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The Ukraine Crisis and the Future of International Courts and Tribunals

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THE UKRAINE CRISIS AND THE FUTURE OF INTERNATIONAL COURTS AND TRIBUNALS

*Milena Sterio**

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I. INTRODUCTION

On February 24, 2022, Russia initiated an aggressive war against Ukraine.¹ Russian forces engaged in a series of aerial strikes as well as in a ground invasion, with these war efforts aimed at conquering Ukraine and at incorporating Ukraine into Russia.² Since the start of the invasion, Russian forces have likely

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1. See, e.g., Yuras Karmanau, *Russia Invades Ukraine on Multiple Fronts in ‘Brutal Act of War’*, PBS (Feb. 24, 2023), www.pbs.org/newshour/world/russia-invades-ukraine-on-multiple-fronts-in-brutal-act-of-war [<https://perma.cc/M5B5-4W3G>].
2. Paul Kirby, *Has Putin’s War Failed and What Does Russia Want?*, BBC NEWS (Feb. 19, 2023), www.bbc.com/news/world-europe-56720589 (noting that Putin announced that the goal of Russia’s military action against Ukraine was to “demilitarise and de-Nazify Ukraine” but that the stated goal did not add up and that Putin’s

committed crimes against humanity against Ukrainian civilian populations, as well as war crimes, by mistreating prisoners of war, committing sexual violence offenses, using prohibited weapons of war, and launching indiscriminate attacks.³ In addition, Russian media has engaged in anti-Ukrainian propaganda that may constitute incitement to commit genocide.⁴ Finally, Russian leaders, Vladimir Putin and his top-level aids have, by initiating the war against Ukraine, committed acts of aggression.⁵ In light of these Russian-committed atrocities, many in the international community have issued calls for accountability, and have argued that Putin and other Russian leaders—as well as soldiers and other military personnel directly involved in the commission of atrocities—should incur individual criminal responsibility.⁶ Although most would agree about the

real goal was to erase the modern state of Ukraine) [<https://perma.cc/5K87-TYJJ>].

3. *Id.* (noting that Russian forces had committed war crimes against civilians in Bucha, and that an independent report has accused Russia of state-orchestrated incitement to genocide).
4. YONAH DIAMOND, NEW LINES INST. FOR STRAT. & POL’Y & RAOUL WALLENBERG CTR. FOR HUM. RTS., AN INDEPENDENT LEGAL ANALYSIS OF THE RUSSIAN FEDERATION’S BREACHES OF THE GENOCIDE CONVENTION IN UKRAINE AND THE DUTY TO PREVENT 1, 12-14 (2022). *But see* William A. Schabas, *Genocide and Ukraine: Do Words Mean What We Choose them to Mean?*, 20 J. INT’L CRIM. JUST. 843, 850-51 (2022) (arguing that the available evidence does not permit inferences to be drawn that acts in Ukraine have been committed with genocidal intent).
5. Aggression is defined in the International Criminal Court’s Rome Statute as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . .” Rome Statute of the International Criminal Court art. 8*bis*, July 17, 1998, 2187 U.N.T.S. 90. In light of available information, it has been established that Russia has used force against the sovereignty, territorial integrity, and political independence of Ukraine, starting on February 24, 2022. Thus, Russia has committed the act of aggression against Ukraine.
6. The Ukrainian government has repeatedly called for the establishment of a special tribunal for aggression where Russian leaders could be prosecuted for acts of aggression. A number of international organizations, scholars, as well as states have also expressed support for such a special tribunal. Olena Khomenko, *Russia’s War of Aggression in Ukraine Demands Special International Tribunal*, ATLANTIC COUNCIL (Sept. 9, 2022), www.atlanticcouncil.org/blogs/ukrainealert/russias-war-of-

general need for accountability in the context of the Ukraine crisis, implementing comprehensive accountability measures that would result in the prosecution of those most responsible for the commission of atrocities, as well as in the prosecution of a sufficient number of those responsible for such atrocities, is a difficult endeavor.

As this Paper will discuss, the most numerous prosecutions of soldiers and others responsible for the commission of atrocities could most easily take place in the national courts of Ukraine. Yet, three factors may limit such prosecution in these courts: (1) the lack of capacity and expertise to conduct a large number of complex war trials, (2) bias and thus lack of legitimacy, and (3) preclusion through the application of the international law immunity principle from prosecuting those most responsible for the aggressive war against Ukraine—Putin and other top-level Russian leaders. The International Criminal Court can prosecute individuals most responsible but lacks jurisdiction over the most fundamental leadership crime: aggression.⁷ While an ad hoc

aggression-in-ukraine-demands-special-international-tribunal/ (noting that the Ukrainian Foreign Minister Dmytro Kuleba, as well as the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, and the Lithuanian Parliament have all expressed support for the special tribunal for aggression) [<https://perma.cc/KNL6-WBLL>]. Most recently, the European Union, the European Commission, and France have also voiced support for the establishment of the special tribunal for aggression. Isobel Koshiw & Jennifer Rankin, *France Backs Plans for Tribunal for Russian Officials Over Ukraine War*, THE GUARDIAN (Dec. 1, 2022, 9:43 AM), www.theguardian.com/world/2022/dec/01/france-backs-plans-for-tribunal-for-russian-officials-over-ukraine-war [<https://perma.cc/Y6B3-6QSZ>].

7. *How the Works*, INT'L CRIM. CT., www.icc-cpi.int/about/how-the-court-works (noting that the ICC can exercise jurisdiction over the crime of aggression in cases where the situation is referred to the Court by the Security Council; in the absence of such Security Council referral, "the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments") [<https://perma.cc/F7J9-AB AQ>]. The Security Council has not referred the Ukraine situation to the ICC, and the crimes have been committed on the territory of Ukraine, which has not ratified or accepted aggression amendments to the Rome Statute. Thus, the ICC does not have jurisdiction over the crime of aggression in Ukraine.

tribunal could possibly prosecute the crime of aggression, establishing an aggression tribunal is a politically challenging enterprise which, at the moment, lacks the backing of several world's superpowers, including the United States, and of the ICC itself.⁸ The complexity of the Ukraine accountability puzzle demonstrates, however, that no particular accountability measure is a panacea for international criminal justice, and that in order to achieve a full measure of accountability, as well as to fulfill the various goals of international criminal justice, various mechanisms must function in parallel, support each other's work, and conduct multiple prosecutions, at times simultaneously, in a complementary and comprehensive manner. This Paper argues that the future of international courts and tribunals will feature various mechanisms, including national courts, hybrid tribunals, and the ICC, which will each have a different role within more general accountability puzzles. The Ukraine crisis may be a good example of future accountability needs, as other conflicts may also necessitate the utilization of a variety of accountability models.

In Part II, this Paper will describe existing accountability mechanisms, such as national courts, specialized war crimes chambers, hybrid tribunals, and the ICC. In Part III, this Paper will discuss the advantages and disadvantages of each of these accountability mechanisms; this Part will also argue that not one particular mechanism can prosecute most perpetrators for most crimes, and that not a single mechanism can fulfill accountability

8. The United States has strongly condemned the Russian invasion of Ukraine but has not expressed support for the aggression tribunal. Celeste Kmiotek, *How Ukraine's Proposed Special Tribunal for Russian Aggression Would Work*, ATLANTIC COUNCIL (Dec. 6, 2022), www.atlanticcouncil.org/blogs/new-atlanticist/how-ukraines-proposed-special-tribunal-for-russian-aggression-would-work/ (indicating that the United States has "not yet given an official position on the creation of an international tribunal") [<https://perma.cc/WNT5-MRSF>]. ICC Prosecutor Karim Khan has also opposed the creation of a new aggression tribunal. Toby Sterling, *War Crimes Prosecutor: ICC Should Prosecute Aggression, Can Try Heads of State*, REUTERS (Dec. 5, 2022, 10:37 AM), www.reuters.com/world/war-crimes-prosecutor-icc-should-prosecute-aggression-can-try-heads-state-2022-12-05 (reporting on Prosecutor Khan's remarks at the 2022 ICC Assembly of States Parties, where Khan expressed the position that the ICC is the relevant tribunal to prosecute the crime of aggression; Khan stated that "[w]e should avoid fragmentation and instead prefer consolidation") [<https://perma.cc/433C-E7HR>].

needs in the Ukraine context, or in most future conflicts. In Part IV, this Paper will argue in favor of a comprehensive regime of accountability as the only adequate model which can fulfill the goals of international criminal justice, which include prosecuting those responsible for the atrocities committed, advancing the expressive goals of international criminal law, sending a global deterrence message, contributing to the resolution of an ongoing conflict, and bringing about national reconciliation and healing.⁹

II. EXISTING COURTS AND TRIBUNALS

Different accountability models include prosecutions in the national courts of the conflict country, prosecutions in specialized war crimes chambers or so-called “internationalized” domestic tribunals, prosecutions in the national courts of third states under universal jurisdiction, prosecutions at the ICC, and prosecutions at hybrid courts.

A. National Courts

The conflict country has territorial jurisdiction to prosecute those who commit crimes on its territory.¹⁰ Thus, individuals responsible for the commission of atrocity crimes can face prosecution in the domestic courts of the territorial state, in the same way as those who commit “ordinary” crimes.¹¹ From a purely jurisdictional perspective, the prosecution of international/atrocity crimes does not pose a particular challenge

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9. For a more detailed discussion of goals and objectives of international criminal law and international criminal tribunals, see, e.g., Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT’L CRIM. JUST. 427, 428 (2004); Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT’L L. 179, 188 (2018).
 10. Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155 (1971) (“The territorial theory takes the position that criminal jurisdiction depends upon the place of perpetration.”).
 11. See, e.g., 2 MODEL CODES FOR POST-CONFLICT CRIM. JUST.: MODEL CODE OF CRIM. PROC. § 3, art. 4 (U.S. INST. OF PEACE 2008) (“[C]riminal laws apply to persons who commit criminal offenses in the territory of a state. This is an undisputable and universally recognized ground of jurisdiction based on the premise that territorial jurisdiction over criminal offenses is an aspect of a state’s sovereign powers.”).

to territorial courts. However, because of the international law principle of immunity, high-level officials of other, non-territorial countries may be shielded from prosecution at the domestic-level by courts of the territorial state.¹²

There are numerous advantages associated with prosecutions in the national courts of the conflict country.¹³ Such advantages include the proximity to victims, witnesses, and evidence; the ability for the local population to follow or participate in the relevant proceedings; as well as the possibility that local proceedings may have a reconciliatory effect on the conflict-affected populations.¹⁴ In addition, territorial proceedings are generally less costly, logistically easier and time-efficient.¹⁵ Prosecutions in the territorial courts, however, can be difficult in some circumstances. In order to prosecute anyone for atrocity crimes, such as genocide, war crimes, crimes against humanity, or aggression, such crimes need to be criminalized within the domestic criminal codes of the relevant territorial jurisdiction. Some countries lack appropriate domestic criminal statutes as they have failed to incorporate atrocity crimes into their national laws.¹⁶ Thus, although the territorial state may have jurisdiction to prosecute, it may lack national legislation under which it would be able to appropriately charge individuals. Moreover, in situations of ongoing conflict, territorial proceedings may not be possible because of safety concerns; in post-conflict settings, some of such safety concerns may persist, coupled with a host of other issues, including possible threats to victims and witnesses, as well

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12. Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. GENOCIDE RSCH., July 6, 2022, at 1, 8 (2022) (quoting Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 21-2 (Feb. 14)).
 13. For a general discussion of domestic-level prosecutions of international crimes, see Carsten Stahn, *The Future of International Criminal Justice*, 4 HAGUE JUST. J. 257, 264-66 (2009).
 14. See, e.g., Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA J. INT'L L. 887, 904 (2006) (discussing the advantages of national-level prosecutions).
 15. *Id.* at 901-04.
 16. See, e.g., ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 61 (1st ed. 2007).

as the potential of bias against the alleged perpetrators.¹⁷ In some cases, national judicial authorities may lack the requisite expertise necessary for the conduct of successful large-scale war crimes prosecutions.¹⁸ Thus, in some cases, national-level prosecutions may lack legitimacy and may result in convictions contrary to international human rights standards. Finally, as mentioned above, because of the international law principle of immunity, domestic-level prosecutions may not reach high-level officials from the offending country; thus, such prosecutions may have to concentrate on lower and mid-level offenders.¹⁹

In Ukraine, some national-level prosecutions have already taken place, resulting in a small number of convictions.²⁰ While it may be premature to assess the legitimacy of Ukrainian criminal proceedings against Russian perpetrators of atrocities, it is important to note that such proceedings run the risk of bias, or perception of bias, and that it is difficult to tell as of now whether Ukrainian courts have the capacity to conduct complex trials involving challenging modes of liability and the necessity to turn to large numbers of eyewitnesses and volumes of documentary evidence.²¹

Territorial, national-level proceedings, while appropriate in some circumstances, may pose insurmountable problems in other

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17. See Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMPAR. L. 237, 249 (2013) (discussing some of the disadvantages of national-level courts); see also Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 301-05 (2003).
 18. Gaiane Nuridzhanian, *Prosecuting War Crimes: Are Ukrainian Courts Fit to Do It?*, EJIL: TALK! (Aug. 11, 2022), www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/ (noting that it is "quite common" for a domestic legal system to lack experience in prosecuting war crimes) [<https://perma.cc/745G-E2SR>].
 19. Heller, *supra* note 12, at 22.
 20. *Ukraine conflict: What War Crimes Is Russia Accused Of?*, BBC NEWS (Nov. 14, 2022), www.bbc.com/news/world-60690688 (noting that a 21-year-old Russian tank commander was sentenced to life imprisonment by a Ukrainian court for shooting an unarmed civilian) [<https://perma.cc/VT4Y-9S47>]; see also Nuridzhanian, *supra* note 18.
 21. For a discussion of whether Ukrainian domestic courts are fit to conduct complex war crimes trials, see Nuridzhanian, *supra* note 18.

settings. Thus, although such proceedings are likely to remain as an option for accountability in Ukraine as well as in some future conflicts and post-conflict situations, such proceedings may not always be possible or desirable.

B. War Crimes Chambers

The conflict country may wish to create a specialized war crimes chamber within its judicial system; such a specialized war crimes chamber can then handle complex prosecutions of alleged perpetrators of atrocity crimes. An excellent example of such a specialized chamber is the Bosnian War Crimes Chamber, created in order to prosecute cases handed down to the Bosnian authorities by the International Criminal Tribunal for Yugoslavia, pursuant to the latter's completion strategy.²² Moreover, in the context of piracy prosecutions, national-level jurisdictions of the Seychelles, Mauritius, and Kenya developed specialized chambers to prosecute suspected Somali pirates.²³

The advantage of a specialized war crimes chamber is that it allows for expertise to be developed within a national judicial system — judges, prosecutors and defense attorneys may become experts in the conduct of complex prosecutions of international crimes.²⁴ Moreover, the international community may provide training to judges and attorneys, and may provide financial support to the establishment of a war crimes chamber.²⁵ Potential disadvantages to this approach are similar to the ones outlined above regarding national proceedings: specialized chambers may have difficulty conducting proceedings in conflict and post-conflict settings, and may equally suffer from bias and a lack of legitimacy.²⁶ Moreover, similar to domestic-level prosecutions outlined above, a war crimes chamber is a purely domestic tribunal and may not be able to prosecute non-territorial country

22. Sterio, *supra* note 17, at 245.

23. Milena Sterio, *Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius*, 4 AMSTERDAM L. F. 104, 112-19 (2012).

24. *See* Sterio, *supra* note 17, at 248-49.

25. *See id.* at 249.

26. *See id.* at 248.

leaders because of the application of the international law principle of immunity.²⁷

In the context of Ukraine, it is unlikely that a specialized chamber can be created without amending the Ukrainian Constitution, which specifically prohibits the creation of such exceptional chambers.²⁸ Nonetheless, scholars and groups have already advocated in favor of the creation of a Ukrainian High Court, which would specialize in war crimes prosecutions and thereby supplement the ability of the Ukrainian national courts to prosecute these types of complex cases.²⁹ For example, Kevin Jon Heller has argued in favor of the creation of a High Court for Ukraine, which would function as a specialized chamber within the Ukrainian court system but would be backed and supported by the Council of Europe.³⁰ The Public International Law and Policy Group, a prominent non-governmental organization, has also expressed support for a similar accountability model.³¹ Similar to the Bosnian War Crimes Chamber, the Ukraine High Court would employ a mix of domestic and international judges, and would benefit from international community's expertise as well as financial assistance. Such a Court would thus combine the advantages of domestic-level prosecutions with international expertise and backing. As scholars have argued already, the future of international criminal justice, in Ukraine and elsewhere,

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27. Heller, *supra* note 12 (quoting Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 21-2 (Feb. 14)).
 28. Alexander Komarov & Oona A. Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SEC. (Apr. 5, 2022), www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression [<https://perma.cc/8FUK-ALPU>].
 29. See Heller, *supra* note 12, at 17-20.
 30. *Id.* at 18 ("A High Ukrainian Chamber for Aggression would have significant practical advantages over a Special Tribunal, because it would build on Ukraine's functioning judicial system, avoiding the need to create a new tribunal *ex nihilo*, while taking advantage of CoE member-states' expertise regarding the investigation and prosecution of international crimes.").
 31. DRAFT LAW FOR A UKRAINIAN HIGH WAR CRIMES COURT (PUB. INT'L L. & POL'Y GRP. 2022), www.publicinternationallawandpolicygroup.org/draft-law-ukrainian-high-war-crimes-court [<https://perma.cc/YQA4-DJAY>].

may be domestic.³² In fact, it is likely that specialized war crimes chambers will remain an important accountability option.

C. Universal Jurisdiction

Third countries may also conduct national-level prosecutions under the principle of universal jurisdiction. This principle extends to atrocity crime and generally stands for the proposition that any country can prosecute those accused of particularly heinous crimes, as an agent of the international community.³³ The most famous universal jurisdiction case is the prosecution of Adolf Eichmann by Israel; since then, other national-level jurisdictions have utilized universal jurisdiction sparingly.³⁴

Most recently, several European countries have initiated investigations and prosecutions against Syrian perpetrators of atrocities under the principle of universal jurisdiction.³⁵ In the context of the Ukrainian crisis, Lithuania has recently announced that it is currently investigating Russian acts of aggression under the principle of universal jurisdiction.³⁶ It is possible that similar investigations and prosecutions will be launched in the national courts of additional countries.

Although universal jurisdiction prosecutions may play an important accountability role, such prosecutions are not without controversy. It is uncertain whether the crime of aggression,

32. See, e.g., Stahn, *supra* note 13, at 257.

33. *Universal Jurisdiction*, CTR. FOR JUST. ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> [<https://perma.cc/D5T6-YU8P>]; Basic Facts on Universal Jurisdiction, HUM. RTS. WATCH (Oct. 19, 2009, 8:45 AM), www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction [<https://perma.cc/VC7F-73PN>].

34. See, e.g., *Universal Jurisdiction*, *supra* note 33; see also *Factsheet: Universal Jurisdiction*, CTR. FOR CONST. RTS. (Dec. 7, 2015), <https://ccrjustice.org/home/get-involved/tools-resources/factsheets-and-faqs/factsheet-universal-jurisdiction> (noting that universal jurisdiction proceedings remain rare) [<https://perma.cc/7CTB-TEMM>].

35. Rick Gladstone, *An Old Legal Doctrine That Puts War Criminals in the Reach of Justice*, N.Y. TIMES, www.nytimes.com/2021/02/28/world/europe/universal-jurisdiction-war-crimes.html (Aug. 10, 2021) (noting that courts in Germany and in France have prosecuted Syrian perpetrators of atrocities) [<https://perma.cc/M55T-PQU4>].

36. Heller, *supra* note 12, at 22-23.

particularly relevant in the Ukrainian context, is subject to universal jurisdiction; although the Princeton Principles of Universal Jurisdiction include crimes against peace, only about 40 states criminalize aggression, and the majority of them do not provide for universal jurisdiction over this crime.³⁷ On a more practical level, universal jurisdiction-based proceedings face important obstacles as well. In some instances, it is impossible for the prosecuting country to arrest the alleged perpetrators, if they are located elsewhere; it may also be difficult or impossible for the prosecuting country to obtain access to relevant victims, witnesses, and evidence.³⁸ Universal jurisdiction proceedings require “an enormous capacity of human and monetary resources” and they are generally more expensive and time-consuming than regular national-level trials.³⁹ And, universal jurisdiction proceedings can be politically controversial and can interfere with the third country’s conduct of foreign affairs. Due to political backlash, countries such as Belgium and Spain have had to curb their universal jurisdiction laws.⁴⁰ Thus, it is likely that universal

37. *Id.* at 23.

38. *See, e.g.,* TRIAL INT’L, EVIDENTIARY CHALLENGES IN UNIVERSAL JURISDICTION CASES 9 (2019).

39. Mais Masadeh, *Once Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice*, VOLKERRECHTSBLOG (Jan. 24, 2022), <https://voelkerrechtsblog.org/one-court-at-a-time-challenges-of-universal-jurisdiction-and-enhancing-international-justice/> [<https://perma.cc/6LZ5-L24V>].

40. Belgium repealed its universal jurisdiction statute in 2003, in light of pressure by the United States, which threatened Belgium with losing its status as host to NATO headquarters if it did not rescind its law. Belgian law, after this repeal, provides for jurisdiction over international crimes if the accused is a Belgian national or has his or her primary residence in Belgium; if the victim is Belgian or has resided in Belgium for at least three years at the time of the crimes’ commission; or if Belgium is required by treaty to exercise jurisdiction over the case. *See Belgium: Universal Jurisdiction Law Repealed*, HUM. RTS. WATCH (Aug. 1, 2003, 8:00 PM), www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed [<https://perma.cc/46J5-55U5>]. Spain modified its universal jurisdiction law in 2009. After the modification, Spanish law limits the application of universal jurisdiction to cases where the alleged perpetrators are present in Spain, the victims are of Spanish nationality, or there is a link to Spanish interests. *See Spanish Congress Enacts Bill Restricting Spain’s Universal Jurisdiction Law*, CTR. FOR JUST. & ACCOUNTABILITY,

jurisdiction prosecutions will remain an accountability option in the future, but that their use will remain relatively rare.

In the case of Ukraine, many states have already voiced support for the proposition that Russian perpetrators of atrocities need to face accountability; it is possible that some such states may be willing to utilize their national-level courts for universal jurisdiction prosecutions against such Russian individuals.⁴¹ However, it is unlikely that many states will be able to physically arrest and prosecute a significant number of Russian perpetrators under universal jurisdiction.

D. ICC

The ICC Rome Statute was negotiated in 1998; the Court itself became operational in 2002.⁴² Over the past twenty years, the Court has initiated a total of 31 investigations, has issued 38 arrest warrants, and has convicted ten defendants.⁴³ The ICC has jurisdiction over core atrocity crimes, such as genocide, crimes against humanity and war crimes.⁴⁴ In more limited circumstances, for countries which have ratified the so-called Kampala Amendments, the ICC also has jurisdiction over the crime of aggression.⁴⁵

Ukraine has accepted the jurisdiction of the ICC by lodging a special declaration under Article 12(3) of the Rome Statute; Ukraine is not a full-fledged ICC member.⁴⁶ By the virtue of the

<https://cja.org/spanish-congress-enacts-bill-restricting-spains-universal-jurisdiction-law/> [<https://perma.cc/YZ5X-Q6J4>].

41. *See, e.g.*, Heller, *supra* note 12, at 20.

42. *See, e.g.*, Amy McKenna, *The International Criminal Court (ICC)*, ENCYC. BRITANNICA (Dec. 22, 2016), www.britannica.com/story/the-international-criminal-court-icc [<https://perma.cc/9TRL-C7UC>].

43. *About the Court*, INT'L CRIM. CT., www.icc-cpi.int/about/the-court [<https://perma.cc/S6LB-GUEK>].

44. *How the Court Works*, INT'L CRIM. CT., www.icc-cpi.int/about/how-the-court-works [<https://perma.cc/WPH3-VSDY>].

45. For a more detailed discussion about the activation of the ICC's jurisdiction over the crime of aggression, see *The Crime of Aggression*, COAL. FOR THE INT'L CRIM. CT., www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression [<https://perma.cc/6KVX-XFUL>].

46. *Ukraine*, INT'L CRIM. CT., www.icc-cpi.int/ukraine (noting that Ukraine is not a State Party to the Rome Statute but that it has

Ukrainian declaration accepting the Court's jurisdiction, the ICC has jurisdiction over genocide, crimes against humanity, and war crimes committed in Ukraine; the Court does not have jurisdiction over the crime of aggression as neither Ukraine, the victim state, nor Russia, the aggressor state, are members of the ICC.⁴⁷ In Ukraine, the ICC had already concluded a preliminary examination in 2019, which had established that Russia had likely committed crimes on Ukrainian territory.⁴⁸ In March 2022, more than 40 states referred the situation in Ukraine to the ICC; several countries decided to provide additional financial support as well as human resources so that the Court can function efficiently in its Ukraine investigation.⁴⁹ Although the ICC's investigation in Ukraine is ongoing and although it is likely that the ICC will continue to play an important accountability role in this conflict, it is difficult to predict whether the ICC will be able to arrest and prosecute at least some Russian perpetrators.

The obvious advantage of the ICC is that the Court is fully operational and has resources and trained personnel to conduct solid investigations and possible prosecutions.⁵⁰ In addition, the ICC as the world's only permanent international criminal tribunal

twice declared its acceptance of the Court's jurisdiction; in its first declaration, Ukraine accepted the ICC's jurisdiction with respect to crimes committed on Ukrainian territory between November 21, 2013 and February 22, 2014; in its second declaration, Ukraine extended this time period on an open-ended basis, from February 20, 2014 onward) [<https://perma.cc/J52R-S3P9>].

47. Heller, *supra* note 12, at 6.

48. *Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination in the Situation in Ukraine*, INT'L CRIM. CT. (Dec. 11, 2020), [www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine_\(concluding_that_“there is a reasonable basis . . . to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine”\)](http://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine_(concluding_that_"there_is_a_reasonable_basis...to_believe_that_a_broad_range_of_conduct_constituting_war_crimes_and_crimes_against_humanity_within_the_jurisdiction_of_the_Court_have_been_committed_in_the_context_of_the_situation_in_Ukraine")_) [<https://perma.cc/2PUN-Q299>].

49. *Ukraine*, *supra* note 46; see also Yvonne Dutton & Milena Sterio, *The War in Ukraine and the Legitimacy of the International Criminal Court*, JUST SEC. (Aug. 30, 2022), www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/ (noting that the United Kingdom and the European Union have pledged financial and logistical support to the ICC's Ukraine investigation) [<https://perma.cc/B7R9-U2DB>].

50. See Heller, *supra* note 12, at 6.

carries with itself a significant degree of prestige, legitimacy, and attention.⁵¹ If the ICC opens an investigation, the world notices. The disadvantages associated with the ICC investigation include: the long period of time that the Court may take to conduct an investigation, the lack of local participation in the proceedings, the lack of awareness in the victim country about the proceedings, as well as the Court's inability to prosecute but a handful of offenders.⁵² Moreover, as mentioned above, the ICC lacks jurisdiction over the most important leadership crime—aggression. And if Russian leaders do not face accountability for the initiation and conduct of the ongoing aggressive war in Ukraine, this may leave a significant gap in the overall accountability prism in this context.⁵³ The ICC—although it will continue to play a significant accountability role—will likely need to work in conjunction with other accountability partners in order to effectively contribute to the overall arc of justice and accountability in Ukraine and elsewhere.

E. Hybrid Tribunals

Hybrid tribunals are courts established through an agreement between the conflict-affected country and an international organization such as the United Nations.⁵⁴ Recent examples of hybrid tribunals include the Special Court for Sierra Leone, the Extra-ordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, the Kosovo Specialist Chambers,

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51. *Id.* at 6 (noting that prosecuting Russian aggression at the ICC “would make the most practical sense” as this would “offer economy of scale and would spare the international community the time and effort required to create a new tribunal”; also noting that the most important benefit of an ICC prosecution would be symbolic, as this would avoid the appearance of selective justice).
52. For a discussion of challenges facing the ICC, see Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT’L L. 467, 468 (2020).
53. *See, e.g.*, Heller, *supra* note 12, at 6 (explaining that ICC non-state parties are excluded from the jurisdictional regime extending over the crime of aggression).
54. Off. of the U.N. High Comm’r for Hum. Rts., Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, U.N. Doc. HR/PUB/08/2, at 1-2 (2008).

and the Extraordinary African Chambers.⁵⁵ A hybrid tribunal typically employs a mix of national and international judges, prosecutors, and defense attorneys; its statute may incorporate both domestic and international law offenses; it may be located in the host country.⁵⁶

Advantages of a hybrid tribunal include its proximity to the conflict situation and its ability to positively affect and influence the local population and thereby contribute to national reconciliation, as well as its ability to include domestic professionals in judicial and other professional roles.⁵⁷ Moreover, hybrid tribunals can contribute to the rebuilding of judicial and legislative capacity in the hosts country.⁵⁸ Disadvantages associated with hybrid tribunals include the fact that most such institutions have limited geographic and temporal mandates, may cost too much, and may be difficult to create because of a lack of political will.⁵⁹

In the context of Ukraine, some have already suggested the establishment of a hybrid tribunal to prosecute the crime of aggression; such a tribunal could be created through a regional agreement among several countries or within the European Union, or through an agreement between Ukraine and the United Nations.⁶⁰ The government of Ukraine has voiced its support toward the establishment of such a tribunal. However, it is unclear that there is enough support in the international community toward the establishment of a new hybrid tribunal. The ICC Prosecutor himself has voiced skepticism about the establishment of an ad hoc aggression tribunal.⁶¹ Some scholars

55. *The Path Forward on U.S.-Syria Policy: Strategy and Accountability*, 117th Cong. 39 (2022) (statement of Milena Sterio); see also *Hybrid Courts*, ASSER INST., www.asser.nl/nexus/international-criminal-law/the-history-of-icl/hybrid-courts [<https://perma.cc/95DE-C6V7>].

56. See Heller, *supra* note 12, at 17.

57. See *The Path Forward on U.S.-Syria Policy: Strategy and Accountability*, *supra* note 55, at 43-44.

58. See *id.*

59. For a discussion about the utility of hybrid courts see Davide Brunone, *The Return of Hybrid Courts: Omen or Promise?*, FREEDOM FROM FEAR MAG., May 2018, at 120, 120-25.

60. See Heller, *supra* note 12, at 17-19.

61. Sterling, *supra* note 8.

have questioned whether an ad hoc tribunal created through a regional agreement would be able to overcome the immunity hurdle – in fact, according to relevant ICJ precedent, only international criminal tribunals can prosecute heads of state without violating the principle of immunity.⁶² Thus, it is unclear that an ad hoc tribunal, whether created through a treaty among several nations, or through an agreement between Ukraine and the United Nations General Assembly, would constitute an international criminal tribunal and would thus circumvent the principle of immunity.⁶³ Moreover, while most in the international community agree that aggression has been committed by Russia against Ukraine, many powerful countries, such as the United States, remain opposed to expanding jurisdiction of any tribunal over the crime of aggression for fear of exposing their own leaders to potential prosecutions in the future.⁶⁴ And, even those in favor of establishing an aggression tribunal for Ukraine have acknowledged the selectivity problem that this would entail: the issue of why Ukraine warrants the establishment of an aggression tribunal when other aggressive acts throughout the world may

62. The ICJ has held in the Arrest Warrant case that “certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal” but that “an [I]ncumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.” Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 51, 61 (Feb. 14).

63. For an in-depth discussion of the principle of immunity and its application to prosecutions within a special aggression tribunal for Ukraine, see Heller, *supra* note 12, at 8-12.

64. Most states have proven willing to create international tribunals whose rules apply only to leaders of other countries. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 232-33 (2005). The United States has thus far remained neutral regarding the creation of an aggression tribunal for Ukraine. According to a State Department spokesperson, “[w]e are carefully reviewing proposals for a special tribunal dedicated to the crime of aggression against Ukraine.” See Jennifer Hansler, *Ukrainians Push for US to Support Special Tribunal to Prosecute Russian Leadership for Crime of Aggression*, CNN, www.cnn.com/2022/12/14/politics/ukraine-special-tribunal-russia-crime-of-aggression/index.html (Dec. 14, 2022, 9:56 PM) [<https://perma.cc/4PDK-VPVK>].

equally deserve accountability.⁶⁵ Thus, although an ad hoc aggression tribunal appears to be an attractive accountability option in theory, it is doubtful whether such a tribunal can be established and whether it would enjoy support from the world's superpowers.

III. DIFFICULTY OF PROSECUTING ALL CRIMES AND ALL PERPETRATORS

As Part II above has discussed, different models of accountability exist and can be utilized in different contexts and situations. However, as the above discussion demonstrates, no such model may be sufficient in Ukraine, as well as in other contexts, as each model contains limitations. In fact, each goal of international criminal justice may require resort to a different type of an accountability model.

If one wants to prosecute the highest number of perpetrators and therefore emphasize accountability as a primary goal of international criminal justice, one may wish to resort to national courts. Such courts are already in existence and, presuming the existence of a competent judiciary, have the capacity to prosecute a large number of cases.⁶⁶ As discussed above, all international and hybrid courts are typically set up to prosecute only those most responsible for the atrocities committed; moreover, international and hybrid courts often lack adequate funding to be in a position where they could prosecute more than a handful of individuals.⁶⁷ Yet, national courts may lack legitimacy and expertise; moreover, national courts may not be able to bring to custody the leaders of the aggressor state and thus may not be

65. Heller, *supra* note 12, at 12. *But see* Chile Eboe-Osuji, *The Absolute Clarity of International Legal Practice's Rejection of Immunity Before International Criminal Courts*, JUST SEC. (Dec. 8, 2022), www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/ (arguing that “[a] comprehensive review of authoritative literature . . . leaves no room for doubt that customary international law recognizes no immunity for heads of state”) [<https://perma.cc/9YUR-TTTB>].

66. *See supra* Part II.A on the discussion of national tribunals.

67. *See supra* Parts II.D and II.E.

able to impose accountability on those most responsible.⁶⁸ Moreover, while conflict is ongoing, national courts may not be a viable prosecutorial venue because of safety concerns.⁶⁹ While the creation of a specialized war crimes chamber within a domestic system may alleviate expertise and legitimacy concerns to some extent, such specialized chambers are often possible in post-conflict situations only and may not be an adequate option while conflict is ongoing. In addition, national courts may not be able to prosecute aggressor country leaders because of the international law principle of immunity, which precludes national-level courts from prosecuting sitting heads of state.⁷⁰ Thus, prosecutions in national courts may have to focus on mid- and lower-level perpetrators, resulting in a lack of accountability for those most responsible for atrocities committed. Finally, national authorities of the prosecuting country may not have the ability to conduct investigations into crimes that took place on the territory of another state and may lack authority to arrest defendants if they are located outside of the prosecuting country's borders.⁷¹

On the other hand, if one's goal is to prosecute a select group of high-level individuals in order to prioritize the expressive function of international criminal law, resorting to an ad hoc supra-national tribunal or to the ICC may be more appropriate. Supra-national tribunals do not face the same immunity hurdle that national-level courts do; under international law, such courts may prosecute sitting heads of state and other leaders.⁷² Moreover, prosecutions in supra-national venues may have more expressive value, as they may attract more significant attention and focus from the international community, thereby advancing the expressive goals of international criminal justice.⁷³ Finally,

68. For a discussion of the fitness of Ukrainian courts to prosecute Russian perpetrators of atrocities, see Nuridzhanian, *supra* note 18.

69. *See supra* Part II.A.

70. *See Heller, supra* note 12.

71. *See supra* Part II.A.

72. *See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 51, 61 (Feb. 14).

73. For a discussion of the expressive value related to ICC's prosecutions, see, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 173-76 (2007); Damaska, *supra* note 9, at 345; Margaret M. deGuzman, *Choosing to Prosecute: Expressive*

because supra-national trials, especially those conducted at the ICC, attract significantly more attention, they may play a larger global deterrence role, as leaders throughout the world become aware of criminal proceedings instituted against country leaders who order the commission of atrocities.⁷⁴

If one's goal is to achieve other goals of international criminal justice, such as national reconciliation and healing, one may resort to hybrid/ad hoc tribunals. Such tribunals, because of their ability to be situated close to the affected community, might have a more direct reconciliatory impact upon post-conflict societies, as the example of the Special Court of Sierra Leone has shown.⁷⁵ International tribunals, far removed from conflict situations, may have minimal effect on local communities and might play a de minimis role in terms of national reconciliation and healing.⁷⁶ Moreover, national-level tribunals may suffer from perceptions of bias and may exacerbate rifts among conflicting groups.⁷⁷ Thus, such tribunals may not be best situated in order to promote national reconciliation.

In sum, no single accountability model fulfills all the goals of international criminal justice, and in some situations, such as those where conflict is ongoing, as in Ukraine, some accountability models may not be feasible at all. Thus, in order to provide a full measure of accountability satisfying various goals of international criminal justice, resorting to different models of accountability in parallel may be necessary.

IV. SOLUTION: A COMPREHENSIVE REGIME OF ACCOUNTABILITY

For a complex situation like Ukraine, as well as for many other conflict and post-conflict situations, achieving justice might

Selection at the International Criminal Court, 33 MICH. J. INT'L L. 265, 270 (2012).

74. DeGuzman, *supra* note 73, at 306.

75. For a discussion of the Special Court for Sierra Leone's role in national reconciliation within Sierra Leone, see, e.g., Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 139 (2003).

76. *See supra* Part II.D.

77. *See supra* Part II.A.

imply resorting to different models of accountability in parallel. No particular model of accountability, as discussed above, is a panacea for international criminal justice. As discussed in more detailed above, each accountability model presents both advantages and inconveniences, fulfilling some goals of international criminal justice while falling short of others. Thus, the full arc of accountability for Ukraine, as well as for many other situations, involves the utilizations of multiple parallel accountability mechanisms.

Much has been written about the different goals of international criminal justice, some of which include accountability, deterrence, national reconciliation & healing, expressivism, as well as contributing to the resolution of the ongoing conflict.⁷⁸ Whether in the Ukraine context or elsewhere, each of the accountability models fails to fulfill multiple goals of international criminal justice.

In Ukraine, the ICC has played an integral role. Starting in 2014, the ICC opened a preliminary examination into Ukraine, following the Russian invasion and annexation of the Donbas region and Crimea.⁷⁹ In 2020, the ICC OTP concluded that there was reasonable basis to believe that crimes had been committed in Ukraine; because of a lack of funding, that conclusion was not followed by the opening of an investigation or prosecutions.⁸⁰ Following the February 24 attack on Ukraine orchestrated by Russia, 43 states referred the Ukraine situation to the ICC OTP, and the latter opened a formal investigation.⁸¹ The ICC's investigation will undoubtedly lead toward some accountability; it remains to be determined which individuals the ICC may indict in the future, but it is reasonable to assume that at least some Russian leaders will face ICC indictments at that time. The ICC investigation remains hampered, however, by the ICC's lack of jurisdiction over the crime of aggression.⁸² Thus, although the ICC may one day be able to prosecute Russian leaders for war

78. See, e.g., deGuzman, *supra* note 73; Ford, *supra* note 9.

79. See *Information for Victims*, INT'L CRIM. CT., <https://www.icc-cpi.int/victims/ukraine> [<https://perma.cc/6L98-NS84>].

80. See generally *id.*

81. See *Ukraine*, *supra* note 46.

82. See Heller, *supra* note 12, at 6 (noting that non-state-parties are completely excluded from jurisdiction regarding the crime of aggression).

crimes, crimes against humanity, or genocide, this tribunal will not be able to bring aggression charges against any such leaders.⁸³ In addition, because it may remain difficult to arrest high-level Russian leaders, the ICC may have to resort to indictments and eventual prosecutions of lower to mid-level Russian military and political leaders. It may be argued that prosecutions at the ICC fulfill some of the goals of international criminal justice, such as accountability, deterrence, as well as advancing the expressive value of international criminal law. On the other hand, the ICC may be criticized for failing to fulfill other goals of international criminal justice, such as contributing to national reconciliation and healing. Overall, it is also uncertain how much of a deterrence-impact ICC prosecutions may have, as well as whether such prosecutions contribute to resolving the ongoing conflict. Finally, the ICC has been criticized for delivering selective justice; its focus on Ukraine could exacerbate this perception by demonstrating that the Court is focused on some situations to the exclusion of other equally grave conflicts.

In order to prosecute the crime of aggression in Ukraine, an ad hoc tribunal may have to be established. As discussed above, many in the international community have already suggested the creation and establishment of an ad hoc aggression tribunal for Ukraine; such a tribunal could be established through an agreement between the government of Ukraine and the United Nations, or through an agreement among several regional states; such a tribunal would have jurisdiction over the crime of aggression and could act as a complementary mechanism to the ICC.⁸⁴ As aggression is a leadership crime,⁸⁵ such a tribunal would focus on the prosecution of senior-level Russian political and military leaders, and would likely prosecute only a handful of individuals. A hybrid tribunal may fulfill some goals of international criminal justice: it may provide accountability for those most responsible for the conflict and may thereby play a larger deterrent role. In addition, a hybrid tribunal may assist in national reconciliation and healing efforts. However, the ICC or an ad hoc hybrid tribunal may not adequately fulfill all goals of international criminal justice. A hybrid tribunal may have a very limited prosecutorial role because of its limited mandate and

83. *Id.*

84. *Id.* at 1.

85. *Id.* at 19.

resources; it may contribute significantly less to the advancement of the expressive value of international criminal law; and its actual role in national reconciliation may be questionable, in particular if the tribunal is located outside of the conflict country.

All prosecutions, whether at the ICC or at an ad hoc aggression tribunal, could be complemented by national-level prosecutions, where a higher number of lower and mid-level offenders could be prosecuted under national law. Such national-level prosecutions could take place in ordinary Ukrainian courts, or within a specialized war crimes chamber where judges and other legal professional will have received appropriate training and developed the requisite expertise in terms of prosecuting large numbers of complex war crimes cases. National-level prosecutions may have the most significant impact on the local population and may contribute to reconciliation and healing; they may also cover the largest number of individuals and cases and thereby contribute significantly to accountability itself. Such prosecutions, however, may have minimal impact on the development of international criminal law, may actually exacerbate the ongoing conflict, and may suffer from bias and a lack of legitimacy.

Finally, all such prosecutions could be further complemented by national-level prosecutions conducted under the principle of universal jurisdiction in the courts of third states, where offenders may be located. In the context of Syria, multiple European countries have already instituted such universal-jurisdiction-based prosecutions;⁸⁶ this model could become attractive in the context of Ukraine if Russian offenders were to be found within the jurisdiction of third countries which are willing to investigate and prosecute. Universal-jurisdiction-based proceedings contribute to accountability but may have minimal effect on advancing other goals of international criminal justice, such as national reconciliation and healing and the advancement of the expressive value of international criminal law. It is also doubtful that such proceedings can contribute toward conflict resolution.

In sum, achieving a full measure of accountability in a complex situation as Ukraine requires the utilization of several different accountability models in parallel. In Ukraine, as well as

86. See, e.g., *Germany: Conviction for State Torture in Syria*, HUM. RTS. WATCH (Jan. 13, 2022, 4:00 AM) www.hrw.org/news/2022/01/13/germany-conviction-state-torture-syria [<https://perma.cc/BFC7-CVMQ>].

in most other contexts, fulfilling the various goals of international criminal justice, such as accountability, the advancement of the expressive value of international criminal law, deterrence, and national reconciliation and healing, necessitates the use of the ICC, ad hoc tribunals, national-level courts, and universal jurisdiction proceedings, in tandem and over different types of defendants. The future of international criminal justice lies within the international community's ability to resort to different mechanisms of justice and accountability, and to rely upon different types of investigations and prosecutions extending over diverse types of defendants.

V. CONCLUSION

The Ukraine crisis is an example of modern-day conflict which poses various accountability challenges and demonstrates that not a single existing prosecutorial mechanism is capable of achieving a full measure of accountability while fulfilling the different goals of international criminal justice. As the discussion above demonstrates, the prosecution of a sufficient number of Russian perpetrators of atrocities, as well as of Russian leaders, conducted legitimately and effectively, will necessitate the utilization of almost all accountability models – Ukrainian courts, a war crime chamber, the ICC, as well as an ad hoc aggression tribunal. The Ukrainian crisis demonstrates that all international courts and tribunals remain relevant, and that those concerned with achieving accountability, whether in Ukraine or elsewhere, will need to continue to use all such different courts and tribunals.

