 26, 1987, ratified by Spain on Oct. 21, 1987.

including the Convention against Torture⁴⁶¹ and the Geneva Conventions and their first Additional Protocol. Thus, any serious crime that violated international law could be heard in Spanish courts as long as it met certain procedural safeguards. Article 23.4 of the Organic Law also did not require the suspect's presence for the purpose of opening an investigation or for charging the perpetrator.

The universal jurisdiction administration was reformed in 2009, which limited the ability of Spanish courts to investigate and prosecute crimes committed outside Spain. The Organic Act No. 1/2009 limited the scope of article 23, paragraph 4, of the Organic Law by establishing that there must be a link with Spain with amendment to the law to include the following language:

“Without prejudice to international treaties and conventions ratified by Spain, in order to take jurisdiction over the above offenses, it must be established that the alleged perpetrators are in Spain or that victims have Spanish nationality or that there is some important connection with Spain; and in any case, neither another jurisdiction nor international court has begun a procedure involving investigation and effective prosecution, if any, of such offenses.”⁴⁶²

As illustrated, the jurisdiction of the Spanish courts became dependent on the existence of a link with Spain, which could be based on the presence of the perpetrator in Spain, the Spanish nationality of the victims or any other “relevant link” with Spain.⁴⁶³ In addition, the Spanish courts operate in accordance with the principle of subsidiarity, thereby exercising jurisdiction only if the offences are not being investigated and prosecuted effectively by another state or by an international court.⁴⁶⁴ Moreover, proceedings already initiated in Spain must be temporarily stayed if proceedings connected with the same offences are initiated by a court in another state or an international court.⁴⁶⁵

An additional reform in 2014 brought about the complete elimination of universal jurisdiction in Spain, as well as any other form of extraterritorial jurisdiction, for the most serious international

⁴⁶¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force Jun. 26, 1987, ratified by Spain on Oct. 21, 1987.

⁴⁶² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force Jun. 26, 1987, ratified by Spain on Oct. 21, 1987.

⁴⁶³ International Law Division, Office of the Under-Secretary of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction” (Madrid, Feb. 22, 2016) (Translated from Spanish) at p. 4.

⁴⁶⁴ International Law Division, Office of the Under-Secretary of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction” (Madrid, Feb. 22, 2016) (Translated from Spanish) at p. 4.

⁴⁶⁵ International Law Division, Office of the Under-Secretary of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction” (Madrid, Feb. 22, 2016) (Translated from Spanish) at p. 4.

crimes - genocide, crimes against humanity and war crimes⁴⁶⁶ - which introduced an extensive and complex set of conditions that must be met before Spanish courts can assert jurisdiction over these crimes.⁴⁶⁷ Organic Act No. 1/2014 (i) maintained the requirement of a link with Spain (to be established on a case-by-case basis), (ii) upheld the principle of subsidiarity, which is implemented by specifying to which state's courts the Spanish courts would cede jurisdiction (unless the state in question is unwilling or unable genuinely to carry out the investigation), and (iii) introduced a new procedural restriction in accordance with which the legal standing to initiate proceedings is limited to the victim and the Spanish Public Prosecution Service.⁴⁶⁸ On March 8, 2022, Spain's public prosecutor's office opened a probe into possible "serious violations of international humanitarian law by Russia in Ukraine." The aim is to "determine the criminal nature" of Russia's invasion of Ukraine.⁴⁶⁹ However, the strict limitations introduced by Organic Act No. 1/2014 greatly narrow the options for victims of the Russian-Ukraine war to seek justice in Spain. The accused had to be found in Spain, the victim had to be Spanish or there had to be some other relevant connection with the forum.⁴⁷⁰ In cases of genocide, crimes against humanity and war crimes, in addition to the victims' nationality, there is the additional requirement of showing that the aggressor is Spanish, or a foreigner who habitually resides in Spain or is present on Spanish soil.⁴⁷¹

⁴⁶⁶ Liberties, *Declaration of Civil Society in Spain for the Recovery of Universal Jurisdiction*, Oct. 28, 2018, available at <https://www.ldh-france.org/declaration-of-civil-society-in-spain-for-the-recovery-of-universal-jurisdiction/#:~:text=The%20Organic%20Law%201%2F2014,of%20justice%20for%20the%20Spanish>.

⁴⁶⁷ Liberties, *Death of Universal Jurisdiction in Spain has Taken Away Plaintiffs' Rights*, Dec. 14, 2020, available at <https://www.liberties.eu/en/stories/spanish-universal-jurisdiction/18997>

⁴⁶⁸ *Organic Act No. 1* art. 23 (Spain, 2014).

⁴⁶⁹ Agence France Presse, *Spain Opens Probe of Russian Actions in Ukraine*, BARRONS, Mar. 8, 2022, available at <https://www.barrons.com/news/spain-opens-probe-of-russian-actions-in-ukraine-01646748320>.

⁴⁷⁰ Nicolás Zambrana-Tévar, *Ruling of the Spanish Constitutional Court Legitimising Restrictions on Universal Criminal Jurisdiction*, EJIL TALK, Feb. 6, 2019, available at <https://www.ejiltalk.org/ruling-of-the-spanish-constitutional-court-legitimising-restrictions-on-universal-criminal-jurisdiction/>.

⁴⁷¹ *Organic Act No. 1* art. 23 (Spain, 2014).

VII. CONCLUSION

The atrocity crimes recently committed in Ukraine can be prosecuted in three broad categories of tribunals that may have jurisdiction: international (permanent and ad hoc) and hybrid courts, Ukrainian domestic courts, and under the concept of universal jurisdiction. Under international courts, the ICC provides credibility in that it will be an independent and impartial jurisdiction. Also, the Prosecutor can initiate proceedings without Russia ratifying the Rome Statute, and the ICC will receive support from other states and can provide lots of resources from the contributions of those states. On the other hand, the ICC will have a hard time obtaining evidence (because Russia is not a member of the ICC), may have a hard time delivering justice quickly (given ICC procedures have historically been slow to deliver justice), and will lack power to enforce its judgment. The ICC also has low conviction rates.

Also under international (permanent and ad hoc) courts, an ad hoc tribunal could overcome governmental immunity preventing domestic courts from exercising jurisdiction over Russian governmental officials. An ad hoc tribunal could be a better option than the ICC should a government change occur in Russia. A new government may be more likely to cooperate with an ad hoc tribunal than to accede into the ICC. However, an ad hoc tribunal would only be able to prosecute the crime of aggression, and would be unlikely to receive needed evidence in Russia. An ad hoc tribunal could potentially take away an opportunity for a positive message for Ukrainian courts, which would also have a stronger legal basis than an international court for prosecution. Lastly, an ad hoc tribunal might fall under criticism of selectivity and bias in favor of western countries, given the absence of a tribunal for the US invasion of Iraq.

Hybrid courts provide the same advantages of political independence and credibility, overcoming sovereign immunity, and international resources as the international courts while also having the advantage of proximity to the victims and evidence in Ukraine. However, a hybrid court in Ukraine may not be a viable option, as the creation of such a court would likely violate Ukraine's constitution. It is possible that the Ukrainian constitution could be interpreted to allow for a hybrid court if it was sufficiently international and removed from Ukraine's domestic legal system, but that would just create a tribunal similar to an ad hoc tribunal, with the same disadvantages of an ad hoc tribunal.⁴⁷²

Ukrainian domestic law has jurisdiction over these matters, but Russian officials would have sovereign immunity, and relying on local courts could lead to Russians not appearing for hearings and difficulty gathering evidence due to most of it being in Russia.

The effect of universal jurisdiction will vary widely depending on which state is chosen and its domestic law. Universal jurisdiction could provide structural advantages due to prior experience in prosecuting war crimes, the ability to demand arrest warrants of Russian soldiers, or the availability of private prosecutions. Potential drawbacks of universal jurisdiction are trials *in absentia* being impermissible or unlikely to succeed, victims' lack of involvement in proceedings,

⁴⁷² Please note that nothing contained in this Memorandum constitutes advice under Ukrainian law.

residency or citizenship requirements of the accused, and limited prosecution or immunity for heads of state.