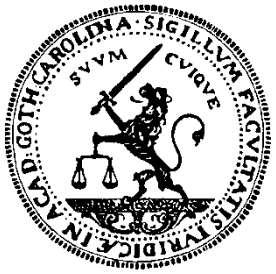

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Prosecuting the Russian Aggression

Assessing Proposals to Enable the Prosecution of Russian Leaders for the Crime of Aggression

JURM02 Graduate thesis

Graduate thesis, Master of Laws program

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Supervisor: Christoffer Wong

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Table of contents

Summary

The Russian invasion of Ukraine has brought immense suffering to the Ukrainian people and has destabilised the European security order. In response, world leaders and international organisations have called for the prosecution of the Russian aggression. However, the scholarly debate on the appropriate measures to ensure criminal accountability for the crime of aggression has demonstrated widespread disagreement among scholars. The present thesis aims to take a first step towards a more structured and constructive discussion – adopting a goal-oriented approach to international criminal trials.

The thesis lays the foundation for a model to assess different proposals to enable the prosecution of Russian leaders for the crime of aggression. The choice of appropriate criteria for the assessment model is made through the lens of legality and legitimacy. The concepts of internationalisation, fair trial standards, and non-selectivity are examined closely to develop indicators of the criteria. Three different proposals are thereafter assessed: (1) amending the Rome Statute of the International Criminal Court, (2) a Special Tribunal established through the UN system, and (3) a treaty-based Special Tribunal.

The model does not deal with practical and political obstacles to the prosecution of Russian leaders. Ultimately, it is up to skilled politicians and diplomats to create enough political momentum to ensure criminal accountability. However, the results show that a goal-oriented approach offers a valuable perspective when deciding between different paths towards criminal accountability in the present situation.

Sammanfattning

Den ryska invasionen av Ukraina har orsakat ofattbart mänskligt lidande och har destabiliserat den europeiska säkerhetsordningen. I gengäld har världsledare och internationella organisationer krävt att den ryska aggressionen beivras. Den rättsvetenskapliga debatten om lämpliga åtgärder för att säkerställa straffrättsligt ansvar för aggressionsbrottet har emellertid uppvisat stor oenighet bland forskare. Detta examensarbete syftar till att ta ett första steg mot en mer strukturerad och konstruktiv diskussion genom att tillämpa ett målorienterat perspektiv på internationella brottmålsrättegångar.

Examensarbetet lägger grunden för en modell avsedd att bedöma olika förslag för att möjliggöra lagföring av de ryska ledarna för aggressionsbrott. Valet av lämpliga kriterier för bedömningsmodellen görs utifrån koncepten legalitet och legitimitet. Begreppen internationalisering, rättvis rättegång och icke-selektivitet granskas noggrant för att utveckla indikatorer för kriterierna. Därefter bedöms tre olika förslag: (1) ändring av Romstadgan för Internationella brottmålsdomstolen, (2) en särskild tribunal inrättad genom FN-systemet och (3) en traktatbaserad särskild tribunal.

Modellen tar inte upp praktiska och politiska hinder. I slutändan är det upp till skickliga politiker och diplomater att skapa tillräckligt med politiskt momentum för att säkerställa straffansvar. Resultaten visar emellertid att ett målorienterat förhållningssätt erbjuder ett värdefullt perspektiv när man ska välja mellan olika sätt att uppnå straffrättsligt ansvar i det aktuella fallet.

Preface

This thesis marks the end of my law studies in Lund. I strayed into journalism, but in the end, I returned to law.

I would like to express my gratitude to the Permanent Mission of Sweden to the United Nations in New York for providing me with an internship. While I was attending meetings concerning accountability for the Russian invasion, the idea for the present thesis was born.

First and foremost, I need to thank my thesis supervisor, Christoffer Wong, for his patience and helpful comments.

Furthermore, thank you to everyone who took time out of their day to answer my emails.

I would like to thank Andrea, Jakob, Stefan, and Viktor for providing invaluable feedback.

To my friends Gustav, Henrik, Mattis, and Theo – you deserve the world and all the love it has to offer.

Finally, I would like to thank my mother, Lena Peterson, for your unwavering support and unconditional love. You are everything I aspire to become.

Jorden kan du inte göra om.

Stilla din häftiga själ!

Endast en sak kan du göra:

en annan människa väl.

– Stig Dagerman

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCSt	Rome Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
OHCHR	Office of the United Nations High Commissioner for Human Rights
SCSL	Special Court for Sierra Leone
UN	United Nations

1 Introduction

1.1 The Russian Invasion

On 21 February 2022, Russian President Vladimir Putin held a televised address asking the Federal Assembly of the Russian Federation to support his decision to recognise the independence and sovereignty of the Donetsk People's Republic and the Luhansk People's Republic, two separatist regions within the internationally recognised borders of Ukraine. In the speech, Putin made numerous hostile claims about Ukraine, stating that 'Ukraine joining NATO is a direct threat to Russia's security'.[1]

Another speech followed, on 24 February 2022, in which Putin announced his decision to carry out 'a special military operation'. The purpose of the operation was to protect people from 'humiliation and genocide perpetrated by the Kiev regime' and 'to demilitarise and denazify Ukraine'.[2]

What followed was a full-scale invasion of Ukraine, resulting in immense human suffering and the destabilisation of the European security order. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has, since the start of the invasion, documented violations of international human rights law and international humanitarian law committed by all parties to the conflict. From 24 February 2022 to 2 April 2023, the OHCHR recorded 22,607 civilian casualties, of which 8,451 were killed and 14,156 were injured. However, the delivery of information has been delayed due to the intense hostilities. Consequently, the OHCHR believes the actual figures to be considerably higher.[3] The United Nations High Commissioner for Refugees (UNHCR) has reported that 8,173,211 refugees from Ukraine have been recorded across Europe during the same approximate period.[4]

In the public and scholarly discourse, the issue of holding the political and military leaders of the Russian Federation responsible for the crime of aggression has become prevalent. Scholars and politicians argue about which

[1] Vladimir Putin, 'Address by the President of the Russian Federation' (The Kremlin, 21 February 2022) <http://en.kremlin.ru/events/president/news/67828> accessed 22 March 2023.
[2] Vladimir Putin, 'Address by the President of the Russian Federation' (The Kremlin, 24 February 2022) <http://www.en.kremlin.ru/events/president/transcripts/67843> accessed 22 March 2023.
[3] Office of the United Nations High Commissioner for Human Rights, 'Ukraine: Civilian Casualty Update 3 April 2023' (3 April 2023) <https://www.ohchr.org/en/news/2023/04/ukraine-civilian-casualty-update-3-april-2023> accessed 4 April 2023.
[4] United Nations High Commissioner for Refugees, 'Situation Ukraine Refugee Situation' (28 March 2023) <https://data.unhcr.org/en/situations/ukraine> accessed 4 April 2023.

proposal is the most effective and legally sound. Many promote their favoured approach and criticise other proposals.[5] The debate raises two questions: how should criminal accountability for the crime of aggression be achieved in the present situation, and to what end?

On 17 March 2023, Pre-Trial Chamber II of the International Criminal Court (ICC) issued arrest warrants for Putin and the Russian Presidential Commissioner for Children's Rights Maria Lvova-Belova. These warrants pertain to war crimes in the form of unlawful deportation of population (children) and unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation.[6]

The warrants arguably represent a victory in the fight against impunity, but they do not address the original crime – the planning, preparation, initiation, and execution of an act of aggression – in the words of the International Military Tribunal (IMT) in Nuremberg: 'the supreme international crime'.[7]

1.2 Reactions to the Invasion

On 25 February 2022, a draft UN Security Council resolution deplored in the strongest terms the Russian aggression against Ukraine in violation of Article 2(4) of the UN Charter.[8] The draft resolution obtained 11 votes in favour, 1 against (the Russian Federation), and 3 abstentions.[9] Therefore, the draft resolution failed to be adopted. The deadlock in the Security Council resulted in the Council calling an emergency special session of the General Assembly through the adoption of Resolution 2623. The Russian Federation voted against the resolution,[10] but the resolution could be passed because permanent members of the Security Council lack veto power over procedural matters.

A few days later, on 2 March 2022, the General Assembly adopted a resolution entitled 'Aggression against Ukraine' at its eleventh emergency special

[5] See for example Heller (2022); Dannenbaum (2022); Vasiliev (2022).
[6] At the time of writing the warrants have yet to be published, see instead International Criminal Court, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> accessed 4 April 2023.
[7] *International Military Tribunal (Nuremberg), Judgment* IMT [1946] para 186.
[8] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI; UNSC Draft Res (25 February 2022) UN Doc S/2022/155 para 2.
[9] UNSC 8979th meeting (25 February 2022) UN Doc S/PV.8979 6.
[10] On convening an emergency special session of the General Assembly on Ukraine UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623(2022); UNSC 8980th meeting (27 February 2022) UN Doc S/PV.8980 2.

session, deploring the aggression.[11] The resolution was passed by a large majority, with 141 votes in favour, 5 against, and 35 abstentions.[12]

Outside of the UN, many organisations and politicians have condemned the Russian invasion and called for criminal accountability. The Ministers of Foreign Affairs of Estonia, Latvia, and Lithuania argued that there is a 'jurisdictional loophole' regarding the Russian invasion and called for a Special Tribunal for the punishment of the crime of aggression against Ukraine.[13] The Parliamentary Assembly of the Council of Europe called on all member and observer States of the Council to 'urgently set up an ad hoc international criminal tribunal' which should have 'a mandate to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation'.[14] Ukrainian officials have also been supportive of the establishment of a Special Tribunal.[15]

In her remarks on 27 March 2023, Ambassador Beth Van Schaack of the United States offered her country's support to 'the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine'.[16] It should be noted that the statement was made after the arrest warrants for Vladimir Putin and Maria Lvova-Belova were issued.

The reactions to the Russian invasion of Ukraine have been overwhelming and undoubtedly voice a need for criminal accountability, but it is not the first

[11] Aggression against Ukraine UNGA Res ES-11/1 (2 March 2022) Eleventh Emergency Special Session UN Doc A/Res/ES-11/1.
[12] UNGA 5th plenary meeting (2 March 2022) Eleventh Emergency Special Session UN Doc A/ES-11/PV.5 14–15.
[13] Ministry of Foreign Affairs of the Republic of Lithuania, 'The Ministers of Estonia, Latvia and Lithuania Call to Establish a Special Tribunal to Investigate the Crime of Russia's Aggression' (16 October 2022) <https://urm.lt/default/en/news/the-ministers-of-estonia-latvia-and-lithuania-call-to-establish-a-special-tribunal-to-investigate-the-crime-of-russias-aggression> accessed 15 March 2023.
[14] The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes, EoC Parliamentary Assembly Res 2436(2022) (28 April 2022) <https://pace.coe.int/en/files/30024> accessed 18 April 2023 para 11.6.
[15] See for example Dmytro Kuleba, 'Statement by Minister of Foreign Affairs of Ukraine Dmytro Kuleba at the United Nations Security Council Meeting on Russia's Aggression against Ukraine' (UN Security Council, 22 September 2022) <https://mfa.gov.ua/en/news/statement-minister-foreign-affairs-ukraine-dmytro-kuleba-united-nations-security-council-meeting-russias-aggression-against-ukraine> accessed 14 March 2023; Volodymyr Zelenskyy, 'We Must Create a Special Tribunal on the Crime of Aggression against Ukraine – Address by President Volodymyr Zelenskyy to the Participants of the Public Debate "War and Law" in Paris' (5 October 2022) <https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochinu-agresiyi-78285> accessed 19 March 2023.
[16] Beth Van Schaack, 'Ambassador Van Schaack's Remarks' (Nuremburg Principles Meeting, Catholic University of America, 27 March 2023) <https://www.state.gov/ambassador-van-schaacks-remarks/> accessed 5 April 2023.

time an act of aggression has been internationally criticised. Previous uses of force in modern history were also met with widespread condemnation and, in some cases, even more powerful reactions.[17] In 1986, the International Court of Justice (ICJ) decided that the United States had acted against Nicaragua 'in breach of its obligation under customary international law not to use force against another State' in the case concerning *Military and Paramilitary Activities in and Against Nicaragua*.[18] In 2005, the Court found that Uganda, by engaging in military activities against the Democratic Republic of the Congo, had violated the prohibition of the use of force and the principle of non-intervention.[19] The Iraqi invasion of Kuwait in 1990 and Iraq's subsequent refusal to withdraw from Kuwait led to a Security Council resolution authorising a military intervention that was led by the United States.[20] Furthermore, the war launched by the United States and its allies against Iraq in 2003 was criticised by States and international lawyers from many regions of the world.[21]

Nevertheless, the condemnations of the Russian aggression against Ukraine have been numerous and widespread. Arguably, the international community is confronted with an unprecedented situation, which may require unprecedented solutions. The political will to ensure criminal accountability is evident, and it is crucial for legal research to approach this matter with seriousness. Furthermore, sanctioning the use of force has historically proved difficult – especially when the aggressor is a permanent member of the Security Council. Proponents of accountability measures for the Russian aggression should therefore take a step back and contemplate what goals such measures should achieve before they move forward with a chosen measure.

[17] Olivier Corten and Vaios Koutroulis, 'Tribunal for the Crime of Aggression against Ukraine – a Legal Assessment' (14 December 2022) <https://www.europarl.europa.eu/thinktank/en/document/EXPO_IDA(2022)702574> accessed 6 March 2023 5 [hereinafter: Corten and Koutroulis].

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ [1986] para 292(4).

[19] *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ [2005] para 345(1).

[20] Authorizing Member States to use all necessary means to implement Security Council resolution 660 (1990) and all relevant resolutions UNSC Res 678 (29 November 1990) UN Doc S/RES/678(1990).

[21] See for example UNSC 4726th meeting (27 March 2003) UN Doc S/PV.4726(Resumption 1) 7ff; International Commission of Jurists, 'Iraq – ICJ Deplores Moves Toward a War of Aggression on Iraq' (7 April 2003) <https://web.archive.org/web/20030407232423/http://www.icj.org/news.php3?id_article=2770&lang=en> accessed 15 March 2023; Corten and Koutroulis (note 17 *supra*) 5.

1.3 Purpose of the Thesis

The pursuit of criminal accountability for the Russian aggression touches upon fragmented areas in international criminal law, where there is limited consensus regarding interpretation.[22] Because of this unclarity in the 'black-letter' law, the present study does not strive to precisely determine the law of immunities and sovereignty of States in relation to the prosecution[23] of the crime of aggression. Instead, the thesis tries to move beyond arguments about the exact legal basis of certain measures, where no consensus can be found, to focus on the goals a measure should try to achieve.

This thesis aims to lay down the foundation for a model to assess different measures to enable criminal trials in connection with the Russian aggression. Moreover, the thesis aspires to take a first step towards a more structured and constructive discussion about proposals to end impunity for the crime of aggression.

The present thesis addresses the following research question:

> *How can a model be designed to assess proposals to enable the prosecution of the Russian leadership for the crime of aggression?*

1.4 Methodology: A Goal-Oriented Approach to International Criminal Trials

The existence of international criminal courts and tribunals can be viewed as a response to the most serious crimes known to the international community. The arguably most important function of the regime of international criminal law is to end impunity for these international crimes, that is, genocide, crimes against humanity, war crimes, and the crime of aggression. Nevertheless, there is no agreement on the overarching goals of international criminal trials. There exist numerous declared and implied goals, but without a fixed hierarchy and with significant conflicts between them.[24]

Scholars and lawyers often see law, including international criminal law, as a response to social needs.[25] Goals or objectives can be used to describe these social needs – and perhaps even make them measurable. The goal-oriented approach is inherently related to the teleological interpretation method asking

[22] Corten and Koutroulis (note 17 *supra*) 2.
[23] In the legal debate concerning the Russian aggression, the word 'prosecute' refers not only to instituting and conducting legal proceedings against the Russian leadership but also to enabling criminal trials. It is used in the same manner in the present thesis.
[24] See for example Damaška (2008) 339; Klamberg (2010) 279; Klamberg (2015) 107; McDermott (2016) 126.
[25] Koskenniemi (2006) 17, 24; Klamberg (2015) 46.

questions about the purpose of law. In national law, the process of identifying goals is often guided by a well-defined constitutional framework of law-making, wherein the lawmaker often articulates different goals in explicit terms. The processes of law-making in international law are much more fragmented. Regarding treaties, goals are sometimes explicitly manifest in the preparatory works or in the treaty itself, including its preamble.[26] Furthermore, an international body, such as the Security Council, can articulate certain goals when it exercises its coercive Chapter VII powers.

Of concern to this thesis are goals that can be used to assess or evaluate different proposals to enable the prosecution of the Russian leadership for the crime of aggression. In this context, there is no pre-existing statutory framework, and the relevant goals must therefore be found within the general framework of international criminal trials. In this regard, the concepts of legality and legitimacy are used to select the appropriate criteria for the assessment model.[27]

It is necessary to acknowledge the critique of the goal-oriented approach. Koskenniemi argued that there is no test to demonstrate the correctness of objective values.[28] Statements about the purpose of international criminal law have been shown to be difficult to prove empirically. Examples include claims that the ICC would be a powerful antidote to impunity or that individualised responsibility would avoid the taint of collective guilt. Even more so, broad statements are problematic. For example, without justice, there can be no lasting peace; or without truth, there can be no genuine reconciliation.[29] These values are policy-oriented and vulnerable to criticisms of subjectiveness. However, goals are usually embedded within the legal structure and the law itself can be viewed as a result of competing goals.

Stahn reminded us that not all outcomes of international criminal proceedings can be assessed or quantified: 'Any investigation carries a certain degree of uncertainty'.[30] Even if the ultimate goal of accountability measures for the Russian military intervention is to end impunity for the crime of aggression, the possibility of acquittal of the Russian leadership must be accepted.

Furthermore, lawyers cannot define the concepts of international law as they please; they operate and write within the established discourse of international law and utilise a pre-existing language – a system of interpreting the world. As Koskenniemi wrote, 'We do not say that people have a right to self-

[26] Confer Klamberg (2010) 281, 293.
[27] The search for appropriate goals continues in Chapter 3.
[28] Koskenniemi (2006) 207.
[29] Orentlicher (2003) 498–499.
[30] Stahn (2012) 257.

determination because we think so. Rather, we come to think so because that is what we say.'[31] The same is true about the goals of international criminal trials, they exist within the legal discourse, and therefore, they are recognised. In the present thesis, legal concepts are not questioned or deconstructed like a critical legal scholar would have done, but it is acknowledged that they could be disentangled and analysed further. Assessment models are at risk of simplifying reality, but they are necessary to create a structured approach to assessing legal measures.

To be able to identify the appropriate goals and the right framework for the assessment model, a positivistic approach is adopted to survey the relevant area of international criminal law. In this regard, the 'black-letter' study examines international law *de lege lata* concerning the crime of aggression, immunities, and international criminal procedure. This approach focuses on the analysis of sources of law to identify existing positive law and emphasises understanding the law as it stands rather than evaluating its morality or effectiveness. The sources of law in the relevant area are controversial and fragmented. Therefore, the survey does not claim to exhaustively explore the subject. Rather, it presents the legal context in which the assessment model operates.

Article 38 of the Statute of the International Court of Justice[32] recognises the following sources of international law[33]:

a. *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
b. *international custom*, as evidence of a general practice accepted as law;
c. the *general principles of law* recognized by civilized nations;
d. subject to the provisions of Article 59, *judicial decisions* and the *teachings of the most highly qualified publicists* of the various nations, as subsidiary means for the determination of rules of law.[34]

Accordingly, the primary sources of international law include treaties, custom, and general principles. Furthermore, the rulings of international courts and international legal doctrine can serve as supplementary means for determining the law.

[31] Koskenniemi (2006) 12.
[32] Statute of the International Court of Justice, in Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[33] Thirlway (2014) 8–9.
[34] Emphasis added.

This study concerns itself with international criminal trials. Hence, the statutes of international criminal tribunals and courts are the primary legal instruments of interest. Furthermore, binding human rights instruments are also examined to identify the goals of international criminal procedure. In relation to treaties, the interpretative methods contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties[35] are applied. However, not all statutes of international tribunals can be categorised as treaties. For example, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[36] and the Statute of the International Criminal Tribunal for Rwanda (ICTR)[37] are Security Council resolutions, making them *sui generis* legal instruments. Nonetheless, Articles 31 and 32 were found to be relevant in the interpretation of these statutes' provisions.[38]

Because of the limited scope of the study, the thesis does not examine State practice or *opinio juris* – both of which are scarce in relation to the relevant area of law. Instead, the work of the International Law Commission (ILC), international case law, and legal doctrine are referenced to give an indication of customary norms. This is carefully done not to suggest that the statements necessarily reflect customary international law. These sources cannot create international law by themselves because they are – as Article 38 states – only subsidiary means for the determination of international law.[39]

Other material than what is listed in Article 38 is also examined. The study considers Security Council resolutions and General Assembly resolutions to investigate the goals and the development of international criminal trials. It is considered that the legally binding character of Security Council resolutions in relation to UN members derives from Chapter VII of the UN Charter.[40] General Assembly resolutions are non-binding but still play an important role in the development of international law – because they express political and moral commitments.

[35] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[36] Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by UNSC Res 827, annexed to Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808).
[37] Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by UNSC Res 955, annexed to the resolution).
[38] *Prosecutor v Dusko Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* ICTY Trial Chamber [1995] para 18.
[39] Thirlway (2014) 131.
[40] It has been questioned whether the list of sources in Article 38 of the Statute of the ICJ is exhaustive, especially regarding decisions by international organisations. However, the binding force of Security Council resolutions is consensual and not controversial, see Thirlway (2014) 24–26.

Additionally, the proposals to enable the prosecution of the Russian leadership for the crime of aggression do not reflect positive law – but their relationship to positive law is studied. In the present thesis, three proposals are assessed that represent three very different approaches towards criminal accountability:

- Amending the Rome Statute of the International Criminal Court (ICCSt).[41]
- Special Tribunal established through the UN system.
- Treaty-based Special Tribunal.

There have been many proposals regarding enabling the prosecution of the Russian leadership for the crime of aggression. The proposals mentioned above are dealt with in this thesis because they represent a wide spectrum of possible measures and have all been discussed in the legal debate. Other proposals include a tribunal that could be set up through an agreement between Ukraine and an international body or organisation other than the UN, for example, the Council of Europe or the European Union, which may or may not be endorsed by the General Assembly.[42] A national trial under Ukrainian law could also be conducted, or some sort of High Court of Ukraine could be established.[43]

Finally, legal doctrine is also used to illuminate the concepts and goals of international criminal trials. The scholarship that is most essential to the present study is mentioned in the next section.

1.5 Previous Research

Most research concerning the crime of aggression focuses on the crime under the ICCSt and its relationship to crimes against peace in the Nuremberg Trials.[44] Regarding the situation in Ukraine, previous in-depth analyses have investigated the precedents for a Special Tribunal for Ukraine and the issue of immunities.[45] Some articles stress the selectivity of proposed accountability

[41] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
[42] Corten and Koutroulis (note 17 *supra*) 18.
[43] Public International Law & Policy Group, 'Draft Law for a Ukrainian High War Crimes Court' (22 July 2022) <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/62d6c27baae10b6ca51cadb7/1658241661209/DRAFT+Ukraine+High+War+Crimes+Court.pdf> accessed 30 March 2023.
[44] See for example Kreß (2016); McDougall (2016).
[45] See for example Heller (2022); Dannenbaum (2022); Corten and Koutroulis (note 17 *supra*); Open Society Justice Initiative, 'Immunities and a Special Tribunal for the Crime of Aggression against Ukraine' (1 February 2023)

measures for the Russian aggression.[46] International law and security blogs, for instance, Just Security[47] and Opinio Juris,[48] have been popular platforms among scholars for debating different accountability measures for the Russian invasion. The discussion has, for example, concerned immunities, the scope of the crime of aggression, the characteristics of an international court, and the role of the ICC in the present situation. Although the content of the blogs is interesting, they have mostly been left out of the present study because they lack the academic standards of recognised journals and publishers. Moreover, the debating scholars often champion their favoured approach and disregard the alternatives. To contribute to a more structured discussion, the present thesis focuses on the goals that should be achieved.

The primary focus of research on immunities revolves around immunities before national courts. However, scholars have also explored immunities before international courts.[49] There have also been discussions in legal research concerning the definition of an international court – even if there is a lack of consensus regarding the definition.[50] Furthermore, the terms 'hybrid court' and 'hybrid tribunal' are not used in the present thesis. A hybrid court or tribunal is often characterised by the following elements: applies both national and international law, has a mixed composition of both national and international judges and other personnel, and has been incorporated into the judicial system of a State. There is, however, no formal or consensus definition of a hybrid court.[51]

A branch of scholarship surrounding the assessment of international criminal trials has developed over time.[52] Certain perspectives have been more prevalent than others. In her comprehensive monograph *Fairness in International Criminal Trials*, McDermott studied the standards of fairness in international criminal trials.[53] Cryer's book *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* thoroughly explores the subject of selectivity in international criminal law.[54] International trials have also

<https://www.justiceinitiative.org/publications/immunities-and-a-special-tribunal-for-the-crime-of-aggression-against-ukraine> accessed 6 March 2023.
[46] See for example Ambos (2022); Vasiliev (2022).
[47] Crime of Aggression Archives (*Just Security*) <https://www.justsecurity.org/tag/crime-of-aggression/> accessed 10 April 2023.
[48] International Criminal Law (*Opinio Juris*) <http://opiniojuris.org/category/topics/international-criminal-law/> accessed 10 April 2023.
[49] See for example Akande (2004); Kreicker (2016).
[50] See Chapter 3.3 and the discussion in Schabas and McDermott (2012); O'Keefe (2015) 86–87.
[51] Schabas and McDermott (2012); O'Keefe (2015) 86–87; Heller (2022) 17–18.
[52] See for example Orentlicher (2003); Stahn (2012); Jo and Simmons (2016).
[53] McDermott (2016).
[54] Cryer (2005).

been explored using other perspectives, such as deterrence,[55] truth-seeking,[56] and victim participation.[57] Furthermore, the concepts of legality and legitimacy are often referred to as the most important aspects of a criminal trial. The concepts of legality and legitimacy in relation to international tribunals and courts have been studied by both Cassese and Popovski.[58] Moreover, both Damaška and Klamberg have contributed to a more open discussion about the goals of international criminal trials.[59] This thesis draws upon these theories to create the assessment model and operationalises the goal-oriented approach. The work of the abovementioned scholars is discussed in Chapter 3 of the thesis.

The model presented in this thesis is inspired by the model measuring the degree of legalisation in international legal regimes, put forth by Abbott and others in *The Concept of Legalization*.[60] Their model concerns a very different field; therefore, the inspiration only comes from their systematic approach and the structure of the legalisation model.

1.6 Point of Departure and Delimitations

Many scholars have argued that the Russian military intervention constitutes a clear-cut case of a crime of aggression perpetrated by the Russian leadership.[61] Furthermore, the General Assembly has qualified the Russian invasion as an act of aggression.[62] The point of departure of this thesis is, therefore, that the Russian military intervention qualifies as an act of aggression. This thesis aims to evaluate different measures to create the appropriate judicial proceedings to facilitate a judgment – not to make a final decision regarding whether an act of aggression has been committed. Furthermore, forms of accountability not related to individual criminal responsibility are not dealt with in the present research. Consequently, the State responsibility of the Russian Federation is left out of the study.

The analysis focuses on the legitimacy and the legality of proposals from a legal perspective, and the positivistic study is delimited to international law. Policy-oriented measures will not be considered. It is up to skilled diplomats

[55] See for example Jo and Simmons (2016).
[56] See for example Klamberg (2010) 284, 290.
[57] For a critical study of victim participation, see Trumbull (2007).
[58] Cassese (2012); Popovski (2012).
[59] Damaška (2008); Klamberg (2010).
[60] Abbott and others (2000).
[61] See for example Heller (2022) 4; Dannenbaum (2022) 860.
[62] Aggression against Ukraine UNGA Res ES-11/1 (2 March 2022) Eleventh Emergency Special Session UN Doc A/Res/ES-11/1 para 2.

and politicians to decide on which strategy to adopt and in what order certain steps should be taken.

Finally, the model only applies to the current situation, where the Russian leadership is still in office. If they were to leave office or if the Russian Federation would waive their immunity, other considerations than the ones the present model is built upon would be relevant – especially regarding personal immunity. Furthermore, the model does not consider prosecuting persons who are part of the leadership but not the *troika*.[63]

1.7 Footnotes

To make the thesis reader-friendly to whoever will read it, some remarks about the footnotes are necessary. Regarding the literature, the surname of the author and the year of publication are cited in the footnotes. When cases are referenced, the name of the case, the court, and the year of judgment are given. More details are found in the bibliography and the table of cases. Other sources are cited in full. Some electronic sources that are frequently used are cited in full the first time and a short version is given in square brackets at the end of the footnote. The next time the source is cited, only the short version is used with a reference to the first footnote (note xx *supra*).

1.8 Structure of the Thesis

Following the introduction, Chapter 2 deals with where current international law stands in regard to the area of study. This chapter is descriptive and adopts the positivistic approach to legal research. First, a brief history of the crime of aggression is given. The prohibition of the use of force is by no means a new concept. However, the criminalisation of the crime of aggression has developed quickly in recent years. The customary definition is touched upon, and then the definition of the crime under the ICCSt is studied – to describe the relevant legal framework. Thereafter, the chapter introduces the concepts of personal and functional immunity, which are crucial to understanding how criminal accountability can be achieved – because of the status of the crime of aggression as a leadership crime.

In Chapter 3, the assessment model is explained, and the criteria for evaluating the proposals are discussed. First, the possible goals of international criminal trials are explored. The concepts of legality and legitimacy are then introduced and used to select the appropriate criteria for the model. In this regard, the discussion of immunities continues in relation to the criterion of internationalisation – with the aim to answer the question: what makes a court

[63] This is discussed further in Chapter 2.4.

or tribunal international? Thereafter, the concepts of fair trial standards and selectivity are studied closely and are incorporated into the assessment model. Lastly, the chapter considers the exclusion of other possible assessment criteria: deterrence, truth-seeking, reconciliation, victim participation, and effectiveness.

As the thesis moves forward in Chapter 4, the three different proposals are evaluated with the assessment model: (1) amending the ICCSt, (2) a Special Tribunal established through the UN system, and (3) a treaty-based Special Tribunal. The proposals' relationship to positive law is also discussed to better understand how they would fit into the existing legal framework. The proposals represent three very different paths towards criminal accountability – and test the capabilities of the assessment model and the goal-oriented approach. After the proposals are assessed, the results are discussed.

By way of conclusion, the research is summarised, and a few general remarks about the results are given.

2 The Crime of Aggression

2.1 A Brief History of the Crime of Aggression

> *To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.*
>
> *– International Military Tribunal (Nuremburg)*[64]

It is difficult to pinpoint an exact time in history when the crime of aggression became unlawful under international criminal law. Brownlie traced the idea of aggression as an unjust act back to Ancient Greece and other advanced ancient civilisations.[65] However, throughout most of history, leaders of States have been able to enjoy impunity for their acts of war. Recently the Kellogg-Briand Pact of 1928[66] has been promoted as an important 'switch point', after which the sovereign State acquisition of territory through the use of military force has declined.[67]

The use of force in international law is primarily regulated by a system of collective security, manifest in the UN Charter.[68] If one State attacks another, it should expect the attacked State to defend itself alone or collectively. There is also the possibility of a UN Security Council intervention since the Council has the primary responsibility for the maintenance of peace and security in the international community.

Arguably, the most important codification of the prohibition on the use of force can be found in the UN Charter. Article 2(4) stipulates:

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

In the 1986 *Nicaragua* decision, the ICJ clarified 'that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations'.[69] Furthermore, the

[64] *International Military Tribunal (Nuremberg), Judgment* IMT [1946] para 186.
[65] Brownlie (1963) 3–4.
[66] General Treaty for Renunciation of War as an Instrument of National Policy (The Kellogg-Briand Pact) (adopted 27 August 1928, entered into force 24 July 1929) 94 LNTS 57.
[67] O'Connell (2021) 142–143.
[68] Confer Kreß (2016) 4–5.
[69] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ [1986] para 181.

adoption by States of the Declaration on Friendly Relations (General Assembly Resolution 2625)[70] was considered by the ICJ to indicate the States' *opinio juris* concerning the use of force in international relations.[71] The declaration asserts the duty for States to 'refrain in their international relations from the threat or use of force by states against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations' and that such threat or use of force is a violation of international law and the UN Charter.[72]

The modern understanding of individual responsibility for the crime of aggression has its roots in the Nuremberg Trials, where the victorious powers of World War II held trials to prosecute the former leaders of Nazi Germany for crimes against peace, war crimes, and crimes against humanity. The Charter of the International Military Tribunal[73] defined crimes against peace in Article 6(a) in the following way:

> the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing.

Article 5(a) of the Charter of the International Military Tribunal for the Far East[74] contained an almost identical definition, with some minor changes. The military tribunals did not construct any definition of 'war of aggression', the State act element of crimes against peace, but identified certain acts that were found to fall within the term 'war of aggression'.[75]

However, after the 1946 Nuremberg Judgment[76] and the 1948 Tokyo Judgment,[77] the crimes against peace faded into the background of international

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[70] Declaration on Principles of International Law Concerning Friendly Relations and Cooperations Among States in Accordance with the Charter of the United Nations UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625(XXV).
[71] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ [1986] para 191.
[72] Declaration on Principles of International Law Concerning Friendly Relations and Cooperations Among States in Accordance with the Charter of the United Nations UNGA Res 2625 (24 October 1970) UN Doc A/RES/2625(XXV) para 1.
[73] Charter of the International Military Tribunal, in Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945, entered into force 8 August 1945) 82 UNTS 284.
[74] Charter of the International Military Tribunal for the Far East (adopted 19 January 1946, entered into force 19 January 1946) TIAS 1589, 4 Bevans 2.
[75] McDougall (2016) 52–53.
[76] *International Military Tribunal (Nuremberg), Judgment* IMT [1946].
[77] *International Military Tribunal for the Far East, Judgment* IMTFE [1948].

criminal law in the latter half of the twentieth century.[78] The process of criminalising the crime of aggression lost its momentum. In 1974, there was an attempt to create a consensus definition by the General Assembly through the adoption of Resolution 3314 (XXIX),[79] but the resolution was oriented towards the State act element of the crime and not individual criminal responsibility.[80]

The customary law status of the crime of aggression is widely accepted.[81] It is, however, difficult to determine the exact customary definition of the crime, but its contours are distinguishable. Kreß asserted that the customary definition only covers the core elements of the prohibition of the use of force. He catalogued a few possible customary definitions of the core elements, including an act intended to annex territory or subjugate the victim State; the use of force directed to the acquisition of territory, appropriate assets, or bring about a change in government, domestic or foreign policy of the victim State; an act intended to change the *status quo* in the victim State by attacking its military, governmental, or economic structures.[82]

2.2 The Crime of Aggression Under the ICCSt

The ICCSt was adopted on 17 July 1998, 50 years after the Tokyo Judgment – marking the first step towards the codification of the crime of aggression. It was set up as a multilateral treaty and established through the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference).[83]

At the 1998 Rome Conference, consultations could not bring the delegations to an agreement on whether the crime of aggression should be included alongside the other core international crimes. Instead, a compromise was made to leave the elaboration of a definition to negotiations after the Rome Conference.[84]

Article 5(1) of the ICCSt lists the crime of aggression as one of the four crimes over which the Court 'has jurisdiction'. However, Article 5(2) of the original Statute provides that:

[78] McDougall (2016) 49.
[79] Definition of Aggression UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX).
[80] With the exception of Article 5(2) of the annex to the resolution.
[81] See for example O'Keefe (2015) 154; McDougall (2016) 103.
[82] Kreß (2009) 1139; Heller (2022) 4.
[83] Schabas (2016) 22–27.
[84] Clark (2016) 260ff.

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

Accordingly, amendments were needed in order for the Court to be able to exercise its jurisdiction over the crime of aggression. After years of negotiations, such amendments became a reality at the Kampala Review Conference in 2010, when States parties adopted Articles 8*bis*, 15*bis*, and 15*ter* as a package, which entered into force in accordance with Article 121(5).[85] In 2017, the Assembly of States Parties to ICCSt decided to activate the ICC's jurisdiction over the crime of aggression from 17 July 2018 onwards.[86]

Article 8*bis* defines the crime, while Articles 15*bis* and 15*ter* sets out the conditions under which the Court can exercise jurisdiction. Article *8bis*(1) states:

> For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

It is only persons 'in a position to exercise control over or to direct the political or military action of a State' who can be prosecuted for the crime of aggression. This is known as the leadership requirement and shields the ordinary soldier from prosecution.[87] The clause only targets high-level individuals with decision-making power, which highlights the issue of immunity of State officials. The leadership circle is not necessarily limited to *troika* members, consisting of the Head of State, the Head of Government, and the Minister of Foreign Affairs, but it is not clear how wide the circle is.[88] Other members of the Russian leadership, who are not covered by personal immunity, could possibly be prosecuted using the definition under the ICCSt – but they might be covered by functional immunity. The topic will be briefly revisited in Chapter 2.4.2.

Furthermore, Article 8*bis* delimits the crime of aggression to the use of 'armed force' and acts of aggression that, by their character, gravity, and

[85] Schabas (2016) 303, 411.
[86] Activation of the jurisdiction of the Court over the crime of aggression, ICC Assembly of States Parties (14 December 2017) ICC-ASP/16/Res.5.
[87] Kreß (2016) 9.
[88] Confer Schabas (2016) 309–310.

scale, constitute a 'manifest violation' of the UN Charter. It further lists acts that shall qualify as an act of aggression in accordance with General Assembly Resolution 3314 (XXIX).

The relationship between the ICCSt's definition and the definition under customary international law has been discussed in legal doctrine.[89] McDougall contended that the definition of the crime of aggression under the ICCSt, in relation to the State act element of the crime, is broader than the definition under customary international law – at least at the time Article 8*bis* was adopted.[90]

It is beyond the scope of the present study to determine whether the customary definition is broader or narrower than the ICCSt's definition. However, a treaty, such as the ICCSt, can only bind its parties, who have consented to be bound.[91] Therefore, it is worth bearing in mind that if the ICCSt's definition is deemed to be broader than the definition under customary international law, it could violate the principle of legality (*nullum crimen sine lege*) to apply such a definition in relation to non-party States.[92] A person may not be punished if the acts at the time they were committed were not prohibited by law.

In addition, Article 22(1) provides that 'A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court'. Furthermore, Article 21(3) stipulates that 'The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. The principle of legality is certainly among those internationally recognised human rights, for example, manifest in Article 7 of the European Convention for the Protection of Human Rights (ECHR)[93] and Article 15 of the International Covenant on Civil and Political Rights (ICCPR).[94] McDougall argued that in cases where the ICC wants to exercise jurisdiction retrospectively, the conduct in question must amount to a crime under customary international law when corresponding national prohibition is absent.[95] Due to the absence of ratification of the ICCSt by the Russian Federation, the

[89] See for example McDougall (2013) 154; O'Keefe (2015) 154–156.
[90] McDougall (2013) 194.
[91] See Articles 34–38 of the Vienna Convention on the Law of Treaties.
[92] For a discussion about the relationship between treaty crimes and customary international law, see Milanovic (2011).
[93] European Convention for the Protection of Human Rights and Fundamental Free-doms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, 213 UNTS 222.
[94] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[95] McDougall (2013) 200.

conduct of the Russian leaders must constitute a crime under customary international law.[96]

The principle of legality also applies to *ad hoc* tribunals. Consequently, it is important for a Special Tribunal for Ukraine or a trial resulting from amending the ICCSt, not to go beyond the customary definition of the crime of aggression. Nonetheless, there is widespread consensus that, at least, the Russian use of armed force against Ukraine – the State act element of the crime – qualifies as an act of aggression under customary law.[97]

2.3 The ICC's Jurisdiction Over the Crime of Aggression

The exercise of jurisdiction over the crime of aggression was one of the most contentious issues at the 1998 Rome Conference.[98] Many States, especially from the Non-Aligned Group, demanded that it should be included alongside the other core international crimes but were opposed by a smaller number of States.[99]

The Kampala Amendments did not align the Court's jurisdiction over the crime of aggression with its jurisdiction over the other international crimes; instead, a new jurisdictional regime was created. Article 15*bis* deals with a situation where prosecution for the crime of aggression is based upon a referral by a State party or at the initiative *proprio motu* of the prosecutor. Article 15*ter* governs the referral of a situation by the Security Council.

Even if Article 15*ter* comes after 15*bis*, Schabas argued that the process operates in the opposite order because Article 15*bis* 'is dependent on either action or inaction by the Security Council'. The Security Council can either refer a situation involving the crime of aggression to the ICC or make a determination that an act of aggression has taken place. It is only after six months have gone by without the Council determining that an act of aggression has taken place that the provisions in Article 15*bis* become truly operational, and if a Security Council referral has been made, there is no need for a referral by a State party or a *proprio motu* investigation by the prosecutor.[100] Because of the Russian Federation's veto in the Council, any Security Council involvement is unlikely to occur in the present situation.

[96] National legislation is not considered in the present thesis.
[97] See for example Heller (2022) 4; Dannenbaum (2022) 860.
[98] Schabas (2016) 303, 411.
[99] See for example Clark (2016) 260.
[100] Schabas (2016) 418.

Concerning the Russian aggression against Ukraine, the issue with the ICC's ability to exercise its jurisdiction over the crime of aggression lies with Article 15*bis*(5). It states that the Court, in respect of a State not party to the Statute, shall not exercise its jurisdiction over the crime of aggression when committed by nationals of that State or on its territory. It was one of the most controversial compromises of the entire drafting process of the Kampala Amendments. It constitutes an exception to the general rule set out in Article 12 of the ICCSt.[101] The general rule provides that the Court may exercise jurisdiction over crimes committed on the territory of a State party and over crimes committed by its nationals regardless of where they were committed. Consequently, Article 15*bis*(5) creates a separate jurisdictional regime for the crime of aggression compared to the other international crimes: war crimes, crimes against humanity, and genocide.

2.4 Immunities

2.4.1 Personal Immunity (*ratione personae)*

An arrest warrant issued in 2000 by Belgium concerning Abdoulaye Yerodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of the Congo at the time, was challenged before the ICJ in the *Arrest Warrant* case.[102] The Court found that Belgium, by issuing the arrest warrant, had failed to respect the personal immunity of the Minister of Foreign Affairs, enjoyed under customary international law. The ICJ clarified that high-ranking officials, such as the Head of State, the Head of Government, and the Minister for Foreign Affairs, enjoy immunity from the jurisdiction of other States, both civil and criminal jurisdiction, throughout the duration of their office. Furthermore, the Court concluded that both 'private' and 'official' acts are covered by the immunity.[103]

Personal immunity can be understood as a status-based immunity enjoyed by a small number of high-level State officials, which at least includes the Head of State, the Head of Government, and the Minister of Foreign Affairs, because of the office they occupy. It derives from the *par in parem non habet imperium* principle, stating that a sovereign State cannot exercise jurisdiction over another sovereign State. However, personal immunity will not be applicable when the official leaves office or the State of the official waives the immunity.[104] The Russian leadership, including at least the *troika* (President Vladimir Putin, Foreign Minister Sergey Lavrov, and Prime Minister Mikhail

[101] ibid 423.
[102] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ [2002].
[103] ibid paras 51, 54–55, 78(2).
[104] ibid para 61.

Mishustin), enjoy personal immunity in relation to the exercise of jurisdiction of all other States.

However, in the *Arrest Warrant* case, the ICJ stated that 'an incumbent or former Minister of Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction'. The ICJ gave the following examples of such courts: the ICTY, the ICTR, and the ICC.[105] Due to the United Nations' universal membership and the binding nature of the Council's decision, under Chapter VII of the UN Charter, the ICTY and ICTR Statutes have the power to set aside the personal immunity of Heads of State. Member States have indirectly consented to the elimination of immunity before these international tribunals through the ratification of the UN Charter.[106] The same cannot be said of the ICC because it is a treaty-based court – a topic that will be discussed below.

In the *Miloševic* case, the ICTY asserted that Article 7(2) of the ICTY Statute, stipulating that the official position of a person does not relieve such person of criminal responsibility nor mitigate punishment, reflected customary international law at the time.[107]

In 2012, Charles Taylor, the former President of Liberia, was tried and convicted of 11 charges arising from crimes against humanity and serious violations of international humanitarian law committed during Sierra Leone's civil war.[108]

In 2004, Taylor made an application to quash his indictment and set aside the warrant for his arrest. The indictment and the arrest warrant were approved when Taylor was still acting President of Liberia. However, the Special Court of Sierra Leone (SCSL) set aside Taylor's personal immunity and argued that 'the principle seems now established that the sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[109]

In addition, the Court asserted that:

> the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals

[105] ibid.
[106] Akande (2004) 417.
[107] *Prosecutor v Slobodan Miloševic, Decision on Preliminary Motions* ICTY Trial Chamber [2001] para 28.
[108] *Prosecutor v Charles Ghankay Taylor, Judgment* SCSL Appeals Chamber [2012].
[109] *Prosecutor v Charles Ghankay Taylor, Decision on Immunity from Jurisdiction* SCSL Appeals Chamber [2004] para 52.

> which are not organs of a state but derive their mandate from the international community.[110]

In other words, the SCSL found that the principle of the *par in parem non habet imperium* does not apply in relation to international courts or tribunals.

There is a special situation for States parties to the ICCSt, regardless of customary international law. Article 27(2) of the ICCSt grants an exception to personal immunity before the ICC. However, Article 27(2) only provides the exception *inter partes* – States renounce the immunity of their own Head of State when they ratify the ICCSt.[111] O'Keefe has written about the relationship between a treaty-based court and a non-party State:

> The state, not being a party to the treaty, cannot be taken – absent consent manifest otherwise – to have consented to the exercise in derogation of its rights of the powers conferred on the court by the treaty. The fact that the court is international makes no difference.[112]

Accordingly, a Head of State of a non-party State would enjoy immunity before the ICC. However, this understanding has been challenged by the ICC's Appeals Chamber in the *Al Bashir* case.[113] Omar Al Bashir, the former President of the Republic of Sudan, which is not a party to the ICCSt, has been the subject of two ICC arrest warrants issued on 4 March 2009 and 12 July 2010, respectively, concerning war crimes, crimes against humanity, and genocide allegedly committed in Darfur from 2003 to at least 2008.[114]

The Court then transmitted to all States parties requests for the arrest and surrender of Al Bashir. In March 2017, Jordan hosted the 28th Summit of the Arab League in Amman, which then-sitting President Al Bashir attended. The Registry had renewed the request to cooperate in the arrest and surrender of Al Bashir in a note verbale to Jordan. During his time in Jordan, Al Bashir was not arrested and surrendered by Jordanian authorities. The ICC's Pre-

[110] ibid para 51.
[111] Confer O'Keefe (2015) 106–110; Schabas (2016) 599ff.
[112] O'Keefe (2015) 106.
[113] *Prosecutor v Omar Hassan Ahmad Al Bashir, Judgment in the Jordan Referral re Al Bashir Appeal* ICC Appeals Chamber [2019].
[114] *Prosecutor v Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir* ICC Pre-Trial Chamber I [2009]; *Prosecutor v Omar Hassan Ahmad Al Bashir, Second Decision on the Prosecution's Application for a Warrant of Arrest* ICC Pre-Trial Chamber I [2010].

Trial Chamber II issued a decision where it found that Jordan had failed to comply with its obligations under the ICCSt.[115]

Jordan appealed the decision and argued, *inter alia*, that Al Bashir enjoyed immunity *ratione personae* as a sitting Head of State and that Jordan, by arresting him, would have violated Jordan's obligations under customary international law.[116]

The ICC's Appeals Chamber found that personal immunity does not apply to a Head of State before an international court.[117] This finding was based on the premise that neither State practice nor *opinio juris* supports a customary rule under which a Head of State would enjoy immunity before an international court.[118] The decision asserted that there is an obligation for a State party to arrest anyone, including the Head of State of a non-party State, upon the lawful request of the Court. Such an obligation arguably violates the obligation of the State party to respect the personal immunity of the Head of State of the non-party State. The Appeals Chamber's argument is that the latter obligation does not exist since Heads of State do not enjoy personal immunity before international courts, such as the ICC.

The position of the Appeals Chamber has proved to be controversial, and its implications for the horizontal relationships between States have been extensively discussed in the scholarly debate.[119] The ICC is a treaty-based court; therefore, many scholars have argued that its exercise of jurisdiction cannot exceed the jurisdiction delegated to it by States parties.[120] A treaty cannot bind non-party States that have not consented to its authority.[121] Consequently, if the national courts of a State cannot set aside personal immunity, the State cannot delegate the power to set aside personal immunity to a treaty-based court in relation to a non-party State. Akande asserted that:

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[115] *Prosecutor v Omar Hassan Ahmad Al Bashir, 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* ICC Pre-Trial Chamber II [2017] 21–22, paras 4–6.
[116] *Prosecutor v Omar Hassan Ahmad Al Bashir, Judgment in the Jordan Referral re Al Bashir Appeal* ICC Appeals Chamber [2019] para 15.
[117] ibid paras 110–117.
[118] ibid para 113.
[119] See for example Alexandre Skander Galand, 'A Hidden Reading of the ICC Appeals Chamber's Judgment in the Jordan Referral Re Al-Bashir' (*EJIL: Talk!*, 6 June 2019) <https://www.ejiltalk.org/a-hidden-reading-of-the-icc-appeals-chambers-judgment-in-the-jordan-referral-re-al-bashir/> accessed 25 March 2023; Dapo Akande, 'Immunities of Heads of States & The International Criminal Court' (Osgoode Events, 28 October 2019) <https://digitalcommons.osgoode.yorku.ca/video_events/53> accessed 25 March 2022; Heller (2022) 10–11.
[120] See for example Akande (2004) 417; O'Keefe (2015) 106–108; Heller (2022) 10–11.
[121] See Articles 34–38 of the Vienna Convention on the Law of Treaties.

> It makes little difference whether the foreign states seek to exercise this judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to. To suggest that immunity is nonexistent before an international tribunal that has not been consented to by the relevant state is to allow subversion of the policy underpinning international law immunities.[122]

In conclusion, the case law seems to indicate that high-ranking State officials do not enjoy personal immunity before international courts. However, it has been questioned whether this includes treaty-based courts.

2.4.2 Functional Immunity (*ratione materiae*)

The ILC has been working on the immunity of State officials from foreign criminal jurisdiction since 2008. Note, however, that the ILC has not considered immunity before international courts. At its seventy-third session in 2022, the Commission adopted at a first reading 18 Draft Articles, as well as an annex and commentaries.[123]

Draft Article 6 describes functional immunity as follows:

> 1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
>
> 2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
>
> 3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.[124]

Functional immunity can be summarised as a conduct-based immunity, which applies to everyone with respect to acts performed in an official capacity. According to Akande, functional immunity may also be enjoyed by persons that are not State officials but have acted on behalf of the State.[125] The acts are restricted to those acts that involve the exercise of State functions. Functional immunity is enjoyed by a much wider range of persons than the circle of persons covered by personal immunity. Accordingly, functional immunity in

[122] Akande (2004) 417.
[123] ILC Report on the work of the seventy-third session (2022) UN Doc A/77/10 188–286.
[124] ibid 190.
[125] Akande (2004) 412–413.

relation to the crime of aggression could be enjoyed by members of the political and military leadership of the Russian Federation who are not members of the *troika*. However, the model presented in the present thesis is delimited to *troika* members. The acts covered by functional immunity are attributed to the State; therefore, the natural persons carrying out the acts are considered immune. Other acts that are not related to public functions are not covered by functional immunity. When an official leaves office, they continue to enjoy functional immunity with respect to the acts performed in an official capacity during their term of office.

In Draft Article 7, the ILC identified that functional immunity should not apply in relation to the following crimes under international law: the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.[126] The crime of aggression is not listed among the crimes to which the exception applies. Additionally, it is not clear to what extent the exceptions reflect customary international law. The ILC only regards limiting the applicability of immunity from jurisdiction *ratione materiae* with respect to certain international crimes as a 'discernible trend' in State practice, more precisely in decisions taken by national courts and, in rare cases, national legislation. The trend has also been highlighted in literature and reflected to some extent in the proceedings before international courts.[127] Moreover, the ILC has explained its decision not to include the crime of aggression among the exceptions to immunity *ratione materiae*. The Commission took the decision given that the crime 'would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of crime'. However, some ILC members did want to include the crime of aggression in Draft Article 7.[128]

Many scholars disagree with the position taken by the ILC. Dannenbaum has stated that functional immunity does not apply in relation to international crimes involving State violations, such as the crime of aggression.[129] In addition, the crime of aggression is, as already mentioned, listed alongside the other core international crimes in the ICCSt. Kreicker argued that there is a customary exception to functional immunity regarding international crimes, including the crime of aggression, supported by both State practice and scholarly writings.[130]

[126] ILC Report on the work of the seventy-third session (2022) UN Doc A/77/10 190–191.
[127] ibid 232–234.
[128] ibid 239.
[129] Dannenbaum (2022) 862.
[130] Kreicker (2016) 681–684.

It is not clear whether the crime of aggression is exempt from the applicability of functional immunity under customary international law. The decision of the ILC not to include the crime of aggression in Draft Article 7 implies that functional immunity could apply in respect of the crime of aggression before at least national courts. However, the viewpoint presented by the ILC is a subject of disagreement among scholars and within the ILC itself.

2.5 Conclusion

This chapter has explored the crime of aggression and immunities in international criminal law. A number of issues were raised that are relevant to the Russian aggression.

Firstly, the separate regime concerning the ICC's exercise of jurisdiction over the crime of aggression, created through the Kampala Amendments, is an obstacle to prosecuting the Russian leadership. Furthermore, the customary definition of the crime must be taken into consideration – a judgement could otherwise violate the principle of legality.

Lastly, the issue of immunities must be addressed. The case law indicates that high-ranking State officials, such as the *troika* in the Russian leadership, do not enjoy personal immunity before international courts, but it is questionable whether this applies to purely treaty-based courts. Moreover, international crimes may be exempt from the application of functional immunity. However, there is no consensus regarding whether functional immunity applies in relation to the crime of aggression – and further research regarding this topic would be valuable.

The next chapter explains the assessment model and the goals of international criminal trials. It builds upon the positivistic approach in the study above.

3 Measuring International Criminal Trials

3.1 The Goals of International Criminal Trials

Different scholars approach the numerous goals of international criminal trials in very different ways. Klamberg found that legal scholars usually focus on one of the following three categories related to criminal procedure: crime control through prosecution, human rights, or both. For example, the defendant's right to a fair trial is a human right. Additionally, he has catalogued the following possible goals of criminal procedure: expeditious proceedings, State sovereignty, truth-seeking, victim participation, and the protection of witnesses and victims.[131] Damaška included additional goals in his discussion about the objectives of international criminal trials, for example, retribution, peace and security, and deterrence.[132] There are interests in positive law that operate as constraining rules to the effort to end impunity. For example, ambitious fair trial standards can decrease the effectiveness of a judicial process, and State sovereignty can preclude the exercise of jurisdiction of an international court. In some cases, goals might even trump the ultimate objective of ending impunity. Other goals, such as establishing expeditious proceedings, deterrence, and retribution, may be considered more aligned with the fight to end impunity. However, it is not possible to identify any natural hierarchy between the various goals of international criminal trials.[133]

Many different goals have been declared by the Security Council in relation to international criminal tribunals. When establishing the ICTY and the ICTR, through Resolutions 827 and 955, the Council stated that bringing perpetrators to justice would contribute to the process of reconciliation, restoration and maintenance of peace, and would help deter future international crimes.[134]

Regarding the ICTR and the SCSL, the objective of strengthening the judicial system of Rwanda and Sierra Leone, respectively, was mentioned in Security Council resolutions.[135] The argument for rebuilding the rule of law carries

[131] Klamberg (2010) 284.
[132] Damaška (2008) 331ff.
[133] Damaška (2008) 339; Klamberg (2010) 279; Klamberg (2015) 107; McDermott (2016) 126.
[134] On establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 UNSC Res 827 (25 May 1993) UN Doc S/RES/827(1993) preambular paras 5–7; On establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal UNSC Res 955 (8 November 1994) UN Doc S/RES/955(1994) preambular paras 6–8; McDermott (2016) 126.
[135] On establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal UNSC Res 955 (8 November 1994) UN Doc S/RES/955(1994) preambular

much weight in post-conflict societies and is connected to the establishment of high fair trial standards, which are crucial for the creation of a credible justice system.[136] The importance of fair trial standards was declared in Resolution 1315 when the Security Council stated that the perpetrators of serious violations of humanitarian law would be brought 'to justice in accordance with international standards of justice, fairness and due process of law'.[137] The goal was also expressed in the ICTY's first annual report when 'render justice' was described as 'to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty'.[138] Likewise, when Resolution 1664 was adopted, which later led to the establishment of the Special Tribunal for Lebanon, the Security Council requested the tribunal to be 'based on the highest international standards of criminal justice'.[139] McDermott has concluded that the rebuilding of domestic justice systems and fair trial standards 'were goals of the contemporary international criminal tribunals upon their establishment'.[140]

In the next sections, the goals of international criminal trials are studied through the lens of legitimacy and legality. From this perspective, it is argued that internationalisation, fair trial standards, and non-selectivity are the most essential goals regarding measures to enable the prosecution of the Russian leadership for the crime of aggression.

3.2 Legitimacy and Legality

Both the question of legitimacy and the question of legality have been raised by many scholars in the debate on prosecuting Russian leaders for the crime of aggression.[141]

Cassese made a distinction between 'the legality and the legitimacy of a body politic or a domestic or international institution'.[142] Legality concerns the conformity of an institution with the legal rules that regulate its establishment and relates to the legal basis of the institution. By referencing legal

para 9; On establishment of a Special Court for Sierra Leone UNSC Res 1315 (14 August 2000) UN Doc S/Res/1315(2000) preambular para 11.
[136] Confer McDermott (2016) 128.
[137] On establishment of a Special Court for Sierra Leone UNSC Res 1315 (14 August 2000) UN Doc S/Res/1315(2000) preambular para 6.
[138] First Annual Report of the International Criminal Tribunal for the former Yugoslavia (29 August 1994) UN Doc A/49/342-S/1994/1007 para 15.
[139] On negotiation of an agreement with the Government of Lebanon aimed at establishing a tribunal of international character UNSC Res 1664(2006) (29 March 2006) UN Doc S/RES/1664(2006) para 1.
[140] McDermott (2016) 130.
[141] See for example Heller (2022); Dannenbaum (2022); Corten and Koutroulis (note 17 *supra*).
[142] Cassese (2012) 492.

instruments, case law, and precedents, the legality of an institution or an action can be determined. Legitimacy is, however, a more complex topic. It encompasses many different things, for example, the moral and psychological acceptance by the institution's constituency or if it is based upon values common to the whole community within which it operates.[143] The concept of legitimacy exists in a social context – concerning legal, political, and ethical processes. Popovski asserted that legality judgments can be made by lawyers, but the determination of legitimacy 'engages all people as bearers of public morality and social constructivism'.[144]

Cassese argued that the legitimacy of the SCSL, the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) had not been questioned mainly because they were established with the consent of the State concerned. He concludes that 'The international community seems to have regarded such consent and the participation of the state concerned in the establishment of those courts as a decisive legitimizing factor.'[145]

State consent is often a traditional approach to legitimacy. While it is safe to assume that the Russian Federation, under the current leadership, will never support an accountability measure for its military intervention, Ukraine has already shown support for the creation of a Special Tribunal.[146] Furthermore, States can be said to have indirectly consented to the ability of the Security Council to establish tribunals, with its Chapter VII coercive powers, via the ratification of the UN Charter.[147] However, other factors can also be used to determine the legitimacy of an institution after its establishment: procedural fairness, transparency of decision-making, answerability to a founding authority, and accountability to the institution's constituency.[148] The concept of legitimacy is connected to how people and institutions operate in a socio-legal context. Legitimacy often concerns values found within an institution's constituency or the international community – values such as the rule of law and justice.

In the present thesis, the concepts of legality and legitimacy are used as guiding lights in search of the right criteria for evaluation. The chosen criteria for

[143] Confer ibid 492–493.
[144] Popovski (2012) 389.
[145] Cassese (2012) 496.
[146] See for example Dmytro Kuleba, 'Statement by Minister of Foreign Affairs of Ukraine Dmytro Kuleba at the United Nations Security Council Meeting on Russia's Aggression against Ukraine' (UN Security Council, 22 September 2022) <https://mfa.gov.ua/en/news/statement-minister-foreign-affairs-ukraine-dmytro-kuleba-united-nations-security-council-meeting-russias-aggression-against-ukraine> accessed 14 March 2023.
[147] Confer Akande (2004) 417.
[148] Confer Cassese (2012) 492–493.

the assessment model are not a matter of a rigid dichotomy but rather a matter of degree and gradation. There are other criteria that could be used in the model, but it is argued below that internationalisation, fair trial, and non-selectivity are the most fundamental from the perspective of legality and legitimacy in the current situation. The indicators of each criterion are not exhaustive or applicable to every situation – they are, as their name implies, only indicators.

3.3 Internationalisation

Internationalisation is the degree to which an international court is part of or represents the international community and is essential for the legitimacy of such a court. After the establishment of the ICTR, the Secretary-General concluded that 'the international character of the Rwanda Tribunal is a guarantee of the just and fair conduct of the legal process'.[149]

Internationalisation also concerns the legality of a trial in the present situation. A certain degree of internationalisation is necessary to avoid the application of immunities in relation to the crime of aggression – at least concerning the *troika*. Addressing the issue of immunities is about respecting customary international law and upholding the rule of law. Immunities are intrinsically connected to the concept of State sovereignty; internationalisation can therefore be seen as also addressing the sovereignty of States.

The case law presented in Chapter 2.4 indicates that immunities do not apply to the prosecution of international crimes before international courts – even if there is some uncertainty regarding functional immunity in relation to the crime of aggression. The purpose of the legal analysis below is not to precisely determine to what degree internationalisation is needed for a court to be considered international but to help establish appropriate indicators of the criterion. There is, as will be evident, no general definition of an international court. While the case law does not provide the exact characteristics that make a court or tribunal international, some important elements can be identified.

According to the ICC Appeals Chamber in the *Al Bashir* case, national courts are of a different character than international courts. International courts act on behalf of the international community as a whole, while domestic courts are an expression of a State's sovereign power. [150] Consequently, the principle

[149] Report of the Secretary General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994) (13 February 1995) UN Doc S/1995/134 para 42.
[150] *Prosecutor v Omar Hassan Ahmad Al Bashir, Judgment in the Jordan Referral re Al Bashir Appeal* ICC Appeals Chamber [2019] para 115.

of *par in parem non habet imperium* does not apply in relation to international courts.

In their joint concurring opinion to the ICC Appeals Chamber's decision, judges Eboe-Osuji, Morrison, Hofmański, and Bossa explained that an international court or tribunal is an:

> adjudicatory body that exercises jurisdiction at *the behest of two or more states*. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an arbitral clause in a treaty. A court that operates physically or in principle within a domestic realm exercises international jurisdiction where such jurisdiction results in any manner described above.[151]

The ultimate character of an international court is, according to the judges, that the source of the jurisdiction is the collective sovereign will of the enabling States, expressed directly or indirectly by an international body, such as the Security Council, or by an international functionary, such as the Secretary-General.[152] They elaborate on what law an international court may apply and note that the substance may be international law, national law, or any combination of those – a court does not lose its international character because it applies domestic law.[153] Whether a Special Tribunal for Ukraine or another type of court is incorporated into the Ukrainian judicial system and applies both national and international law, or not a part of any domestic justice system and only applies international law, would not matter – if the view of the judges in the joint concurring opinion is accepted. The key is instead whether a court exercises jurisdiction at the behest of the enabling States.

Both the ICTY and the ICTR, given by the ICJ as examples of international courts in the *Arrest Warrant* case, were established by Security Council resolutions, invoking the Chapter VII powers of the Council. All member States had an obligation to cooperate with the two tribunals, an obligation that was explicitly stated in the respective resolutions.[154] The ICC was also given as

[151] Emphasis added, *Prosecutor v Omar Hassan Ahmad Al Bashir, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa* ICC Appeals Chamber [2019] para 56.
[152] ibid para 58.
[153] ibid para 57.
[154] On establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 UNSC Res 827 (25 May 1993) UN Doc S/RES/827(1993) para 4; On establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal UNSC Res 955 (8 November 1994) UN Doc S/RES/955(1994) para 2.

an example, but the ICJ cited Article 27(2) of the ICCSt,[155] which only provides an exception to personal immunity *inter partes*. However, this understanding has been challenged by the *Al Bashir* case, as discussed in Chapter 2.4.1.

The SCSL viewed itself as an international court when it set aside the immunity of Charles Taylor. The Court argued that immunity derives from the equality of States and therefore has no relevance to international criminal tribunals.[156] The SCSL reasoned that it had the status of an international court because it 'was established to fulfil an international mandate and is part of the machinery of international justice'.[157] The Court stressed that it was not a national court of Sierra Leone and did not exercise any judicial powers of Sierra Leone's judicial system.[158] Unlike the judges in the joint concurring opinion to the ICC Appeals Chamber's decision, the SCSL believed it was important that the Court was not integrated into the Sierra Leonean judicial system when determining its status as an international court.

Sierra Leone first asked the Security Council to create a third *ad hoc* tribunal that would be similar to the ICTY and the ICTR.[159] However, the Security Council instead decided to request the Secretary-General to negotiate an agreement with Sierra Leone to create an independent court.[160] The SCSL was neither considered a subsidiary organ of the Security Council nor a part of the national judicial system of Sierra Leone.[161] The SCSL recognised the absence of a Chapter VII mandate for the Court, but argued that the absence of such a mandate did not define the legal status of the Court. To strengthen its claim of being an international court, the SCSL emphasised that the Security Council had called for its establishment and that the Council acts on behalf of the member States of the UN. The agreement creating the Court is, therefore, an agreement between Sierra Leone and all UN member States – expressing the will of the international community.[162] Consequently, the

[155] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ [2002] para 61.
[156] *Prosecutor v Charles Ghankay Taylor, Decision on Immunity from Jurisdiction* SCSL Appeals Chamber [2004] paras 51–52.
[157] ibid para 39.
[158] ibid para 40.
[159] UNSC Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council UN Doc S/2000/786.
[160] On establishment of a Special Court for Sierra Leone UNSC Res 1315 (14 August 2000) UN Doc S/Res/1315(2000) para 1.
[161] Corten and Koutroulis (note 17 *supra*) 8–9.
[162] *Prosecutor v Charles Ghankay Taylor, Decision on Immunity from Jurisdiction* SCSL Appeals Chamber [2004] paras 37–38.

means of establishment was an important factor when the SCSL considered whether the Court had the status of an international or a national court.

The ECCC was established without the involvement of the Security Council. Cambodia had requested the assistance of the UN in bringing to justice the perpetrators of genocide and crimes against humanity committed during the Khmer Rouge regime from 1975 to 1979. An agreement was later concluded between the Secretary-General and Cambodia,[163] and the draft agreement had been endorsed by the General Assembly.[164] The Court was part of the existing judicial system of Cambodia.[165]

The ECCC asserted in the *Kaing Guek Eav alias Duch* case that it had the status of what the prosecution called a 'special internationalised tribunal' and referenced the SCSL's description of an international court in the *Taylor* decision.[166] In the *Ieng Sary* case, the ECCC confirmed that the Court was international in nature.[167] However, the Court did not deal with the issue of immunities since it was not involved in the prosecution of foreign officials.

In light of the case law, a court or tribunal will have to make the claim that it acts on behalf, and maybe even at the behest, of the international community. Table 1 shows the indicators of internationalisation – the rows are arranged in order of decreasing internationalisation.

[163] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (adopted 6 June 2003, entered into force 29 April 2005) 2329 UNTS 41723.
[164] On the report of the Third Committee (A/57/806) UNGA Res 57/228 B (13 May 2003) UN Doc A/RES/57/228 B.
[165] Corten and Koutroulis (note 17 *supra*) 9–10.
[166] *Case of Kaing Guek Eav alias Duch, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias Duch* ECCC Pre-Trial Chamber [2007] paras 19–20.
[167] *Case of Ieng Sary, Decision on Ieng Sary's Appeal Against the Closing Order* ECCC Pre-Trial Chamber [2011] paras 220–222.

Table 1: *Indicators of internationalisation.*

High ↑ Low	• Decision of the UN Security Council under Chapter VII of the UN Charter. • Endorsement by the UN General Assembly with overwhelming support from member States. • Endorsement by the UN General Assembly with moderate support from member States. • Endorsement by international organisations other than the UN. • Endorsement by small group/groups of States. • Only national support.

A Security Council resolution might not seem to indicate a high degree of internationalisation because a resolution, at best, only reflects the view of 15 different States, but internationalisation should not be confused with the perception of representation. As mentioned above, all member States have accepted the mandate of the Security Council and its coercive Chapter VII powers. Therefore, the Council has the strongest international mandate in the international community – including the ability to establish international tribunals. Such a tribunal acts both on behalf and at the behest of the international community, similar to the ICTR and the ICTY.

If an overwhelming majority voted for a General Assembly resolution endorsing a tribunal, it would strengthen the claim of the tribunal of being international. The mandate of the tribunal would be comparable to that of the ECCC. A widely supported General Assembly resolution that explicitly affirms the non-applicability of personal immunity and functional immunity would be the most convincing solution.[168] The Uniting for Peace Resolution[169] also provides some support for this path. It asserts that the General Assembly should consider making appropriate recommendations to its members for collective measures, including the use of armed force, when necessary, if the Security Council, because of lack of unanimity, fails to exercise its primary responsibility for the maintenance of international peace and security. However, the General Assembly can only adopt recommendations, and in the 1962 advisory opinion *Certain Expenses of the United Nations*, the ICJ confirmed that the General Assembly lacks the ability to adopt 'coercive or enforcement action'.[170]

[168] Confer Heller (2022) 15–16; Dannenbaum (2022) 872.
[169] Uniting for Peace UNGA Res 337 (V) (3 November 1950) UN Doc A/RES/337(V).
[170] *Certain Expenses of the United Nations (Advisory Opinion)* ICJ [1962] para 164.

A resolution with moderate support would represent a smaller part of the international community, and a resolution with low support would not even be passed in the General Assembly.

Support from international organisations, other than the UN, such as the Council of Europe, would represent an even smaller part of the international community. Support from a small group or groups of States indicates the second lowest level of internationalisation, and mere national support indicates the lowest level.

3.4 Fair Trial

> *There is no question that history will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings.*
>
> – Richard J. Goldstone, ICTY Prosecutor[171]

A fair trial aims to protect and enforce the individual's right to due process.[172] If international courts or tribunals adhere to internationally recognised standards of fair process, their judgments will withstand the test of time and historical scrutiny.[173] A high degree of fairness of procedure safeguards against the abuse of power and wrongful convictions, which is crucial for the legitimacy of the trial. As mentioned above,[174] high standards of fairness are linked to the ability to strengthen the rule of law and rebuild post-conflict judicial systems. The principle of fairness consists of many elements, for example, equality before the law, the presumption of innocence, equality of arms, the right to be tried without undue delay, the right to a public hearing, and the principles of *ne bis in idem* and *nullum crimen sine lege*.

The objective of a fair trial is recognised in international criminal law. For example, in Article 64(2) of the ICCSt, Article 1 of the IMT Charter, Article 20(1) of the ICTY Statute, and Article 19(1) of the ICTR Statute. Klamberg found that key provisions on the right to a fair trial in different human rights instruments are very similar, for instance, Article 6 of the ECHR, Article 14 of the ICCPR, and to some extent Article 7 of the African Charter on Human

[171] Address Before the Supreme Court of the United States 1996 CEELI Leadership Award Dinner, see Ellis (2002) 949.
[172] Klamberg (2010) 286–287.
[173] Confer Orentlicher (2003) 503.
[174] See Chapter 3.1.

and Peoples' Rights (ACHPR).[175] Article 14 of the ICCPR has served as an important model for modern fair trial standards.[176] The Secretary-General has expressed that 'internationally recognized standards' regarding the rights of the accused are found in 'article 14 of the International Covenant on Civil and Political Rights'.[177]

The provisions of modern international tribunals and courts often observe stricter standards of fairness than their national counterparts.[178] It is not a given that national fair trial standards are applicable or sufficient for international trials. There are aspects of international trials that represent less of a problem in national trials, such as the possibility to maintain the presumption of innocence in highly publicised cases, the often lengthy proceedings, and the production of witnesses and defendants.

At the same time, international criminal trials sometimes derogate from high standards of fairness. In the *Tadić* case, the ICTY permitted the use of anonymous witnesses, arguing that the conflict in the former Yugoslavia constituted an exceptional circumstance *par excellence* which allowed for derogation from otherwise recognised procedural guarantees.[179] The decision arguably infringes on the accused right to examine the witnesses. It should also be questioned whether the length of the trials in international courts respects the defendant's right to be tried without undue delay. In addition, McDermott found that there also is room for improvement regarding disclosure, judicial notice, remedies for breaches of rights, and the equality of arms in the practice of international tribunals.[180] The degree of fairness of international criminal trials may be high, but there is an absence of consistency and coherence in the procedural practices.

Damaška questioned if it is appropriate for international criminal trials to fully adhere to the fair trial obligations of their national counterparts. The challenging international environment 'may require the abandonment, or relaxation, of some cherished domestic procedural arrangements'. It should be sufficient that international trials are 'fair enough'.[181] McDermott strongly disagreed with Damaška's view. She convincingly argued that a distinction must be drawn between universal fair trial standards and municipal

[175] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.
[176] Klamberg (2010) 286.
[177] Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704 para 106.
[178] See for example Klamberg (2010) 287; Popovski (2012) 403.
[179] *Prosecutor v Dusko Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* ICTY Trial Chamber [1995] paras 61, 86.
[180] McDermott (2016) 42–102, conclusion at 103.
[181] Damaška (2012) 612, 616.

procedural arrangements. Set aside the latter and the highest standards of fairness could still be reached.[182]

The most apparent risk of derogation from the right to a fair trial is the possibility of wrongful convictions. McDermott contended that it is one of the strongest arguments in national justice systems in favour of fair trial rights, and the need to avoid wrongful convictions increases in international trials because the trials are linked to essential interests, such as post-conflict justice and the rule of law.[183] An accountability measure resulting in judicial proceedings before a court or tribunal needs to observe fair trial provisions to be regarded as legitimate. Incorrect convictions can hurt the public's trust in the international legal system as a whole. Settling for anything less than the highest standards leaves a tribunal vulnerable to criticisms from its detractors.

Table 2: *Indicators of a fair trial.*

High ↑ Low	• High international fair trial standards, found in, for example, the ACHPR, the ECHR, and the ICCPR. • Accepted fair trial standards of international courts, for example, the practice of the ICC, the ICTY, and the ICTR. • Only basic fair trial provisions. • Summary trials, *in absentia*.

In Table 2, the degree of a fair trial, from high to low, is determined with the help of the listed indicators. The indicators are of a general nature. It should, however, be noted that deficiency in one aspect regarding the fair trial standards of a system may be compensated by safeguards elsewhere in the system.

The standards of the ACHPR, the ECHR, and the ICCPR are used to indicate the highest degree of fair trial standards. Because the practice of international tribunals has proved to be inconsistent regarding fairness, their standards indicate a slightly lower degree. Fair trial provisions that only adhere to basic standards of fairness, derogating in some respects from human rights instruments and the practice of international courts, constitute a low-level indicator. Conditions that have a direct negative impact on the right to a fair trial, such as summary trials or *in absentia* proceedings, indicate a low standard. Corten and Koutroulis found that the right for an accused to be tried in his or her presence is established in international criminal law, even if *in absentia*

[182] McDermott (2016) 144.
[183] ibid 134.

proceedings are not necessarily precluded. All modern courts and tribunals in their study included such a right, except the Special Tribunal for Lebanon, which explicitly allows *in absentia* trials.[184] Trials *in absentia* were also permitted at the Nuremberg Trials.[185]

3.5 Selectivity

> *The ultimate step in avoiding periodic war … is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors … if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.*
>
> – Robert H. Jackson, Chief US Prosecutor at the Nuremberg Trials[186]

When an enforcement agency or officer has discretionary power to pursue a case in which enforcement would be clearly justified but does not, it is the result of selective enforcement. The importance of avoiding selectivity can be derived from the rule of law.[187] The prosecutors of the ICTY, the ICTR, and the ICC all have an obligation to act independently.[188] Selectivity erodes the legitimacy and effectiveness of international criminal law. This is closely connected to the concept of equality before the law, which is embodied in international criminal procedure and human rights instruments.

Damaška thought of selectivity in international criminal law in the sense that international prosecutions are instituted mainly against citizens of States that have a weak position in the international arena. However, he did not view the fact that prosecutors charge only a handful of individuals or criminal activities as a form of hurtful selectivity. Rather, this should be considered a characteristic of all criminal justice.[189] No justice system in the world has the resources to prosecute all crimes that occur within its jurisdiction. Scholars such as Stahn and Dannenbaum viewed the expressivist function of international criminal law as an important part of its legitimacy. One of the most obvious

[184] Corten and Koutroulis (note 17 *supra*) 34–35.
[185] Article 12 of the IMT Charter.
[186] Robert H Jackson, 'Opening Statement before the International Military Tribunal' (Palace of Justice, Nuremberg, 21 November 1945) <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> accessed 27 February 2023.
[187] Cryer (2005) 192, 194.
[188] Article 16(2) of the ICTY Statute, Article 15(2) of the ICTR Statute, and Article 42(1) of the ICCSt.
[189] Damaška (2008) 360–361.

ways for a court to lose its moral standing is to shield certain individuals engaged in the conduct it condemns.[190]

Nonetheless, the history of international criminal trials has been plagued by selectivity. The Nuremberg and Tokyo trials were accused of victors' justice, and the later *ad hoc* tribunals were created for some situations where atrocities occurred but not for others, for Yugoslavia but not for Somalia, for Lebanon but not for Chechnya, and so on.[191]

Furthermore, in what manner international tribunals and courts are established and the choices made concerning their establishment, including their composition – can be described as design selectivity. The substantive law of tribunals and courts can be selective concerning which categories of crimes can be prosecuted and under which conditions, for example, temporal and geographic limitations to jurisdiction.[192]

In the scholarly debate on criminal accountability for the Russian aggression, the most common criticism from scholars has been selectivity.[193] If the Russian leadership was brought before a court, it would express the moral condemnation of the crime of aggression and criticisms of selectivity would hurt the moral value of such a condemnation. Dannenbaum specifically criticised the overrepresentation of scholars and politicians from the United Kingdom proposing a treaty-based Special Tribunal. It would damage the legitimacy of such a tribunal if the British involvement was too evident, because of the United Kingdom- and United States-led invasion of Iraq in 2003, which was characterised as a 'crime of aggression' by British Foreign Office lawyer Elizabeth Wilmshurst.[194]

However, the marginalisation of aggression can by itself be understood as a problem of selectivity. Dannenbaum argued that the impunity for aggression since the Nuremberg Trials is due to the marginalisation of the crime of aggression at the ICC and the dominance of the Security Council as the body that determines the scope of *ad hoc* tribunals. The *status quo* has greatly benefited all five permanent members of the Security Council: China, France, the United Kingdom, the United States, and the Russian Federation.[195]

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[190] Stahn (2020) 44; Dannenbaum (2022) 870.
[191] Confer Cryer (2005) 194.
[192] Confer Kiyani (2016) 942–945.
[193] See for example Vasiliev (2022); Heller (2022); Ambos (2022).
[194] BBC News, 'Wilmshurst Resignation Letter' (24 March 2005) <http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm> accessed 4 April 2023; Dannenbaum (2022) 871.
[195] Dannenbaum (2022) 868.

Notwithstanding that criminal accountability for the Russian aggression would not erase past selectivity, it would mark a step away from the tradition of selectivity in international criminal law in relation to the crime of aggression. It could lay the foundation for future measures to hold leaders accountable for military aggressions.

Even if the issue of selectivity can be discussed at length, in this context, it is enough to conclude that selectivity is a great threat to the legitimacy of international criminal trials. Table 3 shows the indicators of the criterion.

Table 3: *Indicators of non-selectivity.*

High ↑ Low	• Universal implementation of measures to enable prosecutions of the crime of aggression. • Permanent tribunal with treaty-based jurisdiction, composed of international judges and personnel. • Domestic prosecution in Ukraine. • *Ad hoc* tribunal, composed of international judges and personnel, widely supported by the international community. • *Ad hoc* tribunal, with moderate support from the international community. • *Ad hoc* tribunal, set up by Western States.

If the perception of selectivity is to be avoided, the enforcement effort should be as universal as possible, addressing all future acts of aggression. Universal implementation of measures to enable prosecutions of the crime of aggression, therefore, indicates the highest degree of non-selectivity.

If States parties were to amend the ICCSt to align the Court's exercise of jurisdiction over the crime of aggression with the other international crimes, it could avoid many of the criticisms of selectivity.[196] However, a crime of aggression would still be beyond the Court's reach when neither the State of which the persons accused are nationals nor the territorial State is a State party. In addition, the ICC as an institution has faced criticism for its selectivity, especially regarding the prosecutorial discretion of the Office of the Prosecutor. However, Cryer argued that the ICC 'represents a dramatic leap forward in the enforcement of international criminal law' and the Court is

[196] Heller (2022) 6; Dannenbaum (2022) 870–871.

'considerably less open to criticism based on selectivity than previous Tribunals or many States' practice in this area'.[197]

National proceedings in Ukraine could hardly be accused of being selective because of Ukraine's status as a victim State, but such proceedings would not constitute any form of universal implementation and would most probably only address the Russian aggression. There is also the risk of bias and the taint of apparent partiality if the processes take place within the justice system of the victim State.[198]

If an *ad hoc* tribunal, such as a Special Tribunal for Ukraine, was established, there would most probably be accusations of selectivity since the situation in Ukraine would be singled out. This could be partly addressed through endorsements from the international community and the international composition of the Court – because then the measure would constitute less of a Western undertaking. Accordingly, the less representation there is from the international community, the more selective an *ad hoc* tribunal would be. The worst-case scenario would be an *ad hoc* tribunal set up by Western States, many of whom have been accused of aggression themselves.[199]

3.6 Excluded Criteria

Below follows a discussion of goals that were found unfit for the assessment model.

3.6.1 Deterrence

A direct consequence of legal punishment is prosecutorial deterrence – when potential perpetrators reduce or avoid law-breaking because of fear of punishment. Another form of deterrence is social deterrence – when potential perpetrators calculate the informal consequences of law-breaking as they operate in a socio-legal context.[200]

The deterrent effect of international courts and tribunals has been extensively discussed in scholarly debates. It has been argued that there is no or little evidence that international courts have deterred atrocity crimes.[201] The most flagrant example of the inability of international criminal courts to deter atrocities is the fact that the ICTY was fully operational at the time of the

[197] Cryer (2005) 228–229.
[198] Confer Dannenbaum (2022) 862.
[199] Confer Heller (2022) 12–14.
[200] Jo and Simmons (2016) 444.
[201] See for example Orentlicher (2003) 500; Stahn (2012) 265; McDermott (2016) 127.

Srebrenica genocide. However, Jo and Simmons found some empirical evidence of the ICC's deterrent effect.[202]

The more effective and universal an accountability measure is, the greater deterrence it should have – but because of the controversial nature of deterrence in legal scholarship, the deterrent effect would need to be determined empirically long after a trial has taken place. Furthermore, in relation to an act of aggression already committed, such as the Russian aggression, deterrence can be deprioritised.

3.6.2 Truth-Seeking and Reconciliation

There is a prevailing view that the role of international criminal trials is to create an accurate historical record, promote social reconciliation, or give victims a voice. Articles 54(1)(a) and 69(3) of the ICCSt establish the duty of the judges and the prosecutor of the ICC to actively seek out the truth. These goals are connected to expressivist values and can strengthen the legitimacy of an accountability measure.[203] However, according to Luban, the trial is at risk of becoming political theatre when such goals are pursued, and it puts pressure on the fairness of the trial.[204] The complexities of establishing a historical record should not be underestimated. Damaška wrote that judges should not detach themselves from the legal framework and delve into purely historical inquiries. Especially since international crimes often have complex backgrounds stemming from lengthy conflicts.[205]

There are other methods of achieving these objectives, for example, truth or reconciliation commissions, which could do a better job since they lack the constraints of the judiciary.

3.6.3 Victim Participation

Victim participation is an important tool to strengthen the legitimacy of international criminal trials.[206] The goal can be used to increase the moral and psychological acceptance of an institution by its constituency. The concept of victim participation is, for example, manifest in Article 68(3) of the ICCSt.

Yet, victim participation raises difficult questions concerning which persons should participate and the forms of participation.[207] Furthermore, the nature of the crime of aggression makes the objective of victim participation less

[202] Jo and Simmons (2016) 460–468.
[203] Confer Stahn (2020) 392–393.
[204] Luban (2010) 575–576.
[205] Damaška (2008) 340–342.
[206] Confer Stahn (2020) 393.
[207] Trumbull (2008) 825–826.

relevant than in proceedings concerning other international crimes. At the ICC, individuals do not necessarily have affected legal interest regarding the crime of aggression – the protected interests are sovereignty and international peace.[208] Some sort of participation could be argued for and may be just, but it is not appropriate as a criterion in the assessment model since it is not essential for legitimacy or legality in the present situation.

3.6.4 Effectiveness

Looking back at the world's experience with international criminal proceedings, it is obvious that future tribunals will be judged in part by their success in apprehending and convicting perpetrators.[209] However, as Stahn has argued, it is not possible to assess or quantify all outcomes of international criminal justice.[210] All investigations, including an investigation of the crime of aggression, carry a certain degree of uncertainty. Most proposals need to be evaluated after they have been implemented – because effectiveness is often a question of execution. Ambos argued that setting up a Special Tribunal may be slower than amending the ICCSt.[211] Some sort of judgement could probably be made at an early stage, but there are too many uncertainties concerning effectiveness for it to be used in the model.

3.7 Conclusion

This chapter has explained how a goal-oriented approach can be used to evaluate international criminal trials. It was argued that internationalisation, fair trial, and non-selectivity are the most important goals in relation to the legality and the legitimacy of a trial in the present situation. In relation to the crime of aggression, it is possible to deprioritise the goals of deterrence, truth-seeking, reconciliation, and victim participation. Nevertheless, it is crucial not to completely discard these goals; rather, they should be given less priority when assessing different proposals aimed at ensuring criminal accountability for the crime. When implementing a proposal, the goals can play a more prominent role.

As already mentioned, there exists no natural hierarchy between the various goals of international criminal trials.[212] Different crimes and trials shine a

[208] Confer Article 8*bis*(2) of the ICCSt and Definition of Aggression UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX).
[209] Confer Orentlicher (2003) 504.
[210] Stahn (2012) 257.
[211] Kai Ambos, 'A Ukraine Special Tribunal with Legitimacy Problems?' (*Verfassungsblog*, 6 January 2023) <https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/> accessed 18 April 2023.
[212] See Chapter 3.1.

light on different goals. Nonetheless, to solve a legal problem, there needs to be an approach towards weighing and balancing the goals.

With the assistance of the concepts of legitimacy and legality, an internal ranking order can be identified for the present model. Internationalisation is, as argued in the chapter, the most essential criterion in relation to enabling a functional criminal trial adhering to the notion of legality and legitimacy in international law. The pressing issue of immunities concerns the fundamental goals of sovereignty and the rule of law. However, without high fair trial standards, little legitimacy could be attributed to a criminal trial. Nevertheless, fair trial standards are less important than internationalisation in relation to the legality of an international criminal trial in the present case and are therefore given less weight in the model. Finally, a selective measure would not completely hinder a judicial process but would considerably decrease the value of its judgment. The selectiveness of past tribunals shows that it is possible to conduct a selective trial, but selectivity would erode its legitimacy. Consequently, the criterion of non-selectivity is weighted the lightest.

The model functions as follows: a measure that achieves a high degree of internationalisation, but a low degree of fair trial and non-selectivity, will be ranked higher than if the measure achieved a high degree of fair trial, but a low degree of internationalisation and non-selectivity. High fair trial standards are in the same manner prioritised over non-selectivity, see Table 4.

Table 4: *All possible outcomes of applying the assessment model to a proposal.*

Proposal	Internationalisation	Fair trial	Non-selectivity
(1)	High	High	High
(2)	High	High	Low
(3)	High	Low	High
(4)	Low	High	High
(5)	High	Low	Low
(6)	Low	High	Low
(7)	Low	Low	High
(8)	Low	Low	Low

Furthermore, the binary character of the model, only measuring high or low, makes it difficult to measure nuances and intermediate forms. Nevertheless,

the model encompasses various outcomes and incorporates essential elements of different proposals.

In the next Chapter, the proposals to enable the prosecution of the Russian leadership for the crime of aggression will be evaluated using the assessment model.

4 Assessing the Proposals

4.1 Amending the ICCSt

One of the most popular paths towards criminal accountability for the Russian aggression, among international scholars and practising lawyers, is amending the ICCSt – if the practical challenges could be overcome. The most significant advantage of ICC prosecution is that it would avoid most of the appearance of selective justice. Prosecutions of future acts of aggression could follow, which is not necessarily the case for an *ad hoc* Special Tribunal.[213] There are many different approaches to amending the ICCSt, but only a few paths are covered below.

Ukraine is not a party to the ICCSt but has accepted the Court's jurisdiction through two declarations, first from 21 November 2013 until 22 February 2014[214] and then from 20 February 2014 onwards.[215] As already discussed in Chapter 2.3, the ICCSt currently require that both the territorial State where the act of aggression is committed and the State of nationality of the offenders are State parties. The only other alternative is a Security Council referral to the ICC. Since the Russian Federation has not ratified the ICCSt and would vote to veto any Security Council referral, the possibility of the ICC exercising jurisdiction over the crime of aggression in relation to Russian leaders can be ruled out.

How could the ICCSt be amended? At first glance, the solution is simple. Article 15*bis*(5), which excludes acts of aggression committed by non-party States from the Court's exercise of jurisdiction in the absence of a Security Council referral, should be removed in its entirety.[216] However, Article 15*bis*(4) states that the Court may exercise jurisdiction over the crime of aggression 'arising from an act of aggression committed by a State Party' – which may need to be amended to correspond to the removal of Article 15*bis*(5).

Then there is the question of amendment procedure. Article 121(3) stipulates that the adoption of an amendment requires the support of at least two-thirds

[213] Heller (2022) 6; Dannenbaum (2022) 870–871.
[214] The Embassy of Ukraine to the Kingdom of the Netherlands, Declaration of 9 April 2014, covering acts committed between 21 November 2013 and 22 February 2014 (9 April 2014) <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf> accessed 14 March 2023.
[215] Ministry of Foreign Affairs of Ukraine, Declaration of 8 September 2015, covering acts committed since 20 February 2014 (8 September 2015) <https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine> accessed 14 March 2023.
[216] See Chapter 2.3.

of States parties. This requirement needs to be fulfilled for any amendment to become reality. Additionally, Article 121(4) governs the entry into force of an amendment, not involving Articles 5–8, and requires the ratification or acceptance by seven-eights of States parties. Today the number of States parties amounts to 123, which would require 108 of them to accept the amendments. Because of the high threshold, amending the ICCSt would face many political obstacles. However, it could be argued that the proposed amendments only relate to the Kampala Amendments and not to the original ICCSt, exempting them from the ordinary amendment procedure. Article 121(5) may then be applicable, similar to the adoption of the Kampala Amendments, or an *inter se* regime may be created.[217] Then the requirement of acceptance by seven-eights of all States parties may be circumvented. However, whether this argument is in conformity with the context and *telos* of the ICCSt is an open question, confer Article 31 of the Vienna Convention on the Law of Treaties.

The proposed amendments only deal with the problem of an act of aggression committed by a non-party State against a State party that has accepted the Kampala Amendments. Many acts of aggression would remain beyond the Court's reach, for example, when neither the aggressor nor the victim is a State party. Furthermore, the jurisdictional restraint in the second sentence of Article 121(5) is a further obstacle. Coracini has raised additional issues concerning the interpretation of the jurisdictional framework for the crime of aggression that would need to be addressed.[218]

Another way of amending the ICCSt and establishing jurisdiction over the crime of aggression in relation to a non-party State would be to allow the General Assembly to make referrals to the Court. The General Assembly may act under the Uniting for Peace resolution, but it would most likely require amending the ICCSt, for example, amending Article 13 and probably Article 15*ter*, which are also covered by Article 121(4) demanding ratification or acceptance by seven-eights of all States parties. However, this solution removes one of the most important aspects of amending the ICCSt – the avoidance of selectivity. The General Assembly would single out the situation in Ukraine and the process would also require broad political support. In addition, the legality of permitting General Assembly referrals can be questioned. The Security Council's coercive power, based upon Chapter VII authority, is accepted by States when they ratify the UN Charter, and the Security Council

[217] For a more in-depth discussion, see Fiona Abken and Paulina Rob, 'Amending the Amendment: In Search of an Adequate Procedure for a Revision of the Jurisdictional Regime for the Crime of Aggression in the Rome Statute' (EJIL: Talk!, 13 January 2023) <https://www.ejiltalk.org/amending-the-amendment-in-search-of-an-adequate-procedure-for-a-revision-of-the-jurisdictional-regime-for-the-crime-of-aggression-in-the-rome-statute/> accessed 13 May 2023

[218] Coracini (2010) 771–781.

can accordingly make referrals to the ICC in relation to non-party States. The General Assembly, on the other hand, does not have coercive power and member States, arguably, cannot be said to have consented to General Assembly referrals when they ratified the UN Charter.[219] Therefore, only the proposal to amend the ICCSt to include jurisdiction over acts of aggression committed by non-party States against States parties is assessed in the present thesis.

The application of the assessment model to amending the ICCSt is straightforward, see Tables 1–3. A treaty-based court, such as the ICC, without any involvement from the UN, only achieves a low degree of internationalisation. The fair trial standards of the ICC are recognised to be among the highest ever employed in any civil or common law system, indicating a high degree of fair trial standards.[220] Even if selectivity, especially regarding enforcement,[221] continues to be a characteristic of the ICC, a treaty-based court with the aspiration of universality is considerably less selective than an *ad hoc* tribunal.

Table 5: *Results of applying the assessment model to the proposal to amend the ICCSt.*

Proposal	Internationalisation	Fair trial	Non-selectivity
Amending the ICCSt	Low	High	High

4.2 Special Tribunal Established Through the UN System

The Ukraine Task Force of the Global Accountability Network published a white paper on 7 September 2022 proposing a General Assembly resolution and a statute for a Special Tribunal for Ukraine.[222] Among the lead writers were the former UN Under-Secretary General for Legal Affairs Hans Corell, the former Canadian Minister of Justice Irwin Cotler, and the former Chief

[219] See Chapter 3.4 and the discussion in Heller (2022) 7.
[220] Popovski (2012) 403.
[221] See Chapter 3.5.
[222] Ukraine Task Force of The Global Accountability Network, 'Proposal for a Resolution by the United Nations General Assembly & Accompanying Proposal for a Statute of a Special Tribunal for Ukraine on the Crime of Aggression' (7 September 2022) <https://2022.uba.ua/wp-con-tent/uploads/2022/09/uktf_unproposal_specialtribunal_resolutionandstatute_7sep2022.pdf> accessed 27 February 2023 [hereinafter Ukraine Task Force of The Global Accountability Network] 7–14.

Prosecutor of the SCSL David M. Crane. The proposal draws inspiration from the establishment of the SCSL. Overall, the structure and language of the proposed statute mirror the Statute of the SCSL. Article 2 of the proposed statute includes the same definition of the crime of aggression as can be found in Article 8*bis* of the ICCSt.[223]

Notwithstanding the similarities to the SCSL, the proposed process of setting up the Special Tribunal is more comparable to how the ECCC was established. In the case of the SCSL, it was the Security Council, not the General Assembly, that requested the Secretary-General to start negotiations with the Sierra Leonean government to set up the Special Court, through the adoption of Resolution 1315.[224] The General Assembly resolution, proposed by Hans Corell and others, would request the Secretary-General to negotiate an agreement with the government of Ukraine to create an independent Special Tribunal, without the involvement of the Security Council.[225] A process more similar to when the agreement between the UN and Cambodia, regarding the ECCC, was negotiated by the Secretary-General and the draft agreement was endorsed by the General Assembly.[226]

According to Corten and Koutroulis, the legal basis of such a tribunal cannot be a General Assembly resolution because of the General Assembly's lack of coercive power. Instead, it would be based on the consent of the involved States and the national jurisdiction of Ukraine.[227] As a sovereign State, Ukraine could delegate the exercise of jurisdiction to a tribunal established by an international treaty. Corten and Koutroulis also conclude that the precedent of the ECCC shows that it is within the powers of the General Assembly 'to trigger the process of setting up a tribunal and request the UN secretary-General to undertake the necessary steps to this effect'.[228]

Using the indicators in Tables 1–3, the proposal is assessed in the following way. A tribunal endorsed by the General Assembly would have the legitimacy of an organisation that represents the international community. The degree of internationalisation is high according to the model but is dependent on the support of the General Assembly resolution. In the proposal by Hans Corell and others, the fair trial provisions are mainly found in Article 13 and mirror the Statute of the SCSL. The fair trial standards of the Special Tribunal would

[223] ibid 7.
[224] On establishment of a Special Court for Sierra Leone UNSC Res 1315 (14 August 2000) UN Doc S/Res/1315(2000).
[225] Ukraine Task Force of The Global Accountability Network (note 222 *supra*) 5, para 2.
[226] On the report of the Third Committee (A/57/806) UNGA Res 57/228 B (13 May 2003) UN Doc A/RES/57/228 B.
[227] Corten and Koutroulis (note 17 *supra*) 10, 16.
[228] ibid 17–18.

most likely adhere to the practice of other international tribunals.[229] The *ad hoc* characteristic of the tribunal and the selective approach of having the General Assembly single out the situation in Ukraine provides the proposal with a low degree of non-selectivity in accordance with the assessment model. However, the composition of the Special Tribunal proposed by Hans Corell and others in the proposed Article 8, including judges appointed by Ukraine and the Secretary-General, has the potential to be fairly international.[230]

Table 6: *Results of applying the assessment model to the proposal to establish a Special Tribunal through the UN system.*

Proposal	Internationalisation	Fair trial	Non-selectivity
Special Tribunal established through the UN system	High	High	Low

4.3 Treaty-Based Special Tribunal

In March 2022, the former Prime Minister of the United Kingdom Gordon Brown together with the international lawyer Philippe Sands and other politicians and lawyers, published a combined statement and declaration calling for the creation of a Special Tribunal for Ukraine.[231] It was not a detailed proposal but rather a show of political and scholarly will.

It states that the Special Tribunal should be constituted on the same principles that guided the Allies when they met in London in 1942 to draft a resolution on German war crimes, which later led to the creation of the IMT and the Nuremberg Trials.[232]

According to the declaration, States should grant jurisdiction arising under national criminal codes and general international law to the Special Tribunal to investigate and prosecute individuals who have committed the crime of aggression against Ukraine. The proposal also includes those 'who have materially influenced or shaped the commission of that crime', and the circle of

[229] Ukraine Task Force of The Global Accountability Network (note 222 *supra*) 11–12.
[230] ibid 9–10.
[231] Gordon Brown and others, 'Statement – Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine' (4 March 2022) <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> accessed 22 February 2022.
[232] ibid 2.

persons that can be held accountable is not explicitly limited to State leaders.[233] The definition in the proposal differs from the definition in Article 8*bis*(1) of the ICCSt, where the leadership requirement includes persons 'in a position effectively to exercise control over or to direct the political or military action of a State'. The ICCSt's definition arguably encompasses a smaller circle of political and military leaders. The drafters of the proposed Special Tribunal should be cautious not to go beyond the customary definition of the crime of aggression, which could cause legality concerns, as discussed in Chapter 2.2. However, the definition under the ICCSt does not necessarily correspond with the customary definition.

There is also the question of the Special Tribunal's jurisdictional basis. Heller argued that the proposed treaty-based Special Tribunal could be based on Ukraine's territorial jurisdiction over the crime of aggression.[234] The proposal does not include the UN but rather asserts that countries themselves should grant the Special Tribunal jurisdiction. Combined with the fact that the referenced IMT was treaty-based, Heller's argument seems convincing.[235]

Philippe Sands and Gordon Brown got the ball rolling but have been vague about the details of setting up a Special Tribunal, which makes an assessment difficult. However, the indicators in Tables 1–3 can be applied if some reasonable assumptions are made. Regarding internationalisation, the UN would not be involved, and the Special Tribunal would only enjoy support from States – achieving a low level of internationalisation. The fair trial standards of such a tribunal depend on the inclination of the drafters. However, it is likely that the provisions would follow accepted fair trial standards of international courts. According to the assessment model, the tribunal would be selective because of its *ad hoc* status. Additionally, there is a risk of overrepresentation of Western States taking part in the establishment process.[236]

[233] ibid 3.
[234] Heller (2022) 8.
[235] See the discussion concerning the jurisdictional basis of a Special Tribunal in Chapter 4.2.
[236] See Chapter 3.5.

Table 7: *Results of applying the assessment model to the proposal to establish a treaty-based Special Tribunal.*

Proposal	Internationalisation	Fair trial	Non-selectivity
Treaty-based Special Tribunal	Low	High	Low

4.4 Conclusion

In this chapter, the assessment model was applied to three different proposals to enable the prosecution of the Russian leadership for the crime of aggression. Table 8 below shows the results of applying the assessment criteria to the three proposals. Establishing a Special Tribunal through the UN system ranked the highest and a treaty-based Special Tribunal the lowest. Amending the ICCSt ranked in the middle of the other two proposals. From the perspectives of internationalisation, fair trial, and non-selectivity, a UN Special Tribunal may therefore be the most suitable option of the three proposals. The UN Special Tribunal would have achieved the highest possible ranking if it had attained a high degree of non-selectivity.[237]

Table 8: *Summary of results of applying the assessment model to the three proposals.*

Proposal	Internationalisation	Fair trial	Non-selectivity
Special Tribunal established through the UN system	High	High	Low
Amending the ICCSt	Low	High	High
Treaty-based Special Tribunal	Low	High	Low

[237] Confer Table 4.

It could be questioned whether the proposal to amend the ICCSt and the proposal to establish a treaty-based Special Tribunal should be ranked low in relation to the criterion of internationalisation considering the *Al Bashir* case, where the Appeals Chamber clearly viewed the ICC, a treaty-based court, as an international court with the ability to set aside personal immunity. The decision is, nonetheless, controversial, as discussed in Chapter 2.4.1, and whether the decision is in line with international law has been questioned. Therefore, a treaty-based tribunal only achieves a low degree of internationalisation in the model.

There are limitations to the model. The most apparent limitation regarding the application of the assessment model was that the proposal for a treaty-based Special Tribunal did not include any fair trial provisions. Therefore, the fair trial criterion could not be applied properly. Additionally, the model poorly measures to what degree the trial is integrated into the Ukrainian judicial system. Domestic prosecution is an indicator of a high degree of non-selectivity, and endorsement by the General Assembly is an indicator of a high degree of internationalisation. If a tribunal is integrated into the Ukrainian judicial system and endorsed by the General Assembly – it could possibly attain both a high degree of non-selectivity and internationalisation, respectively. Such a proposal is difficult to evaluate with the assessment model. However, it could be argued that such a General Assembly resolution would single out the situation in Ukraine and erase the non-selectivity achieved by integrating the trial into the Ukrainian judicial system. As already stated, the indicators are not exhaustive or applicable to every situation.

Finally, because the model does not take the practical and political implications of the proposals into consideration – a proposal may rank high but could, at the same time, not be the most appropriate. For example, the proposal to establish a Special Tribunal through the UN system ranked the highest but will most certainly be challenging to implement since it will be difficult to attain broad support for the General Assembly resolution required.

5 Final Remarks

The war in Ukraine constitutes a historic moment for international criminal justice: the choices made today will have long-lasting consequences for the international community. The political will to ensure criminal accountability for the Russian aggression is apparent and legal scholarship can play an important role in guiding political decision-making. This thesis has offered a goal-oriented perspective on criminal accountability for the crime of aggression through a systematic assessment of three different measures to enable the prosecution of the Russian leadership for the crime.

Chapter 1 introduced the research subject and the methodology. The objective of the thesis was to lay the foundation for a model to assess different measures to enable criminal trials in connection with the Russian aggression. To achieve this objective, a goal-oriented approach to international criminal trials was adopted.

Chapter 2 examined the crime of aggression and immunities in international criminal law. The positivistic study showed that many questions remain to be answered about the scope of the crime of aggression and the applicability of immunities in relation to the crime. If the definition of the crime of aggression chosen in connection to a trial is broader than the definition under customary international law, it could violate the principle of legality. Further research concerning the customary definition of the crime of aggression would therefore be valuable.

Furthermore, the case law indicates that high-ranking officials do not enjoy personal immunity before an international court or tribunal, but it has been questioned whether this includes a purely treaty-based court in relation to high-ranking officials of non-party States that have not consented to the treaty in question. In addition, it is uncertain whether the crime of aggression is exempt from the application of functional immunity and more research regarding the topic is needed.

Chapter 3 then considered the different goals of international criminal trials and constructed an assessment model. It was argued that internationalisation, fair trial standards, and non-selectivity serve as the most important criteria for ensuring the legitimacy and the legality of an international trial in the present situation. Internationalisation becomes essential due to the pressing issues concerning immunities and State sovereignty. Internationalisation would bestow upon a trial the legitimacy of representing the international community. Moreover, fair trial standards were found to be embedded in international criminal law and must be adhered to in order to attain legitimacy. While the selectivity of a trial may not entirely impede its progress, it would

considerably diminish the significance of its judgment. Hence, there should be an endeavour to establish a universal mechanism that ensures criminal accountability for the crime of aggression. Concerning measures to enable the prosecution of the crime of aggression, it is possible to give less priority to the goals of deterrence, truth-seeking, reconciliation, and victim participation. Regarding the question of what makes a court international, the study found that the court needs to be able to claim that it acts on behalf, or maybe even at the behest, of the international community.

In Chapter 4, the assessment model was applied to the three proposals. A few issues related to the different proposals were also raised. For example, the uncertainties related to the procedure to amend the ICCSt to enable the Court to exercise its jurisdiction over the aggression against Ukraine. More research on this topic is certainly needed. Moreover, the definition of the crime in the proposal by Gordon Brown and others seems to go beyond the definition under the ICCSt, which, depending on the leadership requirement under customary international law, could cause legality concerns.

The results of applying the assessment model demonstrated the model's functionality and its ability to provide insights when comparing different proposals, thereby addressing the research question. A model, such as the one presented in this thesis, can be used to assess proposals to enable the prosecution of Russian leaders for the crime of aggression. The model could potentially be applicable to other situations, resembling the situation in Ukraine, but it has not been considered in the present thesis.

The limitations of the model were also discussed. There is room for improvement regarding the indicators and other aspects of the model – it is certainly not a final product. For example, the model does not measure to what degree a trial is integrated into the Ukrainian justice system, which could have implications for a trial's selectivity.

The international legal regime is fragmented, making it difficult to appease all stakeholders. All accountability measures operate in a challenging legal and political environment, especially when the goal is to enable criminal trials. Furthermore, it is difficult to cover all considerations, particularly practical and political ones, in a legal analysis. Among the proposals, a Special Tribunal established through the UN system achieved the highest ranking but can be expected to face significant challenges in implementation. This is primarily due to the difficulty in obtaining widespread support for the necessary General Assembly resolution.

The model presented in this thesis is not concerned with implementation or enforcement. However, implementation and enforcement are both necessary

to ensure criminal accountability and must be considered with the help of other tools. The creation of a Special Tribunal for Ukraine will require a great deal of funding and political effort, and amending the ICCSt may require even more diplomatic work. Nonetheless, models based on the goal-oriented approach to international criminal trials can be valuable when dealing with issues where little substantive law exists and where the legal community is divided.

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