

International Criminal Law in Action – A Case Study of the International Criminal Court’s Investigation into the Situation in Ukraine

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Summary

This master's thesis explores the opportunities and challenges faced by the International Criminal Court in its investigation of grave crimes committed in Ukraine and how these can be addressed, with a focus on the prospects of achieving justice and accountability in Ukraine and beyond.

International criminal law has made significant strides in the past decades, with the establishment of international and hybrid criminal courts and tribunals. The creation of the International Criminal Court in 2002 entailed a beacon of hope for victims of the most serious crimes of concern to the international community who have been denied justice and accountability in their own countries. The International Criminal Court has since its establishment faced criticism regarding its effectiveness, impartiality, and selectivity resulting in loss of faith in the international criminal justice system. However, the recent Russian invasion of Ukraine presents an opportunity for the International Criminal Court to address this criticism and rectify past shortcomings as the investigation has received unprecedented support from States as well as international and regional organisations.

By conducting a single case study and employing an interdisciplinary research approach, combining the doctrinal legal research method and the qualitative research method, the thesis aims to analyse the International Criminal Court's unprecedented investigation into war crimes, crimes against humanity and genocide committed in Ukraine and seeks to identify ways to address them. This is done by analysing three important aspects of the investigation: complementarity, evidence collection, and bringing perpetrators to trial in the Hague. The study concludes that the International Criminal Court's investigation in Ukraine represents an opportunity for the Court to restore confidence, maintain support from member States, and fulfil its mandate of ending impunity for the most serious international crimes not only in Ukraine but also in future investigations. By leveraging the experience and lessons learned from this investigation, the Court can strengthen its ability to ensure justice and accountability in future cases. However, the outcome of the investigation will determine the impact on the International Criminal Court's legitimacy and future support, as its credibility and reputation with member States could be jeopardised if the Court fails to achieve success under such favourable circumstances. The study also considers additional avenues for promoting accountability, including accountability for the crime of aggression, in the concluding reflections. The findings do not aim to provide complete or final answers, but to provide insight into the opportunities and challenges related to the International Criminal Court's investigation in Ukraine, as well as considerations and limitations that could be applied by the International Criminal Court to future situations to ensure justice and accountability for victims.

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1. Introduction

“At a time of erosion of the rule of law, attempts to undermine the international order, and challenges to multilateral solutions when it is clear that other approaches fail, an effective ICC is more important than ever.”¹

Former Presidents of the Assembly of States Parties

In the past 25 years, international criminal law ('ICL') has developed into a well-established and extensively studied area of international law, resulting in the creation of several international and hybrid criminal courts and tribunals such as The International Military Tribunal at Nuremberg following World War II and the Special Court for Sierra Leone.² These contributed to a surge of positivity and optimism surrounding ICL, which culminated in the establishment of the International Criminal Court ('ICC' or 'Court') in 2002 in the Hague, referred to by legal scholar Kenneth Anderson as "one of the most remarkable phenomena in international law"³ in recent years. The Court is founded by the Rome Statute ('Statute') as a beacon of hope for victims of "the most serious crimes of concern to the international community"⁴ who have been denied justice and accountability in their own countries. Its mandate is to prosecute individuals responsible for serious international crimes namely war crimes, crimes against humanity, genocide, and the crime of aggression.⁵ Despite the existence of international law prohibiting these crimes, perpetrators continue to act with impunity, undermining the legitimacy⁶ of the international criminal justice system, including the ICC.⁷ This has created a period of instability and change in the field of ICL and raised doubts about its ability to provide accountability and justice to victims and affected communities creating uncertainty about whether the field can meet the high expectations placed upon it.⁸

¹ Prince Zeid Raad Al Hussein and others, 'The International Criminal Court Needs Fixing' (*Atlantic Council*, 24 April 2019).

² Joanna Nicholson, 'Introduction' in Joanna Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill | Nijhoff 2018) pp. 2–3.

³ Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20 *European Journal of International Law* 331-358, p. 331.

⁴ International Criminal Court, *Rome Statute of the International Criminal Court* (2011) p. 1.

⁵ Also referred to as Article 5 crimes, international crimes, grave crimes, atrocity crimes, and atrocities. James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) p. 679.

⁶ Legitimacy refers to the perception of an institution's authority as appropriately exercised, deserving respect and obedience. The argument presented here revolves around the assessment of the Court's legal legitimacy, specifically in relation to the decisions it renders as described in fn 4 in Gabrielle McIntyre, 'The Impact of a Lack of Consistency and Coherence- How Key Decisions of the International Criminal Court Have Undermined the Court's Legitimacy' (2020) *Questions of International Law* 25-57, p. 26.

⁷ See Amnesty International, 'Amnesty International Report 2021/22' (2022).

⁸ Nicholson, *supra* note 2, p. 1.

The ICC has since its establishment faced criticism from member and non-member states, scholars and other observers regarding its effectiveness, efficiency, and impartiality. Some of the criticism include allegations of an "African bias" due to most cases being in African countries.⁹ This has led to threats of withdrawal from some African States Parties, and in the case of Burundi, a *de facto* withdrawal.¹⁰ The ICC has also been accused of selective justice and a perceived failure to hold powerful countries accountable, such as the United States ('US') in Afghanistan. This criticism suggests that the ICC is creating a hierarchy of victims, with some being seen as more deserving of justice than others.¹¹ Additionally, the ICC has faced criticism for only initiating cases involving one party to a conflict.¹² Finally, there has also been critique from non-States Parties who accuse the ICC of violating state sovereignty,¹³ and States Parties have raised concerns about the Court's lack of effectiveness and funding management.¹⁴ As a result, the Court's credibility and legitimacy have been increasingly questioned. The legal scholar William Schabas described it in 2020 as follows: "Two decades after the Rome Conference, the Court, like the world, finds itself in a state of crisis."¹⁵ However, the recent horrific events in Europe may provide an opportunity to address and counter this criticism and rectify past shortcomings.

The Russian full-scale invasion of Ukraine on 24 February 2022 is one of the clearest violations of the prohibition of use of force as enshrined in Article 2(4) of the United Nations ('UN') Charter¹⁶ since its entry into force.¹⁷ The invasion brought the issue of justice and accountability to the forefront of

⁹ See generally Kai Ambos, 'Expanding the Focus of the "African Criminal Court"' in William Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Taylor & Francis Group 2013).

¹⁰ Agence France-Presse, 'Burundi Becomes First Nation to Leave International Criminal Court' *The Guardian* (28 October 2017).

¹¹ Maria Elena Vignoli, 'The Long – Yet Still Uneven – Arc of International Justice' (*Opinio Juris*, 27 January 2023).

¹² Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending War and Building Peace* (Oxford University Press 2016) pp. 167–172.

¹³ See for example Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-650, p. 619; Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2005) 16 *European Journal of International Law* 979-10000, p. 984.

¹⁴ Group of Independent Experts, 'Independent Expert Review of the International Criminal Court and the Rome Statute System (ICC-ASP/19/16)' (2020) para 949.

¹⁵ William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2020) p. 50.

¹⁶ United Nations, *Charter of the United Nations* (1945).

¹⁷ Tom Dannenbaum, 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine' (*Just Security*, 10 March 2022).

the international agenda.¹⁸ The UN General Assembly ('UNGA') responded promptly to the invasion by adopting a resolution on 2 March 2022, stating "that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades...",¹⁹ citing the use of force against Ukraine as a war of aggression.²⁰

Since then, claims and evidence of alleged war crimes, crimes against humanity, and genocide committed during the Russian war of aggression have been widely discussed.²¹ Less than a week after the invasion, ICC Prosecutor Karim Khan announced his decision to open an investigation into the situation in Ukraine after receiving 39 State Party referrals,²² which later rose to 43, for the first time in history.²³ International lawyers have stated that the prompt and decisive action taken by the ICC in Ukraine is an encouraging sign for victims of mass atrocities worldwide.²⁴ The investigation has until now received unprecedented levels of attention, support, and resources from States Parties and observer States, making it a unique and remarkable case for the Court.²⁵ On 17 March 2023, the investigation took a step forward when the ICC issued arrest warrants for President Vladimir Putin and Maria Lvova-Belova, Russia's Commissioner for Children's Rights, for war crimes.²⁶ States, scholars and others in the field of international security and law have referred to the arrest warrants as a historic event and a step towards accountability,²⁷ but the warrants also carry potential legal, political, and institutional implications that must be considered.²⁸

¹⁸ "Undeniable Need for Accountability" in Ukraine as Violations Mount' (*UN News*, 18 October 2022); James FitzGerald, 'Ukraine War: Putin Should Face Trial This Year, Says Top Lawyer' *BBC News* (1 January 2023).

¹⁹ UN General Assembly, 'Aggression against Ukraine' (2022) A/RES/ES-11/1, p. 2.

²⁰ *ibid*, para 2.

²¹ See for example Human Rights Watch, 'Ukraine: A Year of Atrocities, Justice Essential' (23 February 2023); Jonathan Leader Maynard, 'Is Genocide Occurring in Ukraine? An Expert Explainer on Indicators and Assessments' (*Just Security*, 6 April 2022).

²² Office of the Prosecutor, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' (2 March 2022).

²³ 'Ukraine (ICC-01/22)' (ICC).

²⁴ See for example Rayhan Asat, 'When Do We Call Russia's Atrocities a Genocide?' (*Lawfare*, 25 May 2022).

²⁵ Iryna Marchuk and Aloka Wanigasuriya, 'The ICC and the Russia-Ukraine War' (2022) 26 *ASIL*; Giorgi Nakashidze, 'Uniting for Justice: Group Referrals to the International Criminal Court' (*Opinio Juris*, 25 March 2022).

²⁶ ICC, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova'.

²⁷ See for example France Diplomacy [@francediplo_EN], 'ICC Arrest Warrant against Vladimir Putin and Maria Lvova-Belova' (*Twitter*, 17 March 2023); Minister of Foreign Affairs Gabrielius Landsbergis LT [@GLandsbergis], 'Lithuania: History Is Being Made' (*Twitter*, 17 March 2023); Rebecca Hamilton, 'The ICC Goes Straight to the Top: Arrest Warrant Issued for Putin' (*Just Security*, 17 March 2023).

²⁸ Miles Jackson, 'The ICC Arrest Warrants against Vladimir Putin and Maria Lvova-Belova – An Outline of Issues' (*EJIL: Talk!*, 21 March 2023).

The ICC investigation in Ukraine and the demand for accountability present a unique opportunity to strengthen the perception and respect for international law by holding perpetrators accountable for atrocities committed in Ukraine. The investigation in Ukraine could also help address the criticism directed towards the ICC. The subject of this research is therefore the unprecedented ICC investigation into grave crimes committed in Ukraine because it presents an opportunity for the Court to gain momentum and fulfil its mandate of ensuring that "the most serious crimes of concern to the international community as a whole must not go unpunished."²⁹ If the ICC is able to conduct a thorough and impartial investigation in Ukraine, it could help to restore confidence in the Court and its ability to close the 'impunity gaps' and ensure justice and accountability for victims. In contrast, if the Court fails to achieve significant success under such favourable circumstances, its credibility and reputation with member States, especially with some of its greatest European supporters, could be jeopardised.³⁰

This study aims to analyse the opportunities and challenges facing the ICC in investigating alleged war crimes, crimes against humanity, and genocide committed in Ukraine. The analysis will involve examining legal instruments, ICC case law, blog entries, and other relevant sources. Additionally, this study seeks to identify effective approaches in addressing the identified opportunities and challenges to ensure the Court fulfils its mandate and maintains member-States' and victims' faith in the Court.

²⁹ Statute, *supra* note 4, preamble.

³⁰ David Bosco, 'The ICC's Impact in Ukraine' (*Lawfare*, 27 October 2022).

1.1. Research Question

The central guiding research question is therefore the following:

What opportunities and challenges are associated with the unprecedented ICC investigation into grave crimes committed in Ukraine, and how can these be addressed to ensure justice and accountability for victims of atrocity crimes in not only the situation in Ukraine but also in future investigations?

To ensure a nuanced answer to the research question, the following sub-questions have been derived according to which the analysis chapters will be structured:

1. What are the opportunities and challenges the ICC faces in relation to the principle of complementarity in the investigation of grave crimes in Ukraine and how can they be addressed?
2. What are the opportunities and challenges the ICC faces in collecting evidence of grave crimes committed in Ukraine and how can they be addressed?
3. What are the opportunities and challenges associated with bringing perpetrators of grave crimes committed in Ukraine to trial in the Hague and how can they be addressed?

The themes of the sub-questions are designed to cover crucial operational aspects of the ICC investigation in Ukraine after reviewing extensive literature on ICC investigations.³¹ Moreover, the three themes reflect the strategy of the Office of the Prosecutor ('OTP') which focuses on promoting complementarity-related activities and creating impact in the courtroom.³²

In selecting these three sub-questions, others were necessarily excluded, but the selected themes have been assessed to offer valuable insights into the complexities of the ICC's investigation in Ukraine. The sub-questions are structured in a logical progression, with each question building on the previous one, providing a structured framework for analysing the opportunities and challenges associated with the ICC's investigation in Ukraine and identifying ways to address them.

³¹ Schabas, *supra* note 15, pp. 260–284.

³² Office of the Prosecutor, 'Annual Report of the Office of the Prosecutor – 2022' (ICC 2022) p. 21.

1.2. Concept Clarification

The study adheres to the principle of *in dubio pro reo*, presuming the innocence of individuals charged with criminal offenses until proven guilty according to law.³³

The reference to "opportunities" and "challenges" in the research question is to be understood as follows: Opportunities refer to the potential avenues that can advance the work of the ICC and contribute to the effective administration of justice and accountability for victims. These opportunities may include supportive international cooperation, new legal precedents, new investigative techniques, or other factors that enhance the Court's ability to address atrocity crimes not only in the Ukraine situation but also in future investigations. Challenges, on the other hand, are perceived as potential obstacles or barriers to the work of the Court and the administration of justice and accountability for victims. These challenges may encompass legal, political, practical, or evidentiary obstacles that could hinder the progress of the ICC investigation.

Accountability is to be understood as the ICC having the authority to assess and judge whether individuals have fulfilled their responsibilities as outlined in the Statute.³⁴ Justice is to be understood as not just states and the ICC prosecuting and punishing perpetrators of international crimes, but also to deliver justice to victims through participation and reparations.³⁵ Victims are seen as "a vital actor in the justice process rather than a passive recipient of services and magnanimity"³⁶, which has been incorporated into the ICC Victim Strategy.³⁷ In addition, the term 'victims' refers to both the Ukrainian and Russian victims.

1.3. Delimitation

The study focuses on the ongoing ICC investigation into the situation in Ukraine, starting from its opening on March 2, 2022.³⁸ While the Court has jurisdiction over alleged war crimes, crimes against humanity, and genocide committed in Ukraine, the focus is on the opportunities and challenges associated with the investigation into the situation in Ukraine, rather than a comprehensive analysis of the crimes committed.³⁹ Therefore, the study primarily examines the Court's actions in relation to the investigation, with specific reference to the identified sub-questions.

³³ Statute, *supra* note 4, Article 66.

³⁴ Robert O. Keohane and Ruth W. Grant, 'Accountability and Abuses of Power in World Politics' (2005) 99 *The American political science review* 29-43, p. 29.

³⁵ Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague' (2015) 13 *Journal of International Criminal Justice* 281-311, p. 289.

³⁶ ICC, 'Court's Revised Strategy in Relation to Victims (ICC-ASP/11/38)' (2012) para 6.

³⁷ *ibid.*

³⁸ Office of the Prosecutor, *supra* note 22.

³⁹ For an overview of the characteristics of the crimes, see Article 5-8 of the Statute, *supra* note 4.

This study acknowledges that one of the primary challenges associated with the investigation in Ukraine is the ICC's jurisdictional limitations that prevent it from investigating and prosecuting this textbook example of the crime of aggression⁴⁰ – the leadership crime⁴¹ that is considered to be the underlying cause of the other crimes under investigation in Ukraine.⁴² However, the study deliberately excludes the crime of aggression from the research question and sub-questions, focusing instead on the opportunities and challenges within the Court's mandate.

Still, the following will give a brief overview as to why the lack of jurisdiction over the Russian crime of aggression in Ukraine is identified as the greatest challenge for the ICC investigation in Ukraine.⁴³ The crime of aggression is considered "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole"⁴⁴ and is often seen as a precursor to the other international crimes, because the occurrence of aggression creates the necessary conditions for these crimes. The ICC's inability to investigate and prosecute the crime of aggression affects the Court's legitimacy and credibility, as it was established to ensure accountability for all atrocity crimes. The inclusion of aggression in the Statute was a subject of controversy, with some states pushing for its inclusion, while others opposed it due to concerns that their politicians and military leaders could be held individually responsible for invasions, including those with a humanitarian purpose.⁴⁵ Notably, some States Parties calling for accountability in Ukraine, including France, the United Kingdom, and Denmark have not ratified the crime of aggression,⁴⁶ highlighting the lack of support for the Court's jurisdiction over this crime and thereby a lack of faith in the Courts mandate.

⁴⁰ According to Article 15 *bis* (4) and (5) of the Statute the Court does not exercise jurisdiction over the crime of aggression in Ukraine. The jurisdictional restrictions will be covered in chapter 3.2.1.

⁴¹ See for instance Nikola Hajdin, 'The Nature of Leadership in the Crime of Aggression: The ICC's New Concern?' (2017) 17 *International Criminal Law Review* 543-566; Kevin J Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 *European Journal of International Law* 477-497.

⁴² International Military Tribunal (IMT) (Nuremberg), 'Judgment of 1 October 1946' *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* (October 1946) p. 25.

⁴³ The preconditions for the ICC's exercise of jurisdiction in Ukraine will be examined in chapter 3.2.1.

⁴⁴ IMT Judgment, *supra* note 42, p. 25.

⁴⁵ Tom Dannenbaum, 'The ICC at 20 and the Crime of Aggression' [2022]; Owen Bowcott, 'ICC Crime of Aggression Comes into Effect without Key Signatories' *The Guardian* (17 July 2018).

⁴⁶ 'Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression' (crimeofaggression.info).

Therefore, investigating and prosecuting the crime of aggression in Ukraine would be an ideal way for the ICC to ensure justice and accountability in the country. Ensuring accountability for the crime of aggression would send a strong message to potential aggressors, set a precedent, and establish the ICC as a credible and effective international court. Moreover, it would strengthen the rule of law and provide the victims and affected communities with the justice they deserve. Chapter 7.1 will explore alternative avenues for ensuring accountability for the crime of aggression in Ukraine.

1.4. Structure

The structure of the study adheres to the following format.

Chapter 2 is the methodology chapter which describes the interdisciplinary research approach used to examine the ICC investigation in Ukraine. It also details the research method, which includes case study and qualitative- and doctrinal legal research methods. The section furthermore explains the choice of case, data collection, considerations, limitations, and the interpretive framework. Chapter 3 provides an understanding of the legal framework governing the ICC and its investigation to serve as a basis for the subsequent analysis. It provides information on the ICC and its role in international law and examines the Statute and its key provisions.

Chapters 4-6 provide the analysis based on the three sub-questions outlined above. Chapter 4 examines the ICC's role in promoting complementarity-related activities and its cooperation with Ukraine, as the principle of complementarity is central to the ICC's mandate. Chapter 5 examines the importance of evidence collection, which is essential in building robust cases against alleged perpetrators. Chapter 6 examines the process of bringing these perpetrators to trial in The Hague, which is a critical step in achieving justice and accountability. Preliminary conclusions are drawn at the end of each chapter. Chapter 7 will provide the conclusion as well as considerations on additional avenues for promoting justice and accountability in Ukraine including suggestions for ensuring accountability for the crime of aggression.

2. Methodology

The following chapter will account for the overall methodological framework by explaining how I intend to answer the research question as well as arguing for the choices made throughout the study. It begins with an introduction to the interdisciplinary research approach. This will be followed by the chosen research method – single case study, followed by a presentation of the chosen case. Hereafter, I will briefly touch upon data collection and the opt-ins and opt-outs that have been made in relation hereto. Then, the potential drawbacks and limitations of the research will be outlined, particularly considering that the primary emphasis of the study is on an ongoing investigation into a situation that is constantly evolving. Finally, I will introduce the interpretive framework used throughout the study.

2.1. Methodological Framework – The Interdisciplinary Research Approach

This research takes an interdisciplinary approach to the study given the complexity of the ICC investigation in Ukraine, drawing primarily on the field of international law while incorporating insights from political science to address the research question. The interdisciplinary research approach expressed by scholars P. Ishwara Bhat and Lydia Nkansah & Victor Chimbwanda will serve as the framework for this research and will be briefly outlined below.

The most used approach in international law has been the doctrinal legal research method, which relies on legal texts, statutes, and case law to enable lawyers to interpret and present legal knowledge effectively.⁴⁷ This approach typically does not involve generating new knowledge, as it draws from existing judicial decisions and imparts relevant skills.⁴⁸ Given that law concerns human behaviour and is an interdisciplinary subject with strong connections to fields such as sociology, political science, psychology, economics, and criminology, some scholars find that international law benefits from an integrated and interdisciplinary approach that considers multiple perspectives and views in a holistic manner, rather than being confined to narrow disciplinary boundaries.⁴⁹ Therefore, the choice of utilising the interdisciplinary approach is made to provide a more comprehensive analysis of the ICC investigation in Ukraine, drawing on multiple perspectives and approaches to better understand the opportunities and challenges in ensuring justice and accountability in the Ukraine situation and beyond.⁵⁰

⁴⁷ Lydia A. Nkansah and Victor Chimbwanda, 'Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm' (2016) 3 Asian Journal of Legal Education 55-71, pp. 57–58.

⁴⁸ *ibid*, pp. 58–59.

⁴⁹ P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press 2020) p. 7.

⁵⁰ *ibid*.

The interdisciplinary approach often involves collecting data and information from various sources, including legal sources.⁵¹ This helps provide an understanding of the phenomenon that is being studied, and to consider it from multiple perspectives. My collection of data involves using qualitative methods which offer in-depth examination and interpretation of relevant information on legal and political factors, as it uses “words as data . . . collected and analyzed in all sorts of ways.”⁵² Furthermore, the qualitative research method is appropriate for examining a recent phenomenon that lacks established theories or variables to explain it, as it seeks to understand the meaning and interpretation of the phenomenon from the perspective of those who have direct experience with it.⁵³ Given this, the interdisciplinary research approach is considered appropriate for studying the ongoing ICC investigation in Ukraine.

Due to the complexity of the situation in Ukraine, a narrow or single-disciplinary approach focused solely on legal issues would not provide a comprehensive understanding of the ICC investigation, because political factors are also significant, as the ICC is not solely a legal entity, but also subject to states' political agenda.⁵⁴ Moreover, the ICC's activities have significant political, legal, and human implications that cannot be fully understood without examining the broader social context in which they occur.⁵⁵ Therefore, this study is set apart from a single-disciplinary study of the ICC investigation in Ukraine by seeking to enhance the understanding and application of the law in a social context, thereby addressing the relationship between the legal system and the broader social system.⁵⁶

2.2. Research Methods

To identify the opportunities and challenges faced by the ICC in Ukraine and how to address them, the research utilises the methods of single case study and qualitative research,⁵⁷ combined with the doctrinal legal research method.⁵⁸ The following provides an overview of how these will be applied in the analysis.

The doctrinal legal research method will be applied to analyse and evaluate the legal opportunities and challenges associated with the ICC investigation in Ukraine, focusing on legal instruments, case

⁵¹ *ibid*, p. 11; Nkansah and Chimbwanda, *supra* note 47, p. 62.

⁵² Braun and Clarke (2013), as cited in Sharan B. Merriam and Elizabeth J. Tisdell, *Qualitative Research: A Guide to Design and Implementation* (John Wiley & Sons 2015) p. 6.

⁵³ Nkansah and Chimbwanda, *supra* note 47, p. 63.

⁵⁴ Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34 *Third World Quarterly* 800-818, p. 802.

⁵⁵ *ibid*.

⁵⁶ Nkansah and Chimbwanda, *supra* note 47, p. 56.

⁵⁷ Merriam and Tisdell, *supra* note 52, pp. 5–8.

⁵⁸ Bhat, *supra* note 49, p. 11.

law, and other legal documents.⁵⁹ The qualitative method will be used to identify and analyse opportunities and challenges within the realm of politics by using secondary sources and data, such as expert opinions in the form of blog entries, webinars, interviews and podcasts as well as articles, scholarly publications (e.g. journal articles, monographs, and textbooks), and reports.

Throughout the analysis chapters, relevant international criminal cases will be used as illustrative examples to support the arguments. The aim is to uncover valuable insights that can contribute to the success of the ICC investigation in Ukraine and future situations. While these cases will not be explained in depth, adequate references will be provided in case the reader is not familiar with them.

The use of the single case study, as articulated by Malcolm Tight, is an effective small-scale research method that can unravel complex issues and provide insights.⁶⁰ While the use of a single case study may limit the generalisability of the findings, this thesis does not aim to provide definitive or universal answers.⁶¹ Instead, it seeks to analyse the opportunities and challenges associated with the three specific aspects of the ICC investigation in Ukraine and identify ways to address them.

2.2.1. The Choice of Case Study

The selection of the ICC investigation in Ukraine as the focus of this research is based on several factors. Firstly, the investigation has received unprecedented support and resources from States Parties and observer States, making it a noteworthy case for the Court.⁶² Secondly, the investigation is being conducted during and ongoing international armed conflict ('IAC'), which sets it apart from the majority of other ICC investigations that have been or are being conducted in situations with non-international armed conflicts.⁶³ Finally, the unique nature of the investigation allows the Court to strengthen its credibility, legitimacy and address long-standing criticism.

Given the unprecedented level of support and resources that the ICC investigation in Ukraine has received, one may question whether it has explanatory power in relation to other investigations. Additionally, it raises the question of whether it can serve as a model for evaluating the potential impact of the ICC's efforts on justice and accountability in comparison to other investigations. Despite these questions and concerns, the investigation in Ukraine is chosen over other investigations precisely because there is no precedent. I, along with others, believe that despite challenges, the

⁵⁹ *ibid.*

⁶⁰ Malcolm Tight, *Understanding Case Study Research: Small-Scale Research with Meaning* (Sage Publications 2017) p. 43.

⁶¹ *ibid.*, p. 22.

⁶² Marchuk and Wanigasuriya, *supra* note 25; Nakashidze, *supra* note 25.

⁶³ ICC, 'Situations Under Investigation'.

investigation in Ukraine offers hope that even individuals from powerful states like Russia cannot evade accountability, and that victims may ultimately achieve justice, despite the initial improbability.⁶⁴

2.2.2. Data Collection

Data collection has been conducted through desk research to gather qualitative data for the analysis. This approach was chosen because it allows for a systematic and informed exploration of the research question and sub-questions.⁶⁵

Qualitative research relies on the researcher as the primary data collection tool, which can introduce bias.⁶⁶ To mitigate this, the data collection process gave equal attention to corroborative data and diverse views and opinions. Attention was paid to the fact that the purpose of the study was not to arrive at a singular truth, but rather to present the multitude of perspectives and variables involved. To ensure the accuracy and reliability of information, this study employed source criticism techniques, utilising only well-established and reputable sources and fact-checking questionable information while multiple sources of data have been used to confirm findings. The data was collected with a focus on legal documents supported by OTP and other press releases, journal articles, various blog entries and discussions, webinars, documents and reports from international and regional organisations, newspaper articles, information available on websites, and podcasts. Several practical considerations influenced the choice of data collection method for this qualitative study. Due to limited access to interviewees, security concerns, and time constraints, interviews and fieldwork were not conducted. However, valuable insights from professionals and experts were obtained through webinars, podcasts, blogs, and news articles, allowing for information gathering from secondary sources. The data collection was a continuous process throughout the completion of the study due to the ICC investigation being ongoing and therefore new information and data emerges regularly.

⁶⁴ Marchuk and Wanigasuriya, *supra* note 25; Milena Sterio and Yvonne Dutton, 'The War in Ukraine and the Legitimacy of the International Criminal Court' (*Just Security*, 30 August 2022).

⁶⁵ Merriam and Tisdell, *supra* note 52, pp. 18–19.

⁶⁶ Nkansah and Chimbwanda, *supra* note 47, p. 70.

2.3. Considerations and Limitations

As highlighted in this chapter, several factors influence the extent of the research results.

This section will address the potential challenges of the study, including strategies to address them, and considerations for their potential impact on the findings.

Firstly, collecting data on the ICC investigation and the conflict in Ukraine may have been challenged due to the prevalence of systematic information manipulation, disinformation and propaganda used by both parties to the conflict as part of their information warfare. Russia, in particular, uses disinformation to conceal their crimes, potentially leading to inaccurate and misleading information.⁶⁷ To counter this, my focus has been on being aware of these potential pitfalls and strive for objectivity throughout the study by using trustworthy sources and corroborative data. How this potentially affects the ICC's investigation will be examined in chapter 5.

Secondly, the ongoing nature of the ICC investigation and the war in Ukraine poses a limitation as data sources may quickly become outdated. Moreover, since the conflict and investigation are highly current, international lawyers and scholars have not yet fully developed theories, examinations, and assessments of whether and how the events will affect the ICC and international law. Monographs, edited volumes, and journal articles have therefore primarily been used in chapter 2 and 3. Consequently, this could impact the study's academic quality, as the analysis mainly relies on sources with the latest information, such as various international security and law blogs, press statements, and online news media. To mitigate this, measures have been taken to ensure the reliability of the information, such as utilising blogs authored by recognised experts in their respective fields.

Lastly, it is important to emphasise that the conclusion of this study is specific to the prevailing conditions related to the ICC investigation at the time of writing and may change if the situation changes. Hence, the findings do not aim to provide complete or final answers, but to provide insight into the opportunities and challenges related to the ICC investigation in Ukraine, as well as considerations and limitations that could apply to other similar situations to ensure justice and accountability.

⁶⁷ Stuart A. Thompson and Davey Alba, 'Fact and Mythmaking Blend in Ukraine's Information War' *The New York Times* (8 March 2022).

2.4. Interpretive Framework

The following will address the interpretive framework applied in this study. Interpretation is a crucial component of international law, as the language used often can be subject to multiple interpretations, impacting the obligations of member States towards the Court and the rights of victims and defendants.⁶⁸

The Statute itself does not specifically cover how interpretation must be conducted, although Article 21(3) states that interpretation “must be consistent with internationally recognized human rights” and Article 22(2) establishes the principle of *in dubio pro reo*.

A review of literature and commentaries on the Statute indicates that the question of how to interpret the Court's legal instruments has been a controversial topic among legal scholars and practitioners.⁶⁹ While the majority of legal scholars find that the customary rules of interpretation as set out in Article 31 and 32 of the Vienna Convention on the Law of Treaties (‘VCLT’)⁷⁰ apply to the Statute because it has the status of an international treaty,⁷¹ a minority is more sceptical and has raised concerns about the potential risks of ambiguity and unpredictability in applying the law, particularly in criminal law, where the principle of legality demands clear and predictable laws.⁷²

The VCLT prescribes four methods of interpretation: textual, contextual, teleological, and historical.⁷³ The Court has practiced that interpretation should be based on these principles,⁷⁴ with a focus on its textual, contextual, and teleological aspects.⁷⁵ Textual interpretation is strict and narrow and focuses on the literal and precise meaning of the law without considering its broader context or

⁶⁸ Mikaela Heikkilä, ‘Article 21’ in Mark Klamberg (ed), *Commentary on the law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017) p. 243.

⁶⁹ *ibid.*

⁷⁰ UN, *Vienna Convention on the Law of Treaties* (1969).

⁷¹ See for instance William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Second edition, Oxford University Press 2016) p. 517; Dapo Akande, ‘Treaty Interpretation, the VCLT and the ICC Statute: A Response to Kevin Jon Heller & Dov Jacobs’ (*EJIL: Talk!*, 25 August 2013).

⁷² Dov Jacobs argues that the principle of legality requires the rejection of the application of the more forward leaning and expansive approach to interpretation. See Dov Jacobs, ‘International Criminal Law’ in Jörg Kammerhofer and Jean D’Aspremont (eds), *International legal positivism in a post-modern world* (Cambridge University Press 2014) pp. 466–470.

⁷³ Alina Kaczorowska, *Public International Law* (Routledge 2010) p. 123.

⁷⁴ For examples, see Situation in the Democratic Republic of the Congo (ICC-01/04), ‘Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal’ *Appeals Chamber* (13 July 2006) para 33; *The Prosecutor v. Thomas Lubanga Dyilo* (ICC 01/04), ‘Decision on the Practices of Witness Familiarisation and Witness Proofing’ *Pre-Trial Chamber* (8 November 2006) para 8.

⁷⁵ Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017) p. 243.

purpose. Advocates of this approach believe that international law must be applied consistently and predictably, based solely on plain language, not considering factors like policy objectives or intentions. Critics say this approach ignores the dynamic and evolving nature of international law, as well as its broader context and purpose shaped by various factors including politics, economics, and society.⁷⁶ Contextual interpretation considers the text within its broader context by considering the surrounding provisions and the *travaux préparatoires* (preparatory work). Critics argue that it can be subjective and may result in an expansion of the sources of interpretation beyond the text of the instrument itself.⁷⁷ Teleological interpretation is a more forward leaning and expansive approach that reflects the object and purpose of the treaty, allowing for flexibility in interpretation considering societal and political developments. Critics argue that this approach may create uncertainty.⁷⁸ At first glance, these approaches may seem contradictory, but the International Law Commission has emphasised that for a more accurate and comprehensive interpretation of a treaty, the approaches should be considered in conjunction rather than as mutually exclusive.⁷⁹

Interpretation can be undertaken by the Court, states, and researchers alike, and involves making a policy choice by applying the relevant rules of treaty interpretation to justify a particular perspective.⁸⁰

As Cullen, Kastner and Richmond argue, “These ongoing disagreements and conflicting interpretations suggest that ICL and its institutions can act as discursive sites where international actors seek to denounce, legitimate and pursue their respective political interests.”⁸¹

Understanding the interpretive framework is thus useful when examining why the Court or states act the way they do based on their interpretation of the given law.

Throughout the study I have used the different approaches in conjunction, but with an emphasis on the object and purpose-based approach when the text was ambiguous, aiming to determine a meaning that aligns with the object and purpose of the Statute and the intended functioning of the ICC. In chapter 3.2, the examination of the Statute's object and purpose helps identify which interpretation of the various articles is consistent with the intentions with which the Court was founded and has been used to support the analysis.

⁷⁶ Kaczorowska, *supra* note 73, p. 124.

⁷⁷ *ibid*, pp. 124–125.

⁷⁸ *ibid*, pp. 125–126.

⁷⁹ UN, *Yearbook of the International Law Commission 1966, Vol. II* (UN 1966) p. 220.

⁸⁰ Talita de Souza Dias, ‘The Nature of the Rome Statute and the Place of International Law before the International Criminal Court’ (2019) 17 *Journal of International Criminal Justice* 507-535, pp. 534–535.

⁸¹ Holly Cullen, Philipp Kastner, and Sean Richmond, ‘Introduction: The Politics of International Criminal Law’ (2018) 18 *International Criminal Law Review* 907-927, p. 912.

3. The International Criminal Court

“Determined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes.”⁸²

The Rome Statute

This chapter provides an understanding of the legal framework governing the ICC and its investigation into the situation in Ukraine to serve as a basis for the subsequent analysis of the opportunities and challenges associated with the investigation. Understanding the legal framework that underpins the ICC's investigation, including the specific legal issues at play, is crucial to fully grasp these opportunities and challenges. The chapter includes an examination of the relevant provisions of the Statute as well as the key legal issues arising in relation to the investigation in Ukraine.

3.1. Background Information on The ICC and its Role in International Law

The Court's jurisdiction has been in effect since 1 July 2002 and there are currently 123 States Parties to the Statute.⁸³ The Court has opened 31 cases with four leading to convictions and three cases resulting in acquittals,⁸⁴ two ongoing preliminary examinations with eight closed and decided not to proceed,⁸⁵ as well as 17 ongoing investigations.⁸⁶

The adoption of the Statute in 1998 marked a significant event in the history of international law when the international community opted for collective action, thereby laying the groundwork for the creation of the ICC, which according to legal scholar Robert Cryer was the “most important development in international criminal law” since Nuremberg.⁸⁷ This not only resulted in the creation of a stronger legal framework for prosecuting grave international crimes, but has also contributed to a rise in the number of domestic prosecutions, including those based on universal jurisdiction, albeit

⁸² Statute, *supra* note 4, preamble.

⁸³ ICC, ‘The States Parties to the Rome Statute’.

⁸⁴ ICC, ‘Cases’.

⁸⁵ ICC, ‘Preliminary Examinations’.

⁸⁶ ICC, *supra* note 63.

⁸⁷ Robert Cryer, ‘International Criminal Law’ in Malcolm D Evans (ed), *International law* (Oxford University Press 2018) p. 762.

still a small number.⁸⁸ The primary legal framework of the Court consists of the Statute, the Rules of Procedure and Evidence⁸⁹ ('Rules'), and Elements of Crimes⁹⁰ ('Elements').⁹¹

The Statute provides the legal foundation for holding individuals accountable for war crimes, crimes against humanity, the crime of genocide, and the crime of aggression since July 2018.⁹² The Rules provides detailed guidance on the functioning of the Court, including investigations and trials. They are essential to ensure that proceedings before the Court are conducted fairly and effectively, as they also set out the provisions related to evidence, the role of victims and witnesses, as well as the rights of suspects and accused persons.⁹³ The Elements provides a detailed definition of specific crimes within the ICC's jurisdiction and the required elements that must be proven for a conviction.

3.2. Key Provisions of the Statute

The preamble of the Statute provides the key provisions relating to the object and purpose and should therefore be taken into consideration when interpreting and applying the operative part of the Statute.⁹⁴ The Court has on several occasions, including in the *Bemba* case, supported this view and stated that the purpose of the Statute may be identified with reference to "the wider aims of the law as may be gathered from its preamble."⁹⁵

The relevant paragraphs will be operationalised and listed as primary objectives. Each statement will be assigned a number for clarity and presented in a listed format.

The preamble starts out by setting the framework, highlighting the background and historical context for the Court's establishment, by stating that 1) "millions ... have been victims of unimaginable atrocities" and that "such grave crimes threaten the peace, security and well-being of the world."

This is followed by, 2) "the most serious crimes of concern to the international community ... must not go unpunished", and 3) "... their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

⁸⁸ Crawford, *supra* note 5, p. 671; Asymmetrical Haircuts, 'Has Universal Jurisdiction Come of Age?' (*JusticeInfo.net*, 1 May 2023).

⁸⁹ ICC, 'Rules of Procedure and Evidence' (2019).

⁹⁰ ICC, 'Elements of Crimes' (2010).

⁹¹ ICC, 'Core ICC Texts' (*Resource library*).

⁹² ICC, 'The ICC at a Glance (Factsheet)'.

⁹³ Rules, *supra* note 89, Primarily chapters 2-6.

⁹⁴ Otto Triffterer, Morten Bergsmo, and Kai Ambos, 'Preamble' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck 2016) p. 4; VCLT, *supra* note 70, Article 31(2).

⁹⁵ Situation in the Democratic Republic of the Congo, *supra* note 74, para 33. The Appeals Chamber later referred to this judgment in the *Bemba* case, see *The Prosecutor v. Bemba et al* (ICC-01/05-01/08), 'Decision Adjourning the Hearing Pursuant to Article 61(7)(c)(ii) of the Rome Statute' (3 March 2009) para 31.

Stating that the Court is 4) “determined to put an end to impunity ... and thus to contribute to the prevention of such crimes”, and highlighting that, 5) “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” Determined to 6) “establish an independent permanent International Criminal Court ... with jurisdiction over the most serious crimes of concern to the international community”, that the Court 7) “shall be complementary to national criminal jurisdictions” and finally, 8) “ensure lasting respect for and the enforcement of international justice.”⁹⁶

Some of the preambular paragraphs overlap and six primary objectives has been identified:

- I. Ensure accountability and end impunity (See 2 and 4).
- II. Prosecute grave international crimes (See 3).
- III. Prevent future mass atrocities and thereby contribute to peace, security, and the well-being of the world (deterrence⁹⁷) (See 1 and 4).
- IV. Encourage State cooperation (See 3).
- V. Establish an independent permanent Court to ensure respect for and enforcement of international justice (See 6 and 8).
- VI. To do so under the principle of complementarity (See 5 and 7).

The identified objectives are not entirely distinct, but rather interconnected. The primary objectives reflect the Court's mandate and serve as a basis for analysing the opportunities and challenges associated with the investigation in Ukraine and how these can be addressed to ensure justice and accountability for victims in Ukraine and potentially beyond, thereby fulfilling the Court's mandate and object and purpose.

⁹⁶ Statute, *supra* note 4, Preamble.

⁹⁷ The ICC's goal to prevent future atrocities is by the Court and various scholars often associated with the concept of 'deterrence'. Some argue that the ICC's prosecution of international crimes can serve as a deterrent, others are sceptical about its actual deterrent effect. For advocates see for example Sam Sasan Shoamanesh and Gilles Dutertre, 'The ICC and Cultural Property: Reinforced Legal Enforcement of the Protection of Cultural Property in Armed Conflict' *International Criminal Justice Today* (22 June 2016), “*the effective investigation and prosecution of such crimes can have a deterrent impact.*”; *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15), 'Judgment and Sentence' [2016] Trial Chamber VIII, para 100, “deterrent effect on others tempted to commit similar acts in Mali and elsewhere”.

(general deterrence); Jakob von Holderstein Holtermann, 'A "Slice of Cheese"—a Deterrence-Based Argument for the International Criminal Court' (2010) 11 *Human Rights Review* 289-315, pp. 289–290. For sceptics see for example Natalie Hodgson, 'Exploring the International Criminal Court's Deterrent Potential' (2022) 19 *Journal of International Criminal Justice* 913-936, pp. 934–936.; Geoff Dancy, 'Searching for Deterrence at the International Criminal Court' in Joanna Nicholson (ed), *Strengthening the validity of international criminal tribunals* (Brill 2018) pp. 43–44.

3.2.1. The ICC's Jurisdiction over Alleged Crimes Committed in Ukraine

The ICC has jurisdictional challenges due to neither Ukraine nor Russia being States Parties to the Statute.⁹⁸ These challenges include the inability to exercise jurisdiction over the crime of aggression, questions regarding the ICC's jurisdiction over nationals of non-States Parties, and the issue of head of state immunity.

The ICC has jurisdiction over war crimes, crimes against humanity, and genocide committed on the territory of Ukraine from 21 November 2013 onwards, based on the Ukrainian *ad hoc* declarations in 2014⁹⁹ and 2015¹⁰⁰ respectively under Article 12(3) of the Statute,¹⁰¹ which grants the Court jurisdiction despite Ukraine not being a party to the Statute.¹⁰²

The Court does not exercise jurisdiction over the crime of aggression in Ukraine, as it can only exercise jurisdiction over the crime of aggression if committed both on the territory of a State Party and by its national(s).¹⁰³ The ICC can only exercise jurisdiction over the crime of aggression in Ukraine if the situation is referred by the UNSC under Article 15 *ter* of the Statute,¹⁰⁴ which is unlikely to happen due to Russia's veto power as a permanent member of the UNSC.¹⁰⁵

The second issue arising with regards to the ICC's jurisdiction in Ukraine is whether the ICC has jurisdiction over alleged crimes committed by Russian nationals. According to Article 12(2)(a) of the Statute, the Court has jurisdiction when "the State on the territory of which the conduct in question occurred" is a State Party or has accepted the Court's jurisdiction. The Court has practiced an expansive interpretation of this, exemplified in the Afghanistan situation, stating that "conducts that

⁹⁸ ICC, *supra* note 83.

⁹⁹ Embassy of Ukraine, 'Declaration (No. 61219/35-673-384)'.

¹⁰⁰ Minister for Foreign Affairs of Ukraine, 'Declaration'.

¹⁰¹ Office of the Prosecutor, 'Report on Preliminary Examination Activities (2020)' p. 68.

¹⁰² Statute, *supra* note 4, Article 12 (2)(a) and (3).

¹⁰³ Article 15 *bis* (5) of the Statute. The crime of aggression is subject to several conditions and limitations outlined in the Statute. This study will not dive deeper into these complexities. For more information, see for example Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2021) pp. 258–352.; Astrid Reisinger Coracini, 'The Kampala Amendments on the Crime of Aggression Before Activation: Evaluating the Legal Framework of a Political Compromise (Part 1)' (*Opinio Juris*, 29 September 2017); Astrid Reisinger Coracini, 'The Kampala Amendments on the Crime of Aggression Before Activation: Evaluating the Legal Framework of a Political Compromise (Part 2)' (*Opinio Juris*, 2 October 2017). And generally Claus Kreß (ed), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017).

¹⁰⁴ Niels Blokker and Stefan Barriga, 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals' in Claus Kreß (ed), *The crime of aggression: a commentary* (Cambridge University Press 2017) p. 651.

¹⁰⁵ Jennifer Trahan, 'A Reminder of the Importance of the Crime of Aggression: Considering the Situation of Russia and Ukraine' (*Opinio Juris*, 4 February 2022).

have allegedly occurred in full or in part on the territory of ... State Parties, fall under the Court's jurisdiction, regardless of the nationality of the perpetrator."¹⁰⁶

This practice has been strongly criticised by several non-member States notably Russia in relation to the investigation in Ukraine,¹⁰⁷ but also China and the US, who perceive this interpretation as a violation of State sovereignty and pre-existing international law.¹⁰⁸ The US has previously shown its opposition to the Court by using a variety of legal and political tools.¹⁰⁹

The issuance of arrest warrants against President Putin and Maria Lvova-Belova indicates the Court's stance on its jurisdiction over nationals of non-States Parties when crimes are committed on the territory of a state that has accepted the Court's jurisdiction.¹¹⁰ However, this continues to be a topic of debate and interpretation among states and scholars, as the VCLT states that "A treaty does not create either obligations or rights for a third State without its consent."¹¹¹ Despite the Statute being adopted over 20 years ago, there are therefore differing views on the extent to which parties are bound by it and the legal basis for such jurisdiction.¹¹²

3.2.2. Admissibility: Navigating the Criteria for Proceedings under the Statute

After determining its jurisdiction, the ICC conducts an admissibility test to assess the admissibility of situations and cases.¹¹³ This test considers the principles of *ne bis in idem*, complementarity, and gravity. The principle of *ne bis in idem* prevents an individual from being tried twice for the same crime.¹¹⁴ The principle of complementarity requires the ICC to defer to national legal systems to

¹⁰⁶ See for instance Situation in the Islamic Republic of Afghanistan, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (ICC-02/17-33) Pre-Trial Chamber II (12 April 2019) para 50.

¹⁰⁷ Russia at the United Nations [@RussiaUN], 'Arrest Warrant Reaction' (Twitter, 18 March 2023).

¹⁰⁸ See for example U.S. Department of State, 'Opposing International Criminal Court Attempts to Affirm Territorial Jurisdiction Over the Palestinian Situation' (Press Statement, 5 February 2021); Akande, *supra* note 13, p. 619; Cryer, *supra* note 13, p. 984.

¹⁰⁹ This includes the authorisation of the use of military force to liberate any American or citizen of a U.S.-allied country being held by the Court. See for example Human Rights Watch, 'U.S.: "Hague Invasion Act" Becomes Law' (3 August 2002); BBC News, 'International Criminal Court Officials Sanctioned by US' (2 September 2020); American Servicemembers Protection Act of 2002, Public Law 107-206 2002. For an analysis of the latter, see Floriane Lavaud, Ashika Singh, and Isabelle Glimcher, 'The American Servicemembers' Protection Act and the Dodd Amendment: Shaping United States Engagement with the ICC (Part II)' (*Just Security*, 14 February 2023).

¹¹⁰ ICC, *supra* note 26.

¹¹¹ The principle of *pacta tertiis*. VCLT, *supra* note 70, Article 34.

¹¹² Dias, *supra* note 80, p. 507.

¹¹³ Schabas, *supra* note 15, p. 181.

¹¹⁴ Statute, *supra* note 4, Articles 17(1)(c) and 20.

investigate and prosecute crimes,¹¹⁵ unless the investigating state is deemed to be "unwilling or unable genuinely to carry out the investigation or prosecution."¹¹⁶ While the gravity threshold ensures that only the most serious crimes fall within the jurisdiction.¹¹⁷ In the case of Ukraine, the gravity threshold has been met.¹¹⁸ Thus, the following focuses on the principle of complementarity, which is also regarded by William Schabas as the most important of the three.¹¹⁹

The ICC was established to complement national criminal jurisdictions and support national justice systems, rather than to replace them, to ensure that States Parties maintain their sovereign right to try crimes committed on their territory.¹²⁰ Thus, the primary responsibility for addressing atrocity crimes lies with the domestic courts where the alleged crimes were committed.¹²¹ In practice, the relationship between the ICC and national legal systems can be challenging due to differences in legal traditions, resource disparities, and political pressure.¹²²

Regarding the situation in Ukraine, the OTP has collaborated closely with Ukrainian authorities in the investigation of the high number of alleged atrocities committed in the country,¹²³ and both the OTP and Ukraine has received unprecedented support for their respective investigations.¹²⁴ Therefore, it is assessed that the 'positive complementarity' approach which encourages a more supportive relationship between the ICC, States Parties, and national justice systems in addressing international crimes is particularly relevant to the situation in Ukraine, as the ICC is unable to investigate every alleged crime committed in Ukraine due to resource limitations. Positive complementarity is defined as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials ... delivered through cooperative programmes between States themselves, as well as through international and regional organizations and civil society" within the three categories of legislative assistance, technical assistance and capacity building, and physical infrastructure.¹²⁵ The main idea is to not limit efforts to prosecute

¹¹⁵ The principle is primarily enshrined in Article 17(1)(a) and (b) of the Statute, *supra* note 4.

¹¹⁶ Statute, *supra* note 4, Article 17(1)(a).

¹¹⁷ See for example Assembly of States Parties (ASP), 'Report of the Bureau on Stocktaking: Complementarity (ICC-ASP/8/51)' (2010) p. 2.

¹¹⁸ Office of the Prosecutor, *supra* note 101, p. 71.

¹¹⁹ Schabas, *supra* note 15, pp. 182–183.

¹²⁰ Schabas, *supra* note 71, p. 447.

¹²¹ Statute, *supra* note 4, preamble and Article 1.

¹²² Schabas, *supra* note 15, p. 183.

¹²³ ICC, 'Ukraine and International Criminal Court Sign an Agreement on the Establishment of a Country Office'.

¹²⁴ Law in Action, 'Investigating War Crimes in Ukraine' (June 2022) minute 04:30-05:00.

¹²⁵ ASP, 'Resolution ICC-ASP/8/Res.9' (2010) Appendix, Report of the Bureaus on stocktaking: Complementarity, pp. 16-17.

alleged perpetrators, but instead adopt a holistic approach to ending impunity by providing assistance to strengthen national justice systems. This approach acknowledges that strengthening one aspect of the judicial sector may not yield the desired result if other areas remain weak.¹²⁶ Thus, the ICC can play a broader role in ending impunity by utilising a comprehensive approach that involves multiple actors, beyond conducting its own investigations and prosecutions.¹²⁷

However, according to William Burke-White the policy on positive complementarity has been ambiguous in practice, and the Court's track record in promoting national prosecutions has been somewhat inconsistent.¹²⁸ The investigation in Ukraine therefore offers an opportunity for the Court to operationalise positive complementarity where lessons learned can be applied to future investigations to increase the chances of ensuring accountability for grave crimes. This will be further examined in chapter 4. The principle of complementarity requires a degree of cooperation at various levels, and integrating these two essential pillars of the Statute can improve the effectiveness and efficiency of the ICC in ensuring justice for victims and thereby reducing impunity gaps.¹²⁹

3.2.3. The Critical Role of State Cooperation

The ICC relies on state cooperation for various aspects such as witness protection, funding, investigative support as well as the execution of arrest warrants. The first President and former judge of The International Criminal Tribunal for the former Yugoslavia ('ICTY'), Antonio Cassese, once made the following statement:

“The ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions.”¹³⁰

This statement holds true for the ICC as well, and lack of cooperation from States has at times impeded the Court's ability to act.¹³¹

¹²⁶ *ibid*, p. 17.

¹²⁷ William W. Burke-White, 'Reframing Positive Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) p. 343.

¹²⁸ *ibid*, pp. 342–343.

¹²⁹ Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (2016) para 7.

¹³⁰ Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2-17, p. 13.

¹³¹ Claus Kreß and Kimberly Prost, 'Part 9 International Cooperation and Judicial Assistance' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (CH Beck 2016) p. 2004.

According to Part 9 of the Statute (Articles 86-102), States Parties have an obligation to cooperate with the ICC in its investigations and prosecutions, including by arresting and surrendering suspects, providing evidence and testimony, and enforcing ICC sentences. Part 9 is complemented by Chapter 11 of Rules.¹³² Despite these obligations, there have been notable cases of non-cooperation by member States,¹³³ particularly regarding the arrest and surrender of individuals sought by the Court.¹³⁴ The *Al Bashir* case serves as an example, where warrants of arrest for Omar Al Bashir was issued more than ten years ago,¹³⁵ without being executed even though States Parties have had the opportunity to arrest him.¹³⁶ The circumstances related to this will be further examined in chapter 6.

When member States refuse to cooperate with the Court, it undermines the effectiveness of the ICC and hinders its ability to operate at its highest standards. States Parties must therefore be willing to take the necessary, and sometimes politically uncomfortable, steps to participate in the effort to end impunity.¹³⁷ However, as previously mentioned, the Court has faced challenges in this regard. The perception of an African bias¹³⁸ and selective justice has strained the ICC's relationships with member states, resulting in poorer cooperation.¹³⁹ Furthermore, the Group of Independent Experts' evaluation of the ICC in 2020 highlighted that many States Parties were dissatisfied with the Court's performance, specifically its inability to effectively reduce the incidence of international crimes through convictions and deterrence.¹⁴⁰ This frustration has contributed to the Court's operational challenges and it is therefore crucial for the ICC to improve its operations and cooperation with States Parties to enhance its legitimacy, operational capacity, and political support. The investigation in

¹³² Rules, *supra* note 89, Rules 176-197.

¹³³ Kreß and Prost, *supra* note 131, p. 2004.

¹³⁴ State cooperation in post-conviction matters has also been challenging, but will not be examined here, as the prospects for conviction and provisional release are currently uncertain. For more information see for example Xavier-Jean Keïta, 'Defence Perspectives: State Cooperation and ICC Detention: A Decade Past an Arrest Warrant' in Evelyn A Ankumah (ed), *The International Criminal Court and Africa* (Intersentia 2016); Franka Pues, 'Cooperation Cherry-Picking at the ICC: On the Lack of State Parties' Cooperation Concerning the Interim Release of Maxime Mekom' [2023] *Völkerrechtsblog*.

¹³⁵ ICC issued arrest warrants on 4 March 2009 and 12 July 2010, see ICC, 'Al Bashir' (Website).

¹³⁶ Annegret Hartig, 'The Climax of the Al-Bashir Saga: The ICC's Jordan Judgment' (*Völkerrechtsblog*, 20 May 2019).

¹³⁷ Pues, *supra* note 134.

¹³⁸ For the view of the ICC's focus on Africa being necessary and appropriate see for example Abdul Tejan-Cole, 'Is the ICC's Exclusively African Case Docket a Legitimate and Appropriate Intervention or an Unfair Targeting of Africans?' in Richard H Steinberg (ed), *Contemporary issues facing the International Criminal Court* (Brill Nijhoff 2016).

¹³⁹ Cryer, *supra* note 87, p. 764; Matt Killingsworth, '20 Years on, the International Criminal Court Is Doing More Good than Its Critics Claim' (*The Conversation*, 12 July 2022).

¹⁴⁰ Group of Independent Experts, *supra* note 14, para 949.

Ukraine could be the opportunity the Court needs to achieve this goal, which will be further explored in chapter 4.

Moreover, the responsibility to improve cooperation and enhance the efficiency of the Court and its investigations rests not only with the ICC but also with the States involved. It is crucial for States Parties to provide political support and adequate funding to enable the Court to fulfil its mandate, rather than being critical of its operations. However, the reality is that the ICC is not immune to political influence, despite the fundamental principles of neutrality and impartiality in international criminal law.¹⁴¹ This is exemplified by the differential treatment of situations by the UNSC, which referred Darfur¹⁴² and Libya¹⁴³ to the ICC, while omitting situations like Syria or Yemen. Notably, resolution 1970 on the situation in Libya was unanimously adopted despite three of the SC's five permanent members – China, Russia, and the US – are not States Parties to the Statute.¹⁴⁴ To achieve the objectives underlying the creation of the ICC and the adoption of the Statute, such as prosecuting individuals for the gravest international crimes, States Parties must demonstrate sustained political commitment and resolve. Without such engagement, the establishment of a robust, independent, and impartial system of international criminal justice will remain an elusive goal.

¹⁴¹ Hans-Jörg Behrens, 'Investigation, Trial and Appeal in the International Criminal Court Statute' (1998) 6 *European journal of crime, criminal law, and criminal justice* 113-125, pp. 122–123.

¹⁴² UNSC, 'Resolution 1593 (2005)'.

¹⁴³ UNSC, 'Resolution 1970 (2011)'.

¹⁴⁴ UN Press, 'In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters' (26 February 2011).

4. The Principle of Complementarity in Action

*“This darkness [Russia-Ukraine War] has allowed us to see new ways of coming together, new ways of building partnerships towards justice.”*¹⁴⁵

ICC Prosecutor Karim Khan, 2022

One of the central aspects of the ICC investigation in Ukraine is the principle of complementarity, which requires the Court to work alongside national authorities to investigate and prosecute crimes under the ICC's jurisdiction.¹⁴⁶ This chapter explores the opportunities and challenges associated with complementarity in the context of the investigation in Ukraine. Specifically, it examines the Ukrainian legal system to assess its capacity to investigate and prosecute atrocities, as the complementarity regime's effectiveness hinges on the capacity of national courts to conduct own investigations.¹⁴⁷ The chapter also explores the concept of positive complementarity and the field-oriented approach of the ICC, as well as the significance of Ukraine's non-member status.

4.1. Domestic Prosecutions: The Ukrainian Legal Framework for Investigating and Prosecuting Atrocity Crimes

As the ICC is intended to serve as a 'Court of last resort,' the primary responsibility for investigating and prosecuting atrocity crimes rests with the Ukrainian judicial system, which given its territorial jurisdiction, proximity to evidence, and deeper understanding of the context and languages involved is well-positioned to conduct these investigations.¹⁴⁸ A lack of domestic legislation and a legitimate legal system presents challenges in holding individuals accountable for atrocity crimes, which has been evident in cases like Mali where the absence of accountability measures undermines efforts to combat impunity.¹⁴⁹

Ukraine has incorporated and defined atrocity crimes in its Criminal Code ('CCU'), but minor gaps remain. The CCU does not have a specific article on crimes against humanity as with the other crimes, although various articles reflect the types of crimes recognised as crimes against humanity

¹⁴⁵ Office of the Prosecutor, 'ICC Prosecutor Karim A. A. Khan KC Concludes Fourth Visit to Ukraine: "Amidst This Darkness, the Light of Justice Is Emerging"' (*International Criminal Court*, 7 March 2023).

¹⁴⁶ Statute, *supra* note 4, preamble.

¹⁴⁷ *ibid.*

¹⁴⁸ Gaiane Nuridzhanian, 'Prosecuting War Crimes: Are Ukrainian Courts Fit to Do It?' (*EJIL: Talk!*, 11 August 2022); Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (ICC 2003) p. 4.

¹⁴⁹ The State of Mali stated in its referral of the situation to the ICC that "the Malian jurisdictions are unable to prosecute or judge the perpetrators [of the most serious crimes]." (translated from French) State of Mali, 'Referral Letter' (13 July 2012).

when committed on a systematic and widespread basis.¹⁵⁰ Despite the existence of a basal legislative framework for prosecuting alleged atrocities, concerns exist about the effectiveness of investigations and trials in Ukraine.¹⁵¹ Ukraine has long faced challenges with the rule of law, including judicial independence¹⁵² and corruption.¹⁵³ While recent reforms have been implemented,¹⁵⁴ these problems are not expected to disappear quickly, and it can be assumed that the ongoing armed conflict with Russia further complicates efforts to combat corruption and enact reforms. While Ukraine has gained some practical experience in investigating and prosecuting conflict-related crimes since 2014,¹⁵⁵ the domestic prosecutors and judges have not been prepared for the unprecedented scale of atrocities committed since the Russian invasion.¹⁵⁶ Iryna Marchuk has noted that Ukrainian judges are not yet accustomed to incorporating international law into their legal reasoning, which implicates the international legal standard of their decisions.¹⁵⁷ To address this, the judges need to gain experience and develop jurisprudence in invoking international law in domestic prosecutions. One way is to refer to the *Tadic* case,¹⁵⁸ which articulated the elements of war crimes and has been replicated in many international and domestic proceedings.¹⁵⁹

Therefore, experts have expressed concerns about the capacity of the Ukrainian judicial system to carry out fair, independent, and impartial investigations and prosecutions.¹⁶⁰ This raises the question of whether it is feasible for the Ukrainian judicial system to uphold international legal standards during

¹⁵⁰ See “Chapter XX. Criminal Offenses Against Peace, Security of Mankind and International Legal Order” of CCU. The Public International Law & Policy Group (PILPG) recommends in a draft legislation for a High War Crimes Court that the CCU should be amended to add a specific article on crimes against humanity to satisfy obligations to the ICC. See fn 15 of PILPG, ‘Draft Law for a Ukrainian High War Crimes Court’ (2022).

¹⁵¹ Iryna Marchuk, ‘Domestic Accountability Efforts in Response to the Russia–Ukraine War’ (2022) 20 *Journal of International Criminal Justice* 787-803, p. 788.

¹⁵² See for instance, Venice Commission, ‘Fight against Corruption in Ukraine: Venice Commission Says Constitutional Court Decision “Regrettable”, Financial Declarations System for Public Officials, Including Judges, Must Be Kept’ (*Council of Europe*, 10 December 2020); Venice Commission, ‘Ukraine: Venice Commission publishes two urgent opinions’ (*Council of Europe*, 6 May 2021); Venice Commission, ‘Ukraine Urgent Opinion (CDL-PI(2022)046)’ (*Council of Europe* 2022).

¹⁵³ The World Justice Project, ‘Rule of Law Index 2022’ p. 169.

¹⁵⁴ Ivana Kottasová, Kostan Nechyporenko, and Jo Shelley, ‘Zelensky Shakes up Ukrainian Government amid Growing Corruption Scandal’ (*CNN*, 24 January 2023).

¹⁵⁵ Nuridzhanian, *supra* note 148.

¹⁵⁶ Marchuk, *supra* note 151, p. 788.

¹⁵⁷ *ibid*, p. 789.

¹⁵⁸ *The Prosecutor v. Dusko Tadic*, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’ *The Appeals Chamber* (ICTY, 2 October 1995), para 94.

¹⁵⁹ Marchuk, *supra* note 151, p. 799.

¹⁶⁰ See for instance Kai Ambos, ‘Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?’ (*EJIL: Talk!*, 10 June 2022); Céline Bardet, ‘Ukraine: The Risk of Judging War Crimes during War’ (*JusticeInfo.net*, 30 May 2022); Sergey Vasiliev, ‘The Reckoning for War Crimes in Ukraine Has Begun’ (*Foreign Policy*, 17 June 2022).

an ongoing, full-scale armed conflict that continues to inflict suffering and violence on a daily basis. On the contrary, Gaiane Nuridzhanian argues that most Ukrainian courts can still deliver justice despite the ongoing conflict but emphasises the need for cooperation with the international community to ensure the effectiveness and integrity of the judicial process.¹⁶¹

Even with confidence in the professionalism of the Ukrainian judiciary, it is challenging to envision trials being conducted in a fair and impartial manner, as the trials are taking place while the war is ongoing and further atrocities are being committed. Concerns about fairness and impartiality were for example raised in relation to the Israeli and French trials post-WWII against Adolf Eichmann in 1961 and Klaus Barbie in 1987 for war crimes and crimes against humanity, despite the trials taking place many years post war when public sentiment had cooled.¹⁶² The Ukrainian judges thus face a challenging task in remaining objective and impartial while their country is under Russian attacks and an entire Ukrainian population is calling for accountability.¹⁶³ As Céline Bardet argues, every accused person should “be judged without emotion or spirit of revenge in a fair way, especially regarding the sentences pronounced.”¹⁶⁴

In addition, legal scholar Kai Ambos has raised concerns about the proportionality of Ukrainian sentences, citing the case of a Russian soldier who received a life sentence for killing a civilian.¹⁶⁵ Ukrainian law does not allow for suspended sentences or parole for life imprisonment,¹⁶⁶ and The European Court of Human Rights has previously found that the Ukrainian life sentence system violates the prohibition of torture.¹⁶⁷ Although the sentence was later reduced to 15 years, it still sets a precedent for lengthy imprisonments.¹⁶⁸ This may present a legal and practical challenge for the ICC, as life sentences are generally reserved for those who bear the highest responsibility for atrocity crimes,¹⁶⁹ and the Court has yet to issue a life sentence.¹⁷⁰ Indeed, it is important to distinguish the level of responsibility between foot soldiers and leaders who authorise mass violence against

¹⁶¹ Nuridzhanian, *supra* note 148.

¹⁶² Joseph Powderly, ‘The Trials of Eichmann, Barbie and Finta’ in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2012) pp. 33–43.

¹⁶³ Nick Yurlov, Senior Legal Advisor and board member of the Ukrainian Bar Association in *Expert Roundtable - Prosecuting Putin: Next Steps* (Directed by PILPG, 2023) minute 43:00-44:30.

¹⁶⁴ Bardet, *supra* note 160.

¹⁶⁵ Ambos, *supra* note 160.

¹⁶⁶ *ibid.*

¹⁶⁷ *Petukhov v. Ukraine* (no. 2), ‘Judgment’ *Application no. 41216/13* (ECtHR, 12 March 2019) para 169-187.

¹⁶⁸ Dan Bilefsky, ‘A Ukrainian Appeals Court Reduces the Life Sentence of a Russian Soldier Tried for War Crimes.’ *The New York Times* (29 July 2022).

¹⁶⁹ Marchuk, *supra* note 151, p. 797.

¹⁷⁰ ICC, ‘Cases - Convicted’ (Website).

civilians.¹⁷¹ Thus, inconsistencies between the ICC and the Ukrainian judiciary's sentencing practices could create a paradoxical situation and influence the victim's perception of justice.¹⁷²

It is positive that the Ukrainian authorities have expressed their willingness to investigate and prosecute alleged atrocity crimes committed after the Russian invasion, although this has forced Ukrainian prosecutors to take on a new role without having prior experience.¹⁷³ This raises concerns about whether the Ukrainian prosecutors are adequately trained to conduct these investigations. If not, it could compromise the quality of cases brought before domestic courts and increase the risk of the accused receiving an unfair trial or cases being dismissed, which again could present a legal challenge for the ICC. Therefore, the words of Prosecutor Khan of "building partnerships towards justice"¹⁷⁴ is particularly important in Ukraine to make sure that all alleged crimes are being investigated and potentially prosecuted by support from the ICC and in accordance with international law.

The assessment of the impartiality of the Ukrainian legal system also includes its willingness to investigate and prosecute alleged crimes committed by own armed forces. While the scale of atrocities by Ukrainian forces is not comparable to those by Russian forces, it is crucial to investigate all crimes to maintain the legitimacy of the ICC and avoid criticism of selective justice.¹⁷⁵ To demonstrate their commitment to impartiality and justice, Ukraine should investigate alleged atrocities by its own forces with support from the ICC. This would send a strong message to the international community and both Ukrainian and Russian populations, emphasising dedication to fight impunity and ensure justice for all victims.

Thus, the ICC's support through capacity building, training, and technical assistance is essential, as the Ukrainian legal system lacks experience and capacity to ensure fair and impartial trials for atrocity crimes. The successful collaboration and coordination between the ICC and Ukrainian authorities, along with support from States Parties, is therefore crucial to achieve justice and accountability in Ukraine. The rest of the chapter examines the opportunities and challenges associated with this

¹⁷¹ Marchuk, *supra* note 151, p. 797.

¹⁷² Moffett, *supra* note 35, pp. 284–286.

¹⁷³ Joel Gunter, 'Ukraine's Prosecutors Wrestle with a New Role: War Crimes Investigators' *BBC News* (11 June 2022).

¹⁷⁴ Office of the Prosecutor, *supra* note 145.

¹⁷⁵ Mark Kersten, 'Ukraine Can and Should Investigate Its Own Military's War Crimes' (*Justice in Conflict*, 19 December 2022); Malachy Browne and others, 'Videos Suggest Captive Russian Soldiers Were Killed at Close Range' *The New York Times* (20 November 2022); Commission of Inquiry on Ukraine, 'War Crimes, Indiscriminate Attacks on Infrastructure, Systematic and Widespread Torture Show Disregard for Civilians, Says UN Commission of Inquiry on Ukraine' (*OHCHR*); Amnesty International, 'Ukraine: Ukrainian Fighting Tactics Endanger Civilians' (4 August 2022).

collaboration and coordination, demonstrating the need for continued efforts to strengthen the Ukrainian legal system and ensure justice for all victims.

4.2. Unlocking Opportunities and Overcoming Challenges: Positive Complementarity in the ICC Investigation in Ukraine

With over 74,500 reported atrocities committed in Ukraine and the Ukrainian people's demand for accountability, there is a great opportunity for the principle of complementarity to be effective.¹⁷⁶ The importance of national investigations in achieving justice and accountability cannot be understated and it requires a close relationship between the domestic and international level in regard to for instance the collection, assessment, and sharing of evidence.

The ICC has previously faced challenges related to complementarity as exemplified in the *Kenyatta* and *Al Bashir* cases. In the *Kenyatta* case, the Kenyan government accused the ICC of interfering in its domestic affairs,¹⁷⁷ while Sudan and other States Parties refused to cooperate with the ICC.¹⁷⁸ To date, Ukraine has demonstrated a willingness to cooperate with the Court, as evidenced by its acceptance of its ICC's jurisdiction and what appears to be a close cooperation between the Prosecutor and the Prosecutor General of Ukraine.¹⁷⁹ They are currently conducting individual investigations alongside each other into alleged grave crimes committed in the Russia-Ukraine war,¹⁸⁰ which presents an opportunity for the Court to demonstrate that complementarity can work effectively in practice and disprove any critics of the approach.

In a case study examining complementarity in the situations of Uganda and Sudan, Sarah Nouwen concluded that the expectation that the principle of complementarity would encourage national investigations and prosecutions of crimes related to conflicts, and ultimately result in the reform of domestic justice systems, was not met.¹⁸¹ Ukraine has shown greater willingness to cooperate with the ICC than Sudan and Uganda, which has been expressed by the Prosecutor General of Ukraine, Andriy Kostin, stating confidence in a new chapter of cooperation with the ICC and that he is

¹⁷⁶ Stephanie van den Berg and Anthony Deutsch, 'Explainer: How Are War Crimes in Ukraine Being Investigated?' *Reuters* (17 March 2023).

¹⁷⁷ Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case' (5 December 2014).

¹⁷⁸ ASP, 'The President of the Assembly Calls on States Parties to Fulfill Their Obligations to Execute the Arrest Warrants against Mr. Al Bashir' (13 June 2015).

¹⁷⁹ See ICC, *supra* note 123.

¹⁸⁰ Office of the Prosecutor, 'ICC Prosecutor Karim A. A. Khan QC Visits Kharkiv, Ukraine on 15 June 2022' (17 June 2022); Gunter, *supra* note 173.

¹⁸¹ Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013), series page.

convinced that they “will not stop until all perpetrators of international crimes committed in Ukraine are brought to justice.”¹⁸² However, the ongoing conflict with Russia and the Ukrainian aspiration to hold Russian perpetrators accountable is likely to be the driving force behind these initiatives. Since Ukraine has demonstrated willingness to conduct its own investigations and prosecutions as well as cooperation with the ICC, while challenges are facing its legal framework, there is an opportunity for the Court to apply the concept of positive complementarity. This way, the Court and other States Parties have an opportunity to support and strengthen the domestic justice system through technical assistance, legislative assistance, and capacity building to enable them to conduct fair and impartial investigations and trials.¹⁸³

In March 2022, a Joint Investigation Team (JIT) supported by Eurojust was formed by the ICC member States Lithuania and Poland and Ukraine to investigate alleged core international crimes committed in Ukraine.¹⁸⁴ The ICC joined the JIT on April 25, 2022,¹⁸⁵ marking the first-ever participation of the OTP in such a team.¹⁸⁶ Following the announcement, the Prosecutor stated that it would not be a one-way street as the OTP “do[es] not wish to only be the recipients of information and evidence.”¹⁸⁷ Instead, his office will seek opportunities to provide information and evidence to the Ukrainian authorities to assist with their investigations and prosecutions.¹⁸⁸ Julia Crawford writing for *JusticeInfo* argued that this represents a notable shift in the ICC's approach to collaborating with national authorities, as the Court has traditionally prioritised receiving rather than sharing information.¹⁸⁹

Prosecutor Khan has previously sought to apply the concept of positive complementarity in the Colombia situation, marking the first instance of such an approach since his election. This move has been referred to as the 'Return of positive complementarity' by Kai Ambos.¹⁹⁰

¹⁸² ICC, *supra* note 123.

¹⁸³ Schabas, *supra* note 15, pp. 183–184; ASP, *supra* note 125) pp. 16-17.

¹⁸⁴ Eurojust, 'Eurojust Supports Joint Investigation Team into Alleged Core International Crimes in Ukraine' (28 March 2022).

¹⁸⁵ Eurojust, 'ICC Participates in Joint Investigation Team Supported by Eurojust on Alleged Core International Crimes in Ukraine' (25 April 2022).

¹⁸⁶ In September 2022, the OTP also joined a JIT dedicated to investigating crimes against migrants and refugees in Libya. Office of the Prosecutor, 'Statement of ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor Joins National Authorities in Joint Team on Crimes against Migrants in Libya' (7 September 2022).

¹⁸⁷ Office of the Prosecutor, 'Statement by ICC Prosecutor, Karim A.A. Khan QC: Office of the Prosecutor Joins National Authorities in Joint Investigation Team on International Crimes Committed in Ukraine' (25 April 2022).

¹⁸⁸ *ibid.*

¹⁸⁹ Julia Crawford, 'Ukraine, ICC and Eurojust: How Will That Work' (*JusticeInfo.net*, 5 May 2022).

¹⁹⁰ Kai Ambos, 'The Return of "Positive Complementarity"' (*EJIL: Talk!*, 3 November 2021).

In this example, the Prosecutor committed his office to continuously supporting the national judiciary,¹⁹¹ indicating a new strategic direction for the OTP.

By participating in the JIT, the OTP has a unique opportunity to foster the concept of positive complementarity and support national investigations and prosecutions in Ukraine, thereby gaining valuable experience for future investigations to increase the possibilities of ensuring accountability, while also addressing the challenge of the ICC's lack of jurisdiction over the crime of aggression. Sharing evidence of the crime of aggression with Ukraine and other participating States through the JIT could potentially lead to prosecutions under domestic or universal jurisdiction or under the jurisdiction of a special tribunal established for this purpose. Ultimately, this collaboration could help the Court closer to end impunity and promote justice for victims.

Currently, seven states are participating in the JIT,¹⁹² offering an opportunity for positive complementarity to be implemented through bilateral support between ICC member states and Ukraine. This includes technical assistance, such as providing operational support, advice on evidence collection and forensics, support with criminal prosecutions, and legal analysis of relevant issues.¹⁹³ As a result, the capacity of Ukrainian authorities to conduct fair and impartial investigations and trials in accordance with international standards will be strengthened. This situation provides an opportunity to increase the possibility of ensuring accountability, thus allowing the Court to fulfil its mandate of ending impunity and promoting justice for victims.

Besides the JIT, France has worked bilaterally with partners to help Ukrainian authorities with for example evidence collection and reconstitution of facts,¹⁹⁴ while the EU, United Kingdom, and the US have established the Atrocity Crimes Advisory Group (ACA) to support the Prosecutor General of Ukraine in his investigation and prosecution of atrocities.¹⁹⁵

This support reinforces the chances of the ICC succeeding in Ukraine by contributing to accountability and justice for victims domestically, as the Court mandate is to ensure accountability, end impunity, while encouraging State cooperation. The success of the ICC's investigation should

¹⁹¹ Office of the Prosecutor, 'Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia' (2021).

¹⁹² The six ICC member States Estonia, Latvia, Lithuania, Poland, Romania, Slovakia, and Ukraine. Eurojust, 'Romania Becomes Seventh Member of Joint Investigation Team on Alleged Core International Crimes Committed in Ukraine' (13 October 2022).

¹⁹³ Eurojust, *supra* note 184.

¹⁹⁴ UN, 'Statement by Catherine Colonna, Minister for Europe and Foreign Affairs of France at the 9135th Meeting of the UNSC' (15 September 2022).

¹⁹⁵ Atrocity Crimes Advisory Group, 'EU, US, and UK Establish Atrocity Crimes Advisory Group (ACA) for Ukraine: Joint Statement' (GOV.UK, 25 May 2022).

thus not solely be measured by the number of cases pursued by the Court in the Hague, but the total number of cases pursued, both individually by the Court and Ukraine respectively and in cooperation. As William Schabas has noted, “If the object of the exercise is to address impunity, the fact that an offender is being held accountable for serious crimes by national courts should satisfy the requirements of international law” to end impunity.¹⁹⁶ This view is supported by the Prosecutor who has stated that it is not about which Court achieves accountability, but that accountability is achieved at all.¹⁹⁷

4.2.1.A Field-Oriented Approach

The OTP has implemented a field-oriented approach to its investigation in Ukraine, creating opportunities to strengthen the positive complementarity approach. In May 2022, the Prosecutor announced the largest-ever deployment of an investigative team to Ukraine.¹⁹⁸ Additionally, the Prosecutor has made four official visits to Ukraine, aiming to enhance cooperation and coordination with the Prosecutor General of Ukraine,¹⁹⁹ and the fourth visit resulted in an agreement about the opening of an ICC country office, bringing the total number of ICC country offices to seven.²⁰⁰ These actions address previous internal criticism of the Court's limited field presence in investigations and demonstrate a commitment for improvement.²⁰¹

The Prosecutor's repeated visits to Ukraine indicate the importance of the situation and the level of engagement by the OTP. In fact, there is no precedent for the Prosecutor visiting a situation country four times in one year, as can be seen from the OTP's press statements related to other situations under investigation by the ICC.²⁰²

This field-oriented approach has been identified to be driven by three primary factors. Firstly, the relatively new Prosecutor has expressed his intention to establish a stronger field presence in general to bring the OTP's activities closer to the victims and affected communities.²⁰³ Secondly, the investigation has received significant attention and support from various international actors,

¹⁹⁶ Schabas, *supra* note 15, p. 192.

¹⁹⁷ The Prosecutor in Law in Action, *supra* note 124, minute 08:55-09:22.

¹⁹⁸ Office of the Prosecutor, ‘ICC Prosecutor Karim A.A. Khan QC Announces Deployment of Forensics and Investigative Team to Ukraine, Welcomes Strong Cooperation with the Government of the Netherlands’ (*International Criminal Court*, 17 May 2022).

¹⁹⁹ Office of the Prosecutor, *supra* note 145.

²⁰⁰ The ICC has a Liaison Office to the UN in New York and six other field presence/country offices: Central African Republic, ‘CAR’; Côte d’Ivoire; Democratic Republic of the Congo, ‘DRC’; Georgia; Mali; and Uganda. ICC, *supra* note 123.

²⁰¹ Group of Independent Experts, *supra* note 14, p. 64 R82, p. 251 para 779, and p. 253 R297.

²⁰² Office of the Prosecutor, ‘News and Statements’ (ICC).

²⁰³ Office of the Prosecutor, ‘Annual Report of the Office of the Prosecutor – 2022’ (n 32) 17.

including States Parties,²⁰⁴ non-States Parties,²⁰⁵ regional organisations,²⁰⁶ and human rights advocates,²⁰⁷ due to the gravity and scale of the alleged crimes, which puts pressure on the Prosecutor to prioritise the investigation. Thirdly, Ukraine has demonstrated willingness to cooperate with the Court from the beginning, as reflected by several statements on cooperation with the ICC by President Zelensky and the former and current Prosecutor General of Ukraine.²⁰⁸

The situation the Court with a valuable opportunity to assess the effectiveness of a field-oriented approach in enhancing positive complementarity. By leveraging the experience gained from this investigation, the ICC can develop best practices to improve the success of future investigations into international crimes. It may include gaining a deeper understanding of the political, social, cultural, and linguistic context of a situation, potentially avoiding some of the complexities encountered by the OTP in African cases.²⁰⁹ Ultimately, prioritising the expansion of the Court's field presence in current and future investigations, while considering personnel safety and resource availability, can contribute to the Court's legitimacy by enabling the investigation of alleged international crimes, building robust criminal cases, and ensuring justice and accountability for victims.

The investigation in Ukraine therefore serves as a significant example of positive complementarity in action. It showcases how the Court can effectively encourage national authorities to prosecute international crimes while strengthening their justice systems supported by States Parties and non-States Parties. Through this approach, the ICC demonstrates its commitment to justice for victims and ending impunity, whether through its own investigations or by supporting domestic prosecutions. The experience gained in Ukraine offers a valuable model for future engagement between the ICC and national authorities, particularly in cases where States show willingness to prosecute international crimes domestically and cooperate with the OTP.

While the investigation in Ukraine presents unique opportunities for the ICC to demonstrate how complementarity can work in practice, it also presents challenges that must be addressed. The

²⁰⁴ See for instance Government of the United Kingdom, 'International Coalition to Support ICC Russian War Crimes Investigation' (*GOV.UK*, 24 March 2022).

²⁰⁵ Colum Lynch, 'America's ICC Animus Gets Tested by Putin's Alleged War Crimes' (*Foreign Policy*, 15 March 2022).

²⁰⁶ European Commission, 'EU supports ICC investigation Russian war crimes in Ukraine' (8 June 2022).

²⁰⁷ Amnesty International, 'Ukraine: ICC investigation a Crucial element for comprehensive International Justice' (14 December 2020).

²⁰⁸ Ukrinform, 'Venediktova: Rome Statute Will Give Ukraine New Opportunities at ICC' (*Ukrinform*, 19 October 2021); Ruth Green, 'Interview: Andriy Kostin, Prosecutor General of Ukraine' (*International Bar Association*, 4 October 2022).

²⁰⁹ This argument is also supported by Emma Lauren Palmer, 'Constructing International Criminal Justice across Time and Space' (2018) 18 *International Criminal Law Review* 958-987, p. 987.

following will outline two main challenges that may impact the complementarity regime and the close cooperation with Ukraine, along with suggestions for how the Court can address them. These challenges involve the investigation of crimes committed by all parties and the fact that Ukraine is not a State Party to the Statute.

4.2.2. Challenges in Investigating Crimes Committed by All Parties to the Conflict

While the ICC's partnership with Ukraine appears stronger and more beneficial than in other investigations such as Afghanistan, Myanmar/Bangladesh, Sudan, Mali, and Libya, the exact nature of their collaboration behind the scenes is unclear. The close cooperation can be partly attributed to the fact that the situation in Ukraine involves an IAC, with most of the alleged crimes being attributed to Russian forces.²¹⁰ However, it is important that the ICC ensures that all alleged atrocity crimes are being investigated, including those committed by Ukrainian forces, otherwise it could present a legal challenge for the Court and accusations of selective justice. Thus, it is crucial for the ICC to maintain impartiality and investigate all alleged crimes, regardless of perpetrators' nationality, to ensure justice and accountability for all victims of the conflict.

There have been some misunderstandings among Ukrainians that the ICC investigation only targets Russian nationals, as reflected in the Ukrainian 2015 *ad hoc* declaration, which reads "On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes *committed by senior officials of the Russian Federation* [emphasis added]."²¹¹ However, according to Rule 44(2),²¹² *ad hoc* declarations automatically accept jurisdiction with respect to all Article 5 crimes relevant to the situation.²¹³ Ukrainian officials who initiated the cooperation with the ICC may have believed that the Court's primary focus would be on alleged crimes committed by Russian forces, potentially underestimating the possibility of the Court investigating and prosecuting Ukrainian soldiers or officials responsible for crimes committed by Ukrainian forces.

The potential impact of an ICC investigation into alleged crimes committed by Ukrainian armed forces on the ongoing collaboration and potential friction is uncertain at this stage of the investigation. However, it is essential for the ICC to uphold its impartiality and legitimacy by thoroughly investigating all alleged crimes, irrespective of the nationality of the perpetrators, to ensure justice for all victims. To address this challenge, the Prosecutor could encourage the Ukrainian judiciary to conduct its own

²¹⁰ Office of the Prosecutor, 'Report on Preliminary Examination Activities (2019)' para 278.

²¹¹ Minister for Foreign Affairs of Ukraine, *supra* note 100.

²¹² Which was intended to make one sided manipulation of jurisdiction impossible. Schabas, *supra* note 71, p. 358.

²¹³ Rules, *supra* note 89, Rule 44(2).

investigations into alleged crimes committed by Ukrainian forces. This approach would not only counter the perception that the ICC is selectively targeting one party to the conflict, thereby bolstering trust in the ICC, but also build trust in the Ukrainian legal system as previously stated.

4.2.3. Ukraine is yet to Become an ICC State Party

Despite calls from civil society,²¹⁴ Ukraine has not yet ratified the Statute, likely due to concerns about increased prosecution of Ukrainian soldiers. However, as argued by Aloka Wanigasuriya, “Such arguments appear to stem from a deep misunderstanding regarding the operation of the ICC’s jurisdictional parameters, as Ukraine has already accepted the ad hoc jurisdiction ... which enable the ICC to probe alleged international crimes (with the exception of the crime of aggression) committed by any party to the conflict.”²¹⁵

The fact that Ukraine has not yet ratified the Statute poses a legal challenge for the Court. Ukraine could withdraw its declaration under Article 12(3) of the Statute, resulting in the ICC losing jurisdiction over future crimes.²¹⁶ Additionally, not being a State Party may signal a lack of trust in the Court’s ability to operate effectively and fairly in its commitment to uphold international criminal law, which could impact its legitimacy as it is important that States demonstrate their trust in the justice they seek.²¹⁷

Ratification would eliminate legal ambiguities and conflict, strengthen national accountability measures, and demonstrate Ukrainian commitment to international justice. In addition, it would also enhance the ICC’s reputation and legitimacy, potentially encouraging other States to consider ratification. More State Parties would signify increased support for the Court, politically and in terms of funding, as the ICC is dependent on resources from member States.²¹⁸ The ICC should therefore leverage its close cooperation with Ukraine to expedite ratification. This could involve using its strengthened field presence to engage with Ukrainian politicians and citizens to enhance their comprehension of the ICC operations. It would also be important to clarify that the Court has the authority to prosecute Ukrainian forces regardless of whether Ukraine ratifies the Statute. While Ukraine’s ratification alone may not significantly increase the Court’s budget, the ratification would nonetheless have significant symbolic value.

²¹⁴ Coalition for the ICC, ‘Joint Letter to the President of Ukraine on ICC Rome Statute Ratification’.

²¹⁵ Aloka Wanigasuriya, ‘After All This Time, Why Has Ukraine Not Ratified the Rome Statute of the International Criminal Court?’ (*Justice in Conflict*, 14 March 2022).

²¹⁶ Statute, *supra* note 4.

²¹⁷ Ukrinform, *supra* note 208.

²¹⁸ See for instance Office of the Prosecutor, ‘Statement of ICC Prosecutor to the UNSC on the Situation in Libya’ (9 May 2017).

4.3. Unprecedented State Support

Another symbolic value is the fact that the ICC investigation in Ukraine has received over 40 State referrals and the support of EU member states,²¹⁹ making it the most politically supported investigation to date.²²⁰ Moreover, the investigation has received extra funding from various States Parties with the expectation of accountability to be achieved, and thus presents an opportunity for the Court to improve its operations.²²¹ Meeting the high expectations of States Parties and the international community can be a daunting task,²²² but if the Court succeeds, it will enhance its resilience against criticism and “attacks”, as the Court would have demonstrated its ability to deliver justice and hold perpetrators accountable.

It is crucial for the ICC to allocating received funding among all investigations and prioritise resources based on the gravity of crimes and the level of impact on affected communities. In fact, the Prosecutor has stated that any support received for the investigation in Ukraine will be used across all situations based on an assessment of priorities.²²³ To ensure transparency and build trust, Prosecutor Khan should prioritise highlighting the progress made in other situations where ICC investigations are ongoing and how the funding from States Parties is being used to achieve justice and accountability. This can help generate support and collaboration among States Parties, as confidentiality and independence of decision-making are pivotal for continuous support.²²⁴

The fact that the investigation in Ukraine has received such strong support highlights the comparatively low levels of support for the Court's work in other situations, such as Afghanistan, the Democratic Republic of Congo, or Palestine, where the Afghanistan and Palestine situation are politically sensitive as they implicate powerful States and their allies.²²⁵

²¹⁹ European Ministers of Justice, ‘EU Member States’ Support for the International Criminal Court (ICC) and Its Investigation into the Situation in Ukraine’ (*Swedish Presidency of the Council of the European Union*, 20 March 2023).

²²⁰ Bosco, *supra* note 30.

²²¹ Government of UK, ‘London Hosts Major International War Crimes Meeting as UK Boosts Support for International Criminal Court’ (*GOV.UK*, 20 March 2023); ICC, ‘Statement of ICC Prosecutor, Karim A.A. Khan QC: Contributions and Support from States Parties Will Accelerate Action across Our Investigations’ (28 March 2022).

²²² Group of Independent Experts, *supra* note 14, para 950-951.

²²³ ICC, *supra* note 221.

²²⁴ Group of Independent Experts, *supra* note 4, para 950-951.

²²⁵ See for instance Andrew Hilland and Catherine Gilfedder, ‘The International Criminal Court and Afghanistan’ (*Just Security*, 3 September 2021); Pearce Clancy, ‘Putting the International Criminal Court’s Palestine Investigation into Context’ (*Opinio Juris*, 2 April 2021).

This differentiated support exposes the shortcomings of the international justice system – namely that justice for victims is often subject to political calculations, which undermines the principle of justice for all.²²⁶ It thus raises concerns about the risk of a two-tier system and a hierarchy of victims, reinforcing earlier criticism of the Court's selective approach to justice and accountability.²²⁷

In relation to this, Anthony Blinken stated at an accountability conference in 2022 that “We don’t have to choose between focusing on justice in Ukraine and other crises. Everything we are doing to lay the foundation for accountability in Ukraine, we can and must do wherever atrocities are being committed. All victims of grave international crimes deserve equal access to justice – regardless of where they take place or who perpetrates them.”²²⁸ Such statements from States calling for accountability in Ukraine and in general can be used as leverage to emphasise the importance of all showing support for the Court in current and future investigations, not just those that are politically convenient. As Maria Vignoli argues writing for *Opinio Juris*, “the mobilization around Ukraine demonstrates that where there is a will, there is a way.”²²⁹ Although the alleged war crimes committed by US personnel in Afghanistan²³⁰ and the invasion of Iraq²³¹ raise questions about the sincerity of Blinken's statement.

In 2014, when Russia annexed²³² the Crimean Peninsula and supported the arming of pro-Russian separatist groups in the eastern oblasts of Luhansk and Donetsk,²³³ Ukraine did not receive nearly as much support from the international community. This despite the Ukrainian government referring different conflict-related legal issues to various international and regional institutions, including the

²²⁶ Vignoli, *supra* note 11.

²²⁷ *ibid.*

²²⁸ Antony Blinken, ‘Statement to Ukraine Accountability Conference: The Hague’ (2022).

²²⁹ Vignoli, *supra* note 11.

²³⁰ Hilland and Gilfedder, *supra* note 225.

²³¹ Ewen MacAskill and Julian Borger, ‘Iraq War Was Illegal and Breached UN Charter, Says Annan’ *The Guardian* (16 September 2004).

²³² The annexation of Crimea is widely considered to be a violation of international law and has been widely condemned by the international community. However, whether it constitutes an act of aggression under the Statute and other relevant international legal instruments is a matter of interpretation and debate. This study uses the term “annexation” as it is widely accepted. For examples of legal scholars using the term “aggression” see for instance Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan 2015); Kateryna Busol, ‘If Ukraine’s Fate Is Not a Menu à La Carte, Then Ukrainian Voices Must Be Heard’ (*EJIL: Talk!*, 20 June 2022).

²³³ European External Action Service, ‘Eight Years On, War in Ukraine Brings Back Painful Memories of Crimea’s Invasion’ (*EEAS Website*, 18 March 2022).

ICC²³⁴, the International Court of Justice²³⁵ ('ICJ'), the Arbitral Tribunal of the UN Convention on the Law of the Sea,²³⁶ and the European Court of Human Rights²³⁷ in the years following.

This indicates that the ICC must be mindful of the political context in which it operates, as navigating it can pose risks in terms of potentially losing the State support on which the Court is founded. However, to maintain legitimacy it is crucial that the Court maintains impartiality and independence in its investigations and prosecutions, especially in situations involving political pressure or influence.

Another political opportunity for the Court in relation to the investigation in Ukraine is the fact that while non-States Parties have previously raised significant criticism of the Court, the Russian invasion of Ukraine has renewed momentum for accountability and support for the ICC.

For instance, the US, previously critical of the ICC, has shifted its stance in response to the invasion, enacting legislation allowing contributions to the ICC Trust Fund for Victims²³⁸ and vocally supporting the ICC.²³⁹ Recent coordination with the JIT also suggests a growing willingness to engage with the ICC.²⁴⁰ Even though the US is not a State Party to the Statute, its attitude towards the Court matters due to its status as a superpower and permanent member of the UNSC, potentially having a positive effect on the Court's legitimacy and its ability to carry out its mandate effectively. The investigation in Ukraine therefore presents an opportunity for the Court to address the long-term strained relationship between the two, and to foster a better cooperation, even though the cooperation is unlikely to extend beyond Ukraine.²⁴¹ Therefore, the substantial and unprecedented support from states for the ICC following the Russian invasion of Ukraine creates a significant opportunity for the Court to generate momentum not only for the ongoing investigation in Ukraine but also for other

²³⁴ The two declarations accepting the *ad hoc* jurisdiction of the ICC. Iryna Marchuk and Aloka Wanigasuriya, 'Venturing East: The Involvement of the International Criminal Court in Post-Soviet Countries and Its Impact on Domestic Processes' (2021) 44 *Fordham International Law Journal* 735-770, pp. 740-743.

²³⁵ Iryna Marchuk, 'Green Light from the ICJ to Go Ahead with Ukraine's Dispute against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing' (*EJIL: Talk!*, 22 November 2019).

²³⁶ Valentin Schatz and Dmytro Koval, 'Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS' (*EJIL: Talk!*, 6 September 2018).

²³⁷ See *Ukraine v. Russian Federation* (re Crimea) (nos. 20958/14 and 38334/18), European Court of Human Rights, 'List of Cases' (*Inter-State applications*).

²³⁸ Consolidated Appropriations Act, 2023, 117th Congress (2021-2022) 2022 section 7073.

²³⁹ Helen Clapp and Kathryn Sikkink, 'From "Invade the Hague" to "Support the ICC": America's Shifting Stance on the International Criminal Court' (*Harvard University*, 27 April 2022); Office of the Spokesperson, 'Supporting Justice and Accountability in Ukraine' (*US Department of State*).

²⁴⁰ Eurojust, 'National Authorities of the Ukraine Joint Investigation Team Sign Memorandum of Understanding with the United States Department of Justice' (4 March 2023).

²⁴¹ Alice Speri, 'Biden Administration Splits on Prosecuting Russia for War Crimes in Ukraine' (*The Intercept*, 15 March 2023).

investigations. However, the Court must also show action in other situations to avoid continued criticism of a selective justice.

4.4. Preliminary Findings

This chapter examined the opportunities and challenges associated with the principle of complementarity and cooperation with States in the investigation in Ukraine and how the Court can address these to ensure justice and accountability for international crimes committed in the Russia-Ukraine war, as well as in other investigations.

While it was established that the Ukrainian legal framework allows for domestic investigations and prosecutions, the country's legal system lacks the necessary experience and capacity to conduct fair and impartial trials, which could pose a long-term political and legal challenge for the ICC. If Ukraine fails to investigate crimes by its own forces or hands out disproportionate sentences, it could damage the ICC's legitimacy in the eyes of State Parties as well as affected victims and communities who rely on the institution to provide accountability resulting in lack of political will and support for the Court. To address this challenge, the ICC could encourage and provide support for the domestic judicial system in overcoming these issues through positive complementarity.

The current cooperation between the ICC Prosecutor and the Prosecutor General of Ukraine demonstrates the effectiveness of complementarity when supported by enhanced ICC field presence and cooperation not only between the ICC and the host State, but also with other member States and organisations, as evidenced by the JIT. This support enables national authorities to investigate and prosecute alleged international crimes while also strengthening national justice systems. It also addresses the legal challenge of the ICC's lack of jurisdiction over the crime of aggression by allowing the sharing of evidence. The experience thus provides valuable lessons on complementarity that can be applied to other current and future situations where the host State shows willingness to cooperate.

However, the ICC faces two main political and legal challenges in the implementation of complementarity in Ukraine: challenges in investigating crimes committed by all parties and the fact that Ukraine is not a State Party to the Statute. The first challenge can be addressed through positive complementarity and to address the fact that Ukraine is not a State Party to the Statute, the ICC should continue to engage with officials and encourage them to join the ICC.

Another political opportunity identified is the unprecedented support from States Parties, the US, and regional actors which offers increased funding and support to achieve justice and accountability, not

only in Ukraine but beyond. However, the support also risks the creation of a hierarchy of victims and a two-tier system of justice. The Prosecutor can address this challenge by allocating funding and resources received in relation to the investigation in Ukraine for all investigations based on the gravity of crimes and the level of impact on affected communities.

If the ICC can assist the Ukrainian judiciary with investigations and prosecutions while also conducting its own investigations and prosecuting perpetrators responsible for the most serious crimes, it will meet the expectations of member States and the international community. This will increase the Court's credibility and legitimacy and contribute to the prevention of future atrocities by demonstrating that such crimes will not go unpunished. Conversely, if the ICC fails to deliver under such favourable conditions of support, it will pose a significant challenge to the Court's legitimacy and weaken the trust of States Parties and the public. Consequently, the Court's ability to fulfil its mandate will be weakened, potentially resulting in a loss of support for its important work.

5. Opportunities and Challenges in Evidence Collection in Ukraine

*"The commission of international crimes now almost invariably give rise to a significant digital footprint. This presents new opportunities and challenges for the OTP with respect to the collection, synthesis and use of the wide range of audio, visual and other digital data relevant to investigations."*²⁴²

Office of the Prosecutor, 2022

In the previous chapter opportunities and challenges of complementarity and cooperation were identified. This chapter shifts the focus towards the opportunities and challenges related to evidence collection, as the construction of criminal cases necessary to hold perpetrators accountable for the grave crimes committed in Ukraine is another important aspect of the ICC's investigation.²⁴³ Achieving a successful prosecution of these crimes requires establishing individual criminal responsibility and meeting a higher standard of proof compared to domestic investigations, while still upholding the right of the accused right to due process and fair trial.²⁴⁴ Given the restricted access to suspects and crime scenes, the crucial effective, comprehensive, and rigorous evidence collection is more difficult when building robust criminal cases against the alleged perpetrators. Various challenges related to evidence collection in Ukraine and the environment in which the ICC operates have been identified, including the security risks for investigators in the field, limited access to and protection of victims and witnesses in Russian controlled areas, and the risk of evidence tampering by parties to the conflict. Despite these challenges, several opportunities to address the challenges have also been identified, one of which is the collection of digital evidence, such as open-source information^{245, 246}

²⁴² Office of the Prosecutor, *supra* note 32, p. 26.

²⁴³ International Bar Association, 'Evidence Matters in ICC Trials' (2016) p. 9.

²⁴⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08 A), 'Separate Opinion of Judge Van Den Wyngaert and Judge Morrison (ICC-01/05-01/08-3636-Anx2)' *Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"* (2018) para 5.

²⁴⁵ Open-source Information is in this context satellite imagery, conflict mapping, YouTube, and social media content from Facebook, Telegram, Twitter, and TikTok.

²⁴⁶ Bosco, *supra* note 30.

5.1. Evidence Collection During an Ongoing International Armed Conflict

The investigation in Ukraine is unique due to the distinct environment in which the OTP and investigative teams are operating compared to other ICC investigations.²⁴⁷ They are not only investigating a significant number of alleged atrocities committed in an IAC between two sovereign States, but their investigation is taking place during an *ongoing* armed conflict.

Conducting such investigation is a complex and challenging task, and security risks for investigative teams collecting evidence on the ground is one of the practical challenges that the ICC faces.²⁴⁸ It is the first ICC investigation within a country while the country is at war with another state.²⁴⁹ Using digital evidence is one way to address this challenge, which will be explored in the next section.

The Court has previously conducted investigations during ongoing armed conflicts such as in Mali and the Central African Republic, although these conflicts were not international in character.²⁵⁰

In Mali, the investigation focused on alleged war crimes and crimes against humanity committed by armed rebel groups and included several field trip missions to the country.²⁵¹ However, in the *Al Hassan* case the prosecution failed to exploit the evidence-gathering potential of these trips as evidenced when the case came to trial. The judges ruled that the Prosecutor had failed to establish the nexus between Al Hassan's actions, armed conflict, and several of the alleged crimes.²⁵² The judges came to this conclusion because the main evidence was based on "media articles, NGO reports, and anonymous hearsay."²⁵³ While security concerns and destroyed evidence may have impacted the OTP's ability to collect evidence, the case illustrates the importance of investigators being present at the crime scene to gather evidence to construct robust cases against the alleged perpetrators, rather than solely relying on third-party evidence.

In Ukraine, the Prosecutor has prioritised on-the-ground evidence collection, recognising the importance of being present to gather evidence where it exists. In May 2022, the Prosecutor deployed his largest-ever team of investigators, forensic experts, and support personnel to Ukraine to advance the investigations into crimes falling under the Court's jurisdiction and to provide support to Ukrainian national authorities, as examined in chapter 4.²⁵⁴ As the Prosecutor stated in an

²⁴⁷ Joanna York, "'Accountability and Justice': Gathering Digital Evidence of War Crimes in Ukraine" (*France* 24, 28 February 2023).

²⁴⁸ Rebecca Hamilton and Lindsay Freeman, 'The Int'l Criminal Court's Ukraine Investigation: A Test Case for User-Generated Evidence' (*Just Security*, 2 March 2022).

²⁴⁹ Law in Action, *supra* note 124, minute 03:00-03:15.

²⁵⁰ ICC, *supra* note 63.

²⁵¹ Office of the Prosecutor, 'Situation in Mali - Article 53(1) Report' (2013) para 18-22.

²⁵² *The Prosecutor v. Al Hassan* (ICC-01/12-01/18), 'Public Redacted Version of "Submissions for the Confirmation of Charges"' *Pre-Trial Chamber I* (4 June 2019) para 4, 38, 287, and 288.

²⁵³ *ibid*, para 3.

²⁵⁴ Office of the Prosecutor, *supra* note 198.

interview in June 2022, "We can't conduct effective, timely investigations by remote control in The Hague. We need to be present on the ground where the evidence is."²⁵⁵ Therefore, the investigation in Ukraine could provide valuable lessons for future investigations on how to collect evidence on scene.

Another practical challenge of on-the-ground evidence collection in Ukraine besides security of the ICC personnel is the limited physical access to the Russian-controlled territories, such as Donetsk, Luhansk, and Mariupol.²⁵⁶ In Mariupol, for instance, a massacre allegedly committed by Russian forces is difficult to fully investigate due to restricted access.²⁵⁷ Despite these challenges, the ICC's investigation in Ukraine stands out for its broad access to the territory where alleged crimes have been committed.²⁵⁸ This is in contrast to other past or ongoing ICC investigations, such as those in Libya, Sudan, Afghanistan, Myanmar, Palestine, and the Philippines, where access to crime scenes and resources have been more limited. However, Russia has consistently opposed the ICC's jurisdiction in Ukraine and refused to cooperate with the Court,²⁵⁹ including by not responding to communications sent by the Prosecutor.²⁶⁰ Moreover, Russian diplomats have dismissed the ICC investigation as politically motivated, and in September 2022, Foreign Minister Sergey Lavrov told the UNSC that "This body has lost its credibility with us."²⁶¹

David Bosco argues, that without significant political changes (and perhaps even with such change), it is unlikely that Moscow will change its hostile stance towards the ICC.²⁶² It is therefore less likely that ICC personnel will be granted access to Russian-controlled territories. Past cases have shown that the ICC's ability to gather evidence is heavily reliant on the assistance and cooperation of countries involved in the case. The ICC's investigation in the Bangladesh/Myanmar situation illustrates this, as Myanmar is not a State Party to the Statute.²⁶³ Without Myanmar's cooperation, the ICC faces significant obstacles in obtaining important evidence, particularly since most of the

²⁵⁵ Law in Action, *supra* note 124, minute 03:15-03:30.

²⁵⁶ BBC, 'Ukraine in Maps: Tracking the War with Russia' *BBC News* (9 March 2023).

²⁵⁷ Paul Niland, 'Putin's Mariupol Massacre Is One of the 21st Century's Worst War Crimes' (*Atlantic Council*, 24 May 2022); Reuters, "'It Was a Massacre': Mariupol Residents Recall Battle for Ukrainian City' *Reuters* (30 April 2022); Deniz Nikolay Dirisu, 'Project Mariupol: A Record of Evil' (*Leidenlawblog*, 22 August 2022).

²⁵⁸ Bosco, *supra* note 30.

²⁵⁹ America Times News Service, 'Foreign Minister Sergey Lavrov's Remarks at a Meeting of the UN Security Council on Ukraine' *The America Times* (23 September 2022).

²⁶⁰ Office of the Prosecutor, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, at the Arria-Formula Meeting of the UN Security Council on "Ensuring Accountability for Atrocities Committed in Ukraine"' (27 April 2022).

²⁶¹ America Times News Service, *supra* note 259.

²⁶² Bosco, *supra* note 30.

²⁶³ ICC, *supra* note 83.

alleged atrocities were committed on Myanmar's territory.²⁶⁴ Moreover, in August 2022, the Government of Ukraine stated that there is a risk of destruction of evidence by Russian forces.²⁶⁵ Therefore, due to the restricted access to crime sites under Russian control and Russia's non-cooperation with the ICC, the available information documenting alleged international crimes may not be comprehensive or detailed enough to be admissible as evidence in court or strong enough to establish the charges, despite the abundance of available information. This situation could harm the Prosecutor's case. To overcome this challenge, the ICC could potentially obtain digital evidence from open sources such as social media platforms, which provide an opportunity to gather additional information. However, as will be discussed in the next section, this approach has its own limitations and challenges.

Another challenge is the fact that the Ukrainian people are under attack from Russian armed forces on a daily basis,²⁶⁶ which raises at least two additional legal and practical concerns: Firstly, the ongoing armed conflict may influence the Ukrainian people and authorities to pursue justice and accountability by any means necessary. The ICC investigation in Ukraine therefore faces a risk of received evidence being obtained under circumstances that do not comply with the Statute,²⁶⁷ for example if pressure is applied on the accused or witnesses during interviews.²⁶⁸ In the *Al Hassan* case for instance, the Defence requested that the Chamber dismiss certain evidence based on the allegations that part of the evidence was obtained by Malian authorities using torture.²⁶⁹ Although the Chamber rejected the request by the Defence,²⁷⁰ this still presents a valid concern as the investigation in Ukraine is being conducted amidst an ongoing armed conflict that is putting a significant strain on the Ukrainian people.

Secondly, there is a risk that victims and potential witnesses may be re-traumatised if they are repeatedly interviewed by multiple investigators and journalists. Thus, the sheer volume of attention from media²⁷¹ and NGO's²⁷² can cause undue stress and trauma to those who have already

²⁶⁴ UN, 'Statement to the Human Rights Council by Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar, on the 51st Regular Session of the Human Rights Council' (12 September 2022).

²⁶⁵ Government of Ukraine, 'The Russian Occupiers Are Trying to Hide Their Participation in Committing Crimes against the People of Ukraine' (*State websites of Ukraine*, 14 August 2022).

²⁶⁶ For daily updates, see Ukraine Interactive map, 'Ukraine Latest News on Live Map' (*liveuamap.com*).

²⁶⁷ As described in the Statute, *supra* note 4, Article 69(7).

²⁶⁸ Ambos, *supra* note 160.

²⁶⁹ *The Prosecutor v. Al Hassan* (ICC-01/12-01/18), 'Public Redacted Version of "Decision on Requests Related to the Submission into Evidence of Mr Al Hassan's Statements"' [2021] Trial Chamber X para 1-14.

²⁷⁰ *ibid*, para 77.

²⁷¹ Reporters Without Borders, 'Ukraine: A Year of Information Warfare in Numbers' (20 February 2023).

²⁷² Eurojust, 'Media Briefing on the Joint Investigation Team on Alleged International Crimes in Ukraine' (*Youtube*, 23 February 2023) minute 4:40-4:50.

experienced significant harm. Therefore, it is essential that the ICC and other actors provide training, education, and support to Ukrainian authorities and investigative teams to help minimise the need for multiple witness interviews and facilitate evidence sharing, enhancing the possibility of successful investigations.²⁷³

To overcome these identified challenges, the ICC can draw on an approach used in the Afghanistan situation, where it was deemed too dangerous for on-the-ground evidence collection while there was also a risk of evidence destruction and witness targeting by the Taliban.²⁷⁴ During the Taliban takeover several witnesses and victims fled Afghanistan to safe locations, which provided the ICC with an opportunity to access important information and evidence.²⁷⁵ Similar, more than eight million Ukrainian refugees have so far fled Ukraine to other European countries, with the majority being received by Poland, Germany, the United Kingdom, and the Czech Republic,²⁷⁶ all of which are States Parties to the Statute.²⁷⁷ Many witnesses and potential victims are thus located in areas shielded from Russian control, enabling the ICC to bring Article 86 of the Statute into play, which requires all States Parties to the Statute to cooperate with the Court in its investigation and thereby enables obtaining testimonies.

Another example of testimonies is those of defected or captured Russian soldiers in Ukrainian custody who can provide information about the unlawful actions they were ordered to carry out, which may constitute war crimes pursuant to Article 8(2) of the Statute.²⁷⁸ However, these testimonies present an additional challenge as Russia is resorting to the tactic of intimidating and shooting deserters. It is plausible to assume that Russia may employ similar strategies and intimidate Ukrainians as well as its own citizens to dissuade them from defying the regime and testifying before the ICC.²⁷⁹ Protection of witnesses and victims is thus of crucial importance to the OTP. The ICC rely on cooperation with states on this matter, as it does not have its own police force to provide security. It is essential to note, that while testimonial evidence is important to obtain, it only represents one side of the crime, and the OTP has a responsibility under the Statute to collect both incriminating

²⁷³ Eurojust, *supra* note 185.

²⁷⁴ Nema Milaninia, 'Evidence Destruction and the Crisis In Afghanistan' (*Just Security*, 20 August 2021).

²⁷⁵ Raquel Llorente, ICC observer for the International Federation for Human Rights, cited in Stephanie Van Den Berg, 'Afghanistan: ICC More than Ever at a Standstill' (*JusticeInfo.net*, 16 September 2021).

²⁷⁶ UN High Commissioner of Refugees ('UNHCR'), 'Situation Ukraine Refugee Situation' (*Operational Data Portal*).

²⁷⁷ ICC, *supra* note 83.

²⁷⁸ BBC News, 'Russian Army Officer Admits That Troops Tortured Ukrainian Soldiers' (*Youtube*, 2 February 2023).

²⁷⁹ Pjotr Sauer, 'Russian Soldiers Say Commanders Used "Barrier Troops" to Stop Them Retreating' *The Guardian* (27 March 2023).

and exculpatory evidence.²⁸⁰ This is necessary to be able to build robust cases against the alleged perpetrators and get confirmation of the charges before trial, as the evidence must be substantial for the Court to fulfil its mandate to hold perpetrators accountable and end impunity by prosecuting grave international crimes.²⁸¹

The cooperation between the OTP and Ukrainian governmental authorities is also essential for the collection of evidence in both Ukrainian and Russian-controlled areas, as the Court can issue requests for judicial cooperation with both state and private authorities, which allows for another type of evidence than what the Court has the capabilities to collect itself.²⁸² The Ukrainian agencies have the necessary capacity and legal framework to collect information such as intercepted communication, telephone and bank records. Moreover, private companies, such as social media, commercial satellite imagery, email domains, and banking companies providing information on money transfers, also play a significant role in evidence collection.²⁸³ Therefore, the cooperation between the OTP and Ukrainian authorities is crucial to ensure the collection of comprehensive and reliable evidence, which is necessary for the ICC to conduct fair and effective investigations and trials. These approaches not only help the Prosecutor collect evidence from Russian-controlled territory, but also enables investigators to investigate crimes committed in areas of ongoing conflict under adequate security conditions.

The cooperation with States Parties is also crucial in overcoming the challenges that arise during the collection of evidence, as the Prosecutor stated when joining the JIT:

“The Ukraine situation, in particular, demands collective action so as to secure relevant evidence and ultimately ensure its effective use in criminal proceedings. [...] The JIT aims to facilitate investigations and prosecutions in the concerned states as well as those that could be taken forward before the International Criminal Court. Through its participation in the JIT, my Office will significantly enhance its ability to access and collect information relevant to our independent investigations.”²⁸⁴

²⁸⁰ Law in Action, *supra* note 124, minute 04:04-04:30.

²⁸¹ Article 61(5) of the Statute reads that “the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.”

²⁸² Group of Independent Experts, *supra* note 14, para 749-752.

²⁸³ *ibid*, para 753.

²⁸⁴ Office of the Prosecutor, *supra* note 187.

The JIT thus facilitates the sharing of evidence between the ICC and states conducting independent investigations under universal jurisdiction.²⁸⁵ Such collaboration presents an invaluable opportunity for the Court to access evidence that may not have been obtained otherwise due to for instance resource restrictions of lack of expertise in specific fields. However, it is essential for the Court to ensure that the shared evidence is of international standard and complies with its legal requirements, including criteria related to chain of custody and reliability.²⁸⁶

Moreover, establishing a structured and professional forum for sharing evidence could enable the ICC to share evidence of the crime of aggression with states that have the capacity to prosecute this crime under universal or domestic jurisdiction,²⁸⁷ although this presents significant legal challenges *i.e.* the lack of enforcement power and immunity.²⁸⁸ Despite these challenges, this approach would enable the Court to enhance its role in promoting accountability and addressing the challenge of lack of jurisdiction over this crime.

5.2. The Added Value of Digital Evidence

International crimes leave behind a significant digital footprint, making digital information such as communication data, satellite imagery, and user-generated content like on-site photographs and videos, essential tools for international criminal investigations.²⁸⁹ The Russia-Ukraine war has been extensively documented online,²⁹⁰ making it crucial for the ICC to consider this evidence. It provides the ICC with additional opportunities to pursue justice and accountability for victims of atrocities in Ukraine, as well as a chance to leverage the experience in future ICC investigations.

In a radio interview in June 2022, the Prosecutor acknowledged the value of digital evidence, such as telephone communication, interceptions, satellite imagery, and social media, in constructing robust criminal cases.²⁹¹

While there is no universally accepted legal definition of the term 'digital evidence', this study relies on a widely used definition as follows:

²⁸⁵ *ibid.*

²⁸⁶ Statute, *supra* note 4, Article 69; Rules, *supra* note 89, Chapter 4, Section 1.

²⁸⁷ Dannenbaum, *supra* note 17.

²⁸⁸ Providing accountability for the crime of aggression will be further examined in chapter 7.1.

²⁸⁹ Kristina Hellwig, 'The Potential and the Challenges of Digital Evidence in International Criminal Proceedings' (2021) 22 International Criminal Law Review 965-988, pp. 965–966.

²⁹⁰ See for instance Bellingcat, 'Civilian Harm in Ukraine Timemap'.

²⁹¹ Law in Action, *supra* note 124, minute 04:04-04:30.

[e]lectronic evidence is any data resulting from the output of an analogue device and/or a digital device of potential [probative] value that are generated, processed, stored or transmitted using any electronic device. [And] [d]igital evidence is that electronic evidence that is generated or converted to a numerical format.²⁹²

The OTP has prior experience in working with digital evidence, although it is limited. It has successfully obtained and presented such evidence in court in the *Bemba et al.* case²⁹³ and the *Yekatom and Ngaïssona* case.²⁹⁴ In addition, the *al-Mahdi* case, secured the ICC's first guilty plea in 2016 based on open-source videos, photos, and geospatial information as evidence to demonstrate the destruction that took place in Timbuktu.²⁹⁵ It is therefore a great opportunity for the OTP to turn this experience into action in the investigation in Ukraine and use all available digital evidence to hold perpetrators accountable, as well as to further develop the investigative experience to handle such evidence. This will benefit investigations into other situations in the future, where the Court is having problems accessing certain territories or difficulties in cooperating with national authorities. In addition, cooperation with intergovernmental and international organisations, including Interpol, Europol, and UN Agencies, could also provide valuable sources of evidence, as they often have access to immigration records, collect medical and forensic records in situation countries, as well as act as first responders in some situations.²⁹⁶

Digital evidence can also be used to prove the individual responsibility by establishing the link between the crime committed and the person(s) responsible.²⁹⁷ This also enables the establishment of links between individuals or a chain of command, and such links are crucial since international crimes often involve mass crimes with multiple actors performing various elements of the offense in a collective manner.²⁹⁸ For example, numerous audio recordings of phone calls made by Russian soldiers to their relatives have surfaced in the media. In one such recording, a Russian soldier says:

²⁹² As cited in Hellwig, *supra* note 289, p. 968.

²⁹³ The case contained a high number of digital evidence, *inter alia* Western union records and call data records. See *The Prosecutor v. Bemba et al.* (ICC-01/05-01/13), 'Judgment Pursuant to Article 74 of the Statute' *Trial Chamber VII* (19 October 2016) para 209-215.

²⁹⁴ Satellite imagery corroborated witness statements. See *The Prosecutor v. Yekatom and Ngaïssona* (ICC-01/14-01/18), 'Corrected Version of "Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona"' *Pre-Trial Chamber II* (14 May 2020) para 108.

²⁹⁵ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 97, para 38-40.

²⁹⁶ Group of Independent Experts, *supra* note 14, para 753.

²⁹⁷ Hellwig, *supra* note 289, pp. 978–980.

²⁹⁸ *ibid*, pp. 979–980.

“They told us that, where we’re going, there’s a lot of civilians walking around. And they gave us the order to kill everyone we see ... I’ve already become a murderer. That’s why I don’t want to kill any more people, especially ones I will have to look in the eyes.”²⁹⁹

While identifying the soldier, his unit, and his superiors requires some work, it provides the Prosecutor with valuable insight that would have been otherwise unattainable. When used in conjunction with supporting evidence, intercepted communication can help the Prosecutor build robust cases as in the *Ongwen* case, where records of intercepted radio communications were found to be particularly relevant for the charges of crimes against humanity and war crimes.³⁰⁰

Another way for the Prosecutor to overcome the lack of cooperation from Russia and the risks of collecting evidence during armed conflict in addition to the methods already discussed, is to utilise open-source information such as content from social media. For instance, a video of a Ukrainian prisoner of war being beheaded by a Russian soldier was shared on a Telegram channel with over 300,000 followers in April.³⁰¹ The video was widely condemned by UN Human Rights Monitoring Mission in Ukraine and President Zelensky calling for the perpetrators to be held legally accountable.³⁰² However, the Prosecutor should consider several factors when using open-source information, such as the credibility and reliability of the information.³⁰³ To address this challenge, the suggested guidelines of the Berkeley Protocol on Digital Open Source Investigations provide a legal framework for digital open-source investigations covering areas such as ethics, verification, chain of custody, admissibility, and collaboration.³⁰⁴

Efforts to collect digital evidence in Ukraine continue to evolve, with an expanding community of volunteers and professionals gathering user-generated and open-source evidence for use in criminal

²⁹⁹ Translated from Russian in Yousur Al-Hlou, Masha Froliak, and Evan Hill, “‘Putin Is a Fool’: Intercepted Calls Reveal Russian Army in Disarray” *The New York Times* (28 September 2022).

³⁰⁰ *The Prosecutor v. Dominic Ongwen* (ICC-02/04-01/15), ‘Decision on the Confirmation of Charges against Dominic Ongwen’ *Pre-Trial Chamber II* (23 March 2016) para 55.

³⁰¹ Reuters, ‘Kyiv Compares Russia to Islamic State after Beheading Video’ *Reuters* (12 April 2023).

³⁰² UN in Ukraine, ‘Statement by the UN Human Rights Monitoring Mission in Ukraine’; The Kyiv Independent news desk, ‘Zelensky Comments on Video of Ukrainian POW’s Alleged Beheading, SBU Starts Investigation’ (*Kyiv Independent*, 12 April 2023).

³⁰³ The Genocide Network, ‘Prosecuting War Crimes of Outrage upon Personal Dignity Based on Evidence from Open Sources’ (Eurojust 2018) pp. 6–7.

³⁰⁴ UN and Universities of California and Berkeley, *Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* (United Nations Human Rights, Office of the High Commissioner; Human Rights Center, UC Berkeley School of Law 2022) Chapter III.

proceedings by judicial entities such as the ICC.³⁰⁵ As a result, the collection of digital evidence has become relatively well organised and systematised. Steps have been taken to archive digital evidence on databases,³⁰⁶ and the Prosecutor, along with Eurojust, has issued practical guidelines for civil society to document and preserve evidence related to international crimes that may become admissible in court.³⁰⁷ These efforts reflect the importance of digital evidence in modern criminal investigations. In the case of Afghanistan, human rights groups urged social media platforms to preserve potential evidence of human rights abuses.³⁰⁸ Similar calls have been made regarding the conflict between Russia and Ukraine,³⁰⁹ and the emphasis on digital evidence from social media in other situations may have influenced the willingness to document atrocities in Ukraine through social media, as various social media platforms and users have gained experience. Similarly the investigation in Ukraine may have a positive impact on future ICC investigations in relation to the use of digital evidence.

5.2.1. Challenges Associated with Digital Evidence and Ways to Address Them

While digital evidence can help the prosecutor overcome part of the challenges of investigating during an ongoing armed conflict, this approach also has its challenges, including in relation to limited jurisprudence, the role of tech firms, reliability of the evidence, as well as the risk of over-documentation.

The utilisation of open-source information as evidence poses a legal challenge for the ICC, given its limited jurisprudence and absence of established standards regarding admissibility and weight.³¹⁰ Although, the ICC Rules requires the Court to evaluate the credibility of such evidence and to ensure that it is not unduly prejudicial to the accused, there is still a need for a clear standard.³¹¹

The ICC has previously relied on social media information as supporting evidence in some cases, including the 2017 *Al-Werfalli* case, where the Court issued the first arrest warrant based largely on

³⁰⁵ Justin Hendrix, 'Ukraine May Mark a Turning Point in Documenting War Crimes' (*Just Security*, 28 March 2022).

³⁰⁶ Businesswire, 'Palantir to Support Ukrainian Prosecutor-General's Investigation into War Crimes' (24 April 2023).

³⁰⁷ ICC and Eurojust, 'Documenting International Crimes and Human Rights Violations for Accountability Purposes: Guidelines for Civil Society Organisations'.

³⁰⁸ Human Rights Watch, 'Preserve Evidence of Potential Rights Abuses in Afghanistan' (30 August 2021).

³⁰⁹ Sky News, 'Ukraine War: Social Media Companies Asked to Archive Evidence of War Crimes' (*Sky News*, 13 May 2022).

³¹⁰ Hellwig, *supra* note 289, pp. 983–987.

³¹¹ Rules, *supra* note 89, Rule 63(2).

social media evidence allegedly showing executions.³¹² In 2019, the OTP cited Facebook posts by military officials as evidence of the perpetrator's discriminatory intent in Myanmar,³¹³ and in 2021 Facebook communications corroborated other evidence in the *Yekatom and Ngaïssona* case.³¹⁴ However, the 2015 *Bemba et al.* case demonstrated the need to establish the authenticity and reliability of social media evidence, as the Prosecution presented photographs from Facebook as evidence, which were deemed *prima facie* not authentic or reliable.³¹⁵

While the ICC Rules do not explicitly address the use of social media evidence in court, the increasing success of the use of social media as evidence shows that the OTP is moving in a promising direction. The investigation in Ukraine offers a significant opportunity for the Court to develop its jurisprudence on social media evidence in holding perpetrators accountable and potentially accept it as key evidence in future criminal proceedings.

The use of digital evidence, such as social media and battlefield evidence,³¹⁶ has also become increasingly important in domestic prosecutions.³¹⁷ Countries such as Sweden, Germany, Finland, and the Netherlands have successfully utilised this type of evidence in prosecuting war crimes committed by foreign fighters in Syria and Northern Iraq.³¹⁸ Moreover, Australia made its first arrest in March 2023 in the investigation of alleged war crimes committed by Australian Special Forces in Afghanistan, based on video footage.³¹⁹ To address the Prosecutor's limited experience with social media evidence, exploring the domestic case law of other courts may therefore provide valuable insights into effectively using and presenting the evidence in court proceedings.

³¹² *The Prosecutor v. Al-Werfalli* (ICC-01/11-01/17-2), 'Warrant of Arrest' *Pre-Trial Chamber I* (15 August 2017) para 3 and 11-22.

³¹³ Office of the Prosecutor, 'Request for Authorisation of an Investigation Pursuant to Article 15' *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar (ICC-01/19)* (2019) para 175-176.

³¹⁴ *The Prosecutor v. Yekatom and Ngaïssona* (ICC-01/14-01/18-723), 'Public Redacted Version of "Prosecution's Trial Brief", 10 November 2020' (3 March 2021) para 71.

³¹⁵ *The Prosecutor v. Bemba et al* (ICC-01/05-01/13-1245), 'Public Redacted Version of "Defense Response to Prosecution's Third Request for the Admission of Evidence from the Bar Table"' *Trial Chamber VII* (9 October 2015) para 83-84.

³¹⁶ Evidence collected from the site of the conflict, such as documents, electronic devices (e.g. cellphones, tablets), and digital storage medias.

³¹⁷ JusticeInfo.net, 'Social Media as New Evidence in War Crimes' (*JusticeInfo.net*, 25 June 2021); Terry Beitner, 'Social Media, The Truth and War Crimes' [2022] 6 *PKI Global Justice Journal* 10.

³¹⁸ See The Genocide Network, 'Overview of National Jurisprudence' (Eurojust 2022).

³¹⁹ Maxim Shanahan, 'Australia's War Crimes in Afghanistan: A High-Stakes First Arrest' (*JusticeInfo.net*, 28 March 2023).

Due to the violent content, there is a risk of social media platforms removing or blocking the content which highlights the need for secure storage.³²⁰ For example, the video submitted by the Prosecution in the *Al-Werfalli* case showing the now deceased Werfalli ordering the execution of twenty individuals, was taken down only months after it was posted due to its violent content.³²¹ In theory, it is possible for the OTP to engage with social media platforms in order to obtain deleted information, as certain platforms disclose data to law enforcement in compliance with local laws and terms of service.³²² However, cooperation with social media platforms can prove difficult as many of them are situated in countries that have not ratified the Statute such as Meta³²³ in the US, TikTok in China, and Telegram in Russia.³²⁴ These states are thereby not obliged to cooperate with the ICC. Timely and structured collection of digital evidence from social media, along with secure storage on separate databases, is thus crucial for the OTP to effectively process incriminating and exculpatory information.

Another challenge arises from the risk of over-documentation, as numerous parties, including journalists, media, social media platforms, and online submission websites supporting the ICC or domestic investigations,³²⁵ collect extensive amounts of digital evidence related to crimes committed in Ukraine.³²⁶

This can lead to redundancy and repetition in the documentation, as seen in the Rohingya crisis where the same victims and witnesses were interviewed by various actors at Cox's Bazar³²⁷ due to easy accessibility.³²⁸ To address this issue, a coordinated strategy for documentation and evidence collection led by the OTP and the Prosecutor General in Ukraine is necessary to ensure efficient use of resources and avoid duplication of efforts, making sure that every document serves a purpose, as stated by the Prosecutor.³²⁹ While third parties can assist the ICC in obtaining digital evidence that

³²⁰ Roisin Costello, 'Crucial Video Evidence of War Crimes Is Being Deleted. How Can It Be Saved?' (*The World*, 30 September 2018).

³²¹ Bellingcat Investigation Team, 'How a Werfalli Execution Site Was Geolocated' (3 October 2017).

³²² Hellwig, *supra* note 289, p. 982.

³²³ Meta is the parent company of Facebook, Instagram, and WhatsApp.

³²⁴ ICC, *supra* note 83.

³²⁵ See for example Danish Police, 'Report War Crimes / Звіт Про Військові Злочини' (*Danish Police*); Office of the Prosecutor General Ukraine, 'Criminal Liability for #RussianWarCrimes!' (*Office of the Prosecutor General*); Office of the Prosecutor, 'OTP Contact Pathway'.

³²⁶ Council of Europe Office in Ukraine, 'Electronic Evidence of War Crimes and the Role of Journalists, Media and Social Media' (30 November 2022).

³²⁷ Cox's Bazar is a refugee camp in Bangladesh where Rohingya people fled from the atrocities in Myanmar.

³²⁸ Eva Buzo, 'Capturing a Crisis: What Lessons Can We Learn from the "Overdocumentation" of the Rohingya Crisis?' (*Justice in Conflict*, 20 May 2020).

³²⁹ Ministerie van Buitenlandse Zaken, 'Opening Speech Karim A.A. Khan QC at UAC' (*Youtube*, 14 July 2022) minute 04:25-04:45.

it lacks the in-house capacity to collect,³³⁰ there are legal challenges associated with this approach. It is essential to recognise the distinction between laypeople documenting international crimes and trained investigators who possess knowledge of the legal requirements for evidence admissibility in court. These requirements include ensuring the credibility of the evidence and its ability to withstand scrutiny from the defence.³³¹

Moreover, digital data has been criticised for being easily tampered, which can impact its reliability as evidence in court.³³² Additionally, the advent of social media has multiplied the reach of disinformation and potential penetration.³³³ Thus, in the armed conflict between Ukraine and Russia, both sides exploit social media to promote their narratives,³³⁴ making it particular important for the ICC to carefully collect and assess both incriminating and exculpatory evidence.³³⁵

Two strategies can be employed to address these challenges. Firstly, digital evidence should undergo thorough examination by experts to determine its authenticity and admissibility. These experts can detect tampering,³³⁶ and provide detailed explanation in Court to help judges assess its weight.³³⁷ Then it is up to the judges to decide whether the evidence is admissible in accordance with the three-part admissibility test,³³⁸ considering its relevance, probative value, and potential to prejudice a fair trial.³³⁹ The probative value of evidence is determined by criteria like reliability, trustworthiness, accuracy, voluntariness, and authenticity.³⁴⁰

Secondly, the digital evidence should be corroborated with other evidence. For instance, commercial satellite data helped verify social media data of killed Ukrainian civilians in Bucha, which Russia had attempted to discredit as disinformation.³⁴¹ By using corroborating evidence, the ICC and Ukrainian prosecutors can strengthen the credibility of digital evidence and counter disinformation.

³³⁰ Group of Independent Experts, *supra* note 14, para 749-752.

³³¹ Statute, *supra* note 4, Article 54.

³³² Lindsay Freeman, 'Law in Conflict: The Technological Transformation of War and Its Consequences for the International Criminal Court' (2019) 51 *New York University Journal of International Law and Politics* 807-870, pp. 858-859.

³³³ OECD, 'Disinformation and Russia's War of Aggression against Ukraine' (2022) p. 1.

³³⁴ Christian Perez and Anjana Nair, 'Information Warfare in Russia's War in Ukraine' (*Foreign Policy*, 22 August 2022).

³³⁵ Statute, *supra* note 4, Article 54(1).

³³⁶ See for example Janine Schneider, Julian Wolf, and Felix Freiling, 'Tampering with Digital Evidence Is Hard: The Case of Main Memory Images' (2020) 32 *Forensic Science International: Digital Investigation*.

³³⁷ International Bar Association, *supra* note 243, 24.

³³⁸ *The Prosecutor v. Bemba et al* (ICC-01/05-01/08-2299-Red), 'Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute"' *Trial Chamber III* (8 October 2012) para 7.

³³⁹ Statute, *supra* note 4, Article 69(4).

³⁴⁰ *The Prosecutor v. Bemba et al*, *supra* note 338, para 8.

³⁴¹ Marisa Torrieri, 'How Satellite Imagery Magnified Ukraine to the World' (*Via Satellite*, 24 October 2022).

Despite these challenges, digital evidence presents an opportunity for the Court to overcome challenges in evidence collection. However, thorough assessment, cooperation and information-sharing between national authorities and the ICC are crucial to avoid duplication of efforts and build robust cases against the alleged perpetrators. Overall, the Prosecutor's commitment to rigorous investigation in collecting and assessing digital evidence in Ukraine sets a valuable precedent for future ICC investigations, fostering accountability and justice for victims beyond the Russia-Ukraine war.

5.3. Preliminary Findings

This chapter examined the opportunities and challenges of evidence collection in the ICC's investigation in Ukraine, focusing on armed conflict and digital evidence.

Although the Court has experience with evidence collection during armed conflicts, the investigation in Ukraine presents various practical challenges. These challenges include ensuring the personal security of investigators present on the ground, obtaining physical access to Russian-controlled territories, the risk of evidence being destroyed, and the risk of evidence received from Ukrainian authorities being obtained under circumstances that do not comply with the Statute.

Despite these challenges, ICC case law emphasises the importance of on-the-ground evidence collection to substantiate allegations in individual criminal cases. To address these challenges, the Prosecutor should employ diverse methods of evidence collection, including obtaining testimonial evidence from Ukrainian refugees and Russian soldiers in Ukrainian custody, as well as especially digital evidence. Digital evidence can prove valuable when physical access to crime sites is limited and cooperation with relevant states is lacking.

Close cooperation with Ukrainian authorities and other states, such as through the JIT, in terms of evidence collection and sharing, also presents an opportunity for the Prosecutor to address these challenges. These efforts contribute to the development of jurisprudence and the establishment of a strong foundation for future investigations, promoting justice and accountability for grave crimes on a global scale.

6. From Investigation to Prosecution: Bringing Perpetrators of International Crimes in Ukraine to Trial in the Hague

“Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.”³⁴²

Nuremberg Judgment

In this chapter, the opportunities and challenges related to the ICC prosecuting perpetrators of war crimes, crimes against humanity, and genocide in Ukraine will be examined. These include the value of ICC arrest warrants, the dependence on state cooperation in enforcing these warrants, and the challenges associated with head of state immunity and jurisdiction over nationals of non-States Parties. Ensuring accountability for atrocities committed in Ukraine and enforcing international law, as emphasised in the Nuremberg Judgment, is crucial. The chapter will primarily focus on the issuance of arrest warrants for President Vladimir Putin and Maria Lvova-Belova.

6.1. The Significance of ICC Arrest Warrants

In March 2023, the ICC demonstrated swift action by issuing arrest warrants for President Putin and Maria Lvova-Belova. The warrants were issued for their alleged involvement in the unlawful transfer and deportation of children from Ukraine into Russia, with the aim of erasing their Ukrainian lives and identities.³⁴³ With the issuance of these warrants, the total number of ICC arrest warrants has reached 32, with 13 defendants still at large.³⁴⁴ The issuance of the arrest warrant against Putin is a significant development, as it marks the first time the Court has issued a warrant against a head of state of a powerful state and a permanent member of the UNSC.³⁴⁵ This accomplishment was only possible through the cooperation of Ukraine, the JIT and the great support the OTP has received in its investigation into the situation in Ukraine.³⁴⁶ Evidence in support of the warrants relied on a report by Yale School of Public Health,³⁴⁷ which employed satellite imagery, social media posts, and user-

³⁴² IMT Judgment, *supra* note 42, p. 447.

³⁴³ ICC, *supra* note 26.

³⁴⁴ See ICC, ‘Warrant of Arrest | Cases’. The website is not updated with the latest arrest warrants in the situations in Georgia and Ukraine.

³⁴⁵ *ibid.*

³⁴⁶ Office of the Prosecutor, ‘Statement by Prosecutor Karim A. A. Khan KC on the Issuance of Arrest Warrants against President Vladimir Putin and Ms Maria Lvova-Belova’ (17 March 2023).

³⁴⁷ EJIL: The Podcast!, ‘Episode 19 – “From Russia With War: Part Deux”’ (*EJIL: Talk!*, 24 March 2023) minute 06:00-07:00.

generated videos and photographs,³⁴⁸ underlining the importance of digital evidence and open-source research to be used in the investigation.

While the OTP cannot charge Putin with the crime of aggression, it has instead focused on a derivative crime, namely war crimes committed against children.³⁴⁹ The charges brought against Putin and Lvova-Belova are narrow in scope and reminiscent of the *Lubanga* case, where Thomas Lubanga was convicted for enlisting and conscripting children, using them to participate actively in hostilities in the DRC.³⁵⁰ The charges may not fully satisfy Ukraine and other actors' demand for accountability. However, Michael Scharf, Co-Founder of Public International Law & Policy Group (PILPG), suggests that the ICC plans to issue more arrest warrants, as the decision to prioritise the war crimes against children may have been a strategic move by the Prosecutor, as it ensured widespread media attention for the news of the warrants.³⁵¹ Moreover, the timing of the warrants was significant as it highlighted the absurdity of Russia taking the presidency of the UNSC for the month of April 2023,³⁵² given that Russian actions clearly violate the prohibition on the use of force in the UN Charter.³⁵³

The arrest warrants were welcomed on Twitter by several countries, including the US, as a significant move towards individual accountability.³⁵⁴ France went so far as to call it a landmark decision,³⁵⁵ and Human Rights Watch stated that it is a “wake-up call to others committing abuses or covering them up.”³⁵⁶ Russia, on the other hand, underlined that as it is not a State Party to the Statute, does not recognise the Court's jurisdiction over Russian citizens, and therefore considers all ICC documents as “legally null and void.”³⁵⁷

³⁴⁸ Humanitarian Research Lab, 'Russia's Systematic Program for the Re-Education & Adoption of Ukraine's Children' (Yale School of Public Health 2023) p. 7.

³⁴⁹ ICC, *supra* note 26.

³⁵⁰ *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), 'Judgment Pursuant to Article 74 of the Statute' *Trial Chamber I* (14 March 2012) para 1-2 and 1358.

³⁵¹ PILPG, *supra* note 163, minute 28:00-31:00.

³⁵² UNSC, 'Security Council Presidency' (UN).

³⁵³ UN Charter, *supra* note 16, Article 2(4).

³⁵⁴ The countries include for example Canada, several EU States, New Zealand, United Kingdom, United States, and Taiwan. Alonso Gurmendi [@Alonso_GD], 'State Reactions to the ICC's Arrest Warrant against Vladimir Putin' (*Twitter*, 17 March 2023).

³⁵⁵ France Diplomacy, *supra* note 27.

³⁵⁶ As cited in Peter Beaumont, 'What Does the ICC Arrest Warrant for Vladimir Putin Mean in Reality?' *The Guardian* (17 March 2023).

³⁵⁷ Russia at the UN, *supra* note 107.

The Prosecutor's decision to issue an arrest warrant for Putin is a significant achievement, marking a turning point in the ICC's history. According to Michael Scharf, "The ICC has arrived."³⁵⁸

By issuing the arrest warrants the ICC has demonstrated its ability to act decisively and efficiently, without relying on a prolonged evidence-gathering process. This is a significant step in the ICC's investigation into the situation in Ukraine, showing its commitment to holding those who commit atrocity crimes in Ukraine accountable. This not only sends a message to Russia, but also to the international community, highlighting the importance and impact of the ICC's work. This, in turn, may help the Court address some of the challenges it is facing.

While we have yet to see perpetrators of international crimes in Ukraine being brought to trial in the Hague, the importance of the arrest warrant against Putin could be compared to the International Court of Justice's (ICJ) ruling against the US in the *Nicaragua* case^{359, 360}. This ruling is often cited as a turning point for the ICJ, as it made the court a more powerful institution and attracted more member States, although the US became more hostile towards the court.³⁶¹ Similarly, the ICC's decision to issue an arrest warrant against the head of State of a P5 member and a nuclear power marks a significant turning point for the Court. By taking this bold step, the ICC is demonstrating its commitment to justice and accountability for the victims, elevating its significance and reputation on the world stage.³⁶² This may lead to a greater level of public support for its efforts, and potentially, greater political support in terms of for example funding. As previously argued, if support and funding is distributed to other investigations based on the gravity of crimes and level of impact on affected communities, it could potentially enable the Court to ensure justice and accountability for victims in other situations.

6.2. The Dependence on State Cooperation in Enforcing Arrest Warrants

Although the issuance of arrest warrants against Putin and Lvova-Belova is a significant step in the investigation, the main challenge lies in the enforcement of the case against them and their surrender to the ICC. The arrest and surrender of an accused individual to the ICC is, as with other aspects of the investigation, contingent on the cooperation of States Parties, as states are the enforcement mechanism of the Court, tasked with carrying out its functions – the arms and legs of the Court.³⁶³ Article 89 of the Statute is particularly noteworthy in this situation. This provision obliges States

³⁵⁸ PILPG, *supra* note 163, minute 53:30-53:45.

³⁵⁹ *Nicaragua v. USA*, 'Military and Paramilitary Activities in and Against Nicaragua (Judgment)' ICJ (1986).

³⁶⁰ PILPG, *supra* note 163, minute 53:45-55:00.

³⁶¹ Lori Fisler Damrosch, 'The Impact of the *Nicaragua* Case on the Court and Its Role: Harmful, Helpful, or In Between?' (2012) 25 *Leiden Journal of International Law* 135-147, pp. 140–147.

³⁶² Hamilton, *supra* note 27.

³⁶³ Cassese, *supra* note 130, p. 13.

Parties, upon request by the Court, to arrest and surrender individuals to the Court. However, this is particularly difficult when the accused is a national of a non-State Party, as these states do not have any legal obligations towards the Court. The Court can only invite them to provide assistance.³⁶⁴

In addition, the arrest warrants raise two questions related to the Court's jurisdiction over nationals of non-States Parties and head of state immunity. First, as discussed in chapter 3.2.1, the ICC's interpretation of jurisdiction over non-party nationals, absent the consent of the state or a Security Council referral, has been objected to by non-States Parties. However, this objection is not widely held among States Parties or scholars, albeit it persists, and the general view is that the ICC has jurisdiction over all crimes committed in Ukraine.³⁶⁵

Secondly, according to customary international law, President Putin and other state officials³⁶⁶, such as the Russian foreign minister Sergey Viktorovich Lavrov, are granted immunity *ratione personae*, which means that they are immune from the jurisdiction of foreign domestic courts.³⁶⁷ State officials are entitled to immunity *ratione personae* even if the protected individual is accused of having committed an international crime, as stated by the ICJ in the *Arrest Warrant* case in 2002.³⁶⁸ Ukraine and other states are thereby unable to prosecute Putin for international crimes as long as he holds office.

According to Dapo Akande, the issue for the ICC is not about the immunity of heads of state before an international tribunal. It is about the immunity of a head of state of a state that is not party to the instrument that established the tribunal.³⁶⁹ The Court has dealt with this issue before in the *Al Bashir* case when the Court issued arrest warrants for then President of Sudan Omar al-Bashir for war crimes, crimes against humanity and genocide.³⁷⁰ The Appeals Chamber held that “there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court.”³⁷¹ Several commentators and international lawyers support this interpretation and the Court's exercise of the *ius puniendi*³⁷² of the

³⁶⁴ Statute, *supra* note 4, Article 87(5)(a).

³⁶⁵ Jackson, *supra* note 28.

³⁶⁶ This study uses the following definition of a State official: “those that constitute a formal organ of the State but also those persons or entities that exercise elements of governmental authority.” International Law Commission, ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (UNGA 2008) A/CN.4/596 para 6.

³⁶⁷ Dapo Akande and Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010) 21 European Journal of International Law, p. 818.

³⁶⁸ *Democratic Republic of The Congo v. Belgium*, ‘Case Concerning the Arrest Warrant of 11 April 2000’ (ICJ, 14 February 2002) para 56-58.

³⁶⁹ EJIL: The Podcast!, *supra* note 347, minute 8:35-09:05.

³⁷⁰ Arrest warrants: 4 March 2009 and 12 July 2010. ICC, *supra* note 135.

³⁷¹ *The Prosecutor v. Al Bashir* (ICC-02/05-01/09), ‘Judgment in the Jordan Referral Re Al-Bashir Appeal’ *The Appeals Chamber* (6 May 2019) para 1.

³⁷² In the context of international law, it refers to the power to exercise jurisdiction over international crimes.

international community.³⁷³ However, according to Akande, the Court failed to address the issue of whether this applies to a head of state of a non-State Party, despite having the opportunity as Sudan is not a member State. The question of whether the same principle applies to a head of state from a state that is not a party to the Statute therefore remains a matter of interpretation.³⁷⁴

The issuance of the arrest warrant for Putin, a head of state of a non-State Party, further reinforces the Court's interpretation of jurisdiction over non-Party nationals, which is supported by precedent from the Special Court for Sierra Leone³⁷⁵ and the ICTY, which issued an arrest warrant for Slobodan Milošević while he was head of state of the Federal Republic of Yugoslavia.³⁷⁶ While the cases demonstrate that international courts can prosecute heads of state who commit international crimes while in office, they were established by the UN and thereby operated under different terms. However, in an interview in June 2022, the Prosecutor emphasised that "Article 27 of the Rome Statute makes it clear that an official's position is irrelevant."³⁷⁷ In an article for *EJIL: Talk!*, Akande argues that while Article 27 of the Statute specifies that immunity and official capacity should not be taken into account, there is a discrepancy with Article 98 which addresses the immunity of non-States Parties that the ICC is not authorised to waive.³⁷⁸

The Court's position thereby raises a challenge for States Parties to reconcile the obligation of arrest and surrender Putin with immunity *ratione personae* granted by national and international law. The arrest warrant for Putin will therefore serve as a litmus test for support of international law and the Court, revealing which States Parties are willing to fulfil their obligations to the ICC and arrest and surrender Putin to the Court, if given the opportunity, as the jurisdiction to enforce arrest warrants relies upon States Parties. Ultimately, it depends on how States Parties interpret their obligations under international law.

³⁷³ See for example Marko Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 *Journal of International Criminal Justice* 25-52; Akande, *supra* note 13; Dominik Zimmerman, 'Article 12 - Preconditions to the Exercise of Jurisdiction, Para 177' in Mark Klamberg (ed), *Commentary on the law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017).

³⁷⁴ Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . . At Long Last . . .) But Gets the Law Wrong' (*EJIL: Talk!*, 15 December 2011).

³⁷⁵ Stated by the Chief Prosecutor of the Special Court for Sierra Leone, Professor David Crane, *Expert Roundtable - Putin: Pathways to Prosecution* (Directed by PILPG, 2022) minute 21:20-22:00.

³⁷⁶ International Criminal Tribunal for the former Yugoslavia, 'Arrest and Transfer' (*UN*).

³⁷⁷ *Law in Action*, *supra* note 124, minute 07:40-08:05.

³⁷⁸ Dapo Akande, 'Who Is Obligated to Arrest Bashir?' (*EJIL: Talk!*, 13 March 2009).

Al Bashir, who recently escaped from detention in Sudan,³⁷⁹ was also head of state of a non-State Party, and faced several ICC warrants.³⁸⁰ Despite the ICC's request to arrest, several States Parties have refused to do so even when he travelled to their territories, citing immunity *ratione personae* and the risk of destabilisation.³⁸¹ The ASP, and UNSC in case of a UNSC referral as in the case of Sudan, are the only mechanisms to ensure that States Parties fulfil their obligations under the Statute.³⁸² However, in the case of *Al Bashir* these mechanisms failed, leaving the Court paralysed.³⁸³ To address this challenge, the Prosecutor can only encourage cooperation with the Court. In June 2022, the Prosecutor pointed to former President Milošević and leaders in Rwanda and Sierra Leone as examples of successful trials that relied on perseverance, partnership, cooperation, and courage of survivors.³⁸⁴ Although these are not ICC cases, the Prosecutor highlights the fact that while it may be difficult to bring leaders accused of international crimes to trial in The Hague, effective cooperation between States can compensate for the ICC's lack of an enforcement mechanism, and thereby ensure justice and accountability for victims in the Russia-Ukraine war.

The issue of immunity and willingness may become relevant soon, as Putin has allegedly accepted an invitation to attend a BRICS (Brazil, Russia, India, China, South Africa) summit in South Africa scheduled for August 2023.³⁸⁵ South Africa also played a role in the *Al Bashir* case when he travelled to South Africa without being arrested. The South African government claimed that there “was no duty under international law on South Africa to arrest the serving head of a non-state party.”³⁸⁶ Such actions by a central State Party involved in the creation of the Court undermines the stability and legitimacy of the ICC.³⁸⁷ While it is unlikely that Putin will attend the summit in person, only time will tell whether the Court will face a similar situation as it did with Al Bashir.³⁸⁸

³⁷⁹ Gwenaëlle Lenoir, ‘Sudan: Who Helped the ICC Suspects Break Jail?’ (*JusticeInfo.net*, 11 May 2023).

³⁸⁰ *The Prosecutor v. Al Bashir* (ICC-02/05-01/09), ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ *Pre-Trial Chamber I* (4 March 2009) p. 91–92; *The Prosecutor v. Al Bashir* (ICC-02/05-01/09), ‘Second Decision on the Prosecution’s Application for a Warrant of Arrest’ *Pre-Trial Chamber I* (12 July 2010) p. 28.

³⁸¹ The States included Chad, Djibouti, DRC, Jordan, Kenya, Malawi, and South Africa. International Criminal Court, ‘News | Al-Bashir Case’.

³⁸² Article 112(2)(f) of the Statute, *supra* note 4.

³⁸³ Kreß and Prost, *supra* note 31, p. 2004.

³⁸⁴ Law in Action, *supra* note 124, minute 08:05-08:40.

³⁸⁵ Sidhant Sibal, ‘Russian President Putin Accepts Invite for BRICS Summit’ (*WIONEWS*, 20 April 2023).

³⁸⁶ Stated by Pretoria’s legal advisor Dire Tladi, as cited in News Wires, ‘South Africa Tells ICC It Didn’t Break Rules by Failing to Arrest Sudan’s Bashir’ (*France 24*, 8 April 2017).

³⁸⁷ Thierry Cruvellier, ‘Why South Africa Said It Was Leaving the ICC, Then Flip-Flopped’ (*JusticeInfo.net*, 28 April 2023).

³⁸⁸ Marko Milanović in EJIL: The Podcast!, *supra* note 347, minute 12:50-13:00.

The warrant for President Putin is different than that of Al Bashir due to Russia being a great- and nuclear power and its position as a permanent member of the UNSC. According to legal scholar Sergey Vasiliev, some ICC members, such as South Africa, are dependent on support from Russia, which could potentially influence their decisions,³⁸⁹ which adds a layer of complexity to the situation. Moreover, the invasion of Ukraine has shown that Russia is willing to use illegal force against a sovereign state. As a result, the potential arrest of Putin carries significant implications. Former President of Russia and current deputy head of Russia's security council, Dmitry Medvedev, recently warned that if a State was to arrest Putin, it would be perceived as a declaration of war against the Russian Federation.³⁹⁰ Given these circumstances, it is unlikely that Putin will be arrested and surrendered to the ICC while being in power in Russia, but the future may hold surprises, as politics can change suddenly and individuals who were once in power can quickly find themselves without.³⁹¹

The situation with Lvova-Belova and other potential lower-level accused may be different, as the consequences for the executing state are not as severe as arresting Putin. Nevertheless, failure to execute arrest warrants can still undermine the Court's legitimacy and international law in general. The Prosecutor General of Ukraine addressed this in a live interview with *Washington Post* in April 2023:

“The arrest warrant to Putin shows to everyone that no one could be above the law, and if we all agree on this, then all the states who are the members of the Rome Statute should execute this arrest warrant. If they intentionally don't want to do it, it shows that they are not fair and they are not honest, and that for them, probably, justice is just a word.”³⁹²

At present, the prospect of bringing Putin and Lvova-Belova to trial in the Hague appears remote. Legal scholar Marko Milanovic has expressed a strong belief that Putin will not face judgment in The Hague. Milanovic argues that the only realistic possibility for this case to proceed is through a regime change in Russia.³⁹³

³⁸⁹ PILPG, *supra* note 163, minute 08:00-10:00.

³⁹⁰ Sky News, 'Vladimir Putin Arrest Will Be "Declaration of War against Russia", Says Dmitry Medvedev' (*Sky News*, 23 March 2023).

³⁹¹ Asymmetrical Haircuts, 'Justice Update - Four Ways to Accountability in Ukraine' (*Podcast*, 14 July 2022) minute 12:45-13:30.

³⁹² Washington Post Live, 'Transcript: World Stage: Ukraine with Andriy Kostin, Ukrainian Prosecutor General' *Washington Post* (12 April 2023).

³⁹³ EJIL: The Podcast!, *supra* note 347, minute 20:35-21:35.

On a positive note, the pursuit of justice and accountability is always worth considering, even if the outcome is unpredictable. The history of international criminal law shows that at various times, the possibility of individual accountability seemed uncertain or unlikely. For example, when discussions on accountability measures began in 1942, no one expected the completion of the Nuremberg trials.³⁹⁴

6.2.1. The Impact of Unexecuted Arrest Warrants

Although it is unlikely that Putin will be prosecuted by the ICC in the near future, the arrest warrants are still significant for the Court, especially if the charges are confirmed in court. While the ICC does not have the authority to conduct trials in absentia under Article 63(1), the Pre-Trial Chamber can hold a hearing to confirm the charges in the absence of the accused.³⁹⁵ This process allows the Court to assess the strength of the Prosecutor's case and determine whether there is enough evidence to proceed to trial.³⁹⁶ The *Kenyatta* case demonstrated the importance of this stage of proceedings, as the Trial Chamber ultimately declined to confirm the charges against one of the accused, Mohamed Hussein Ali, due to insufficient evidence.³⁹⁷ By contrast, if the Chamber was to confirm the charges against Putin or other perpetrators, it would mark a significant step towards holding them accountable for their alleged crimes, thus presenting a symbolic value and great opportunity to show progress in its investigation in Ukraine.

Moreover, according to Professor Michael Scharf, the arrest warrant against Putin could undermine his effectiveness as a leader.³⁹⁸ Being labelled a 'war criminal' could erode his authority and support, restrict his ability to travel, and leave him vulnerable to both internal and external threats from those seeking to gain power in Russia. Moreover, it could have an impact on international relations, as exemplified by China's decision to refrain from overtly providing arms to Russia.³⁹⁹ The warrant also sends a message to other world leaders, that they too could be held accountable for their actions, as emphasised by the Court in its press statement.⁴⁰⁰ Thus, the issuance of the arrest warrants against Putin and other officials may have a symbolic value in terms of deterrence and sending a

³⁹⁴ Dapo Akande, EJIL: The Podcast!, 'Episode 14 – "From Russia With War"' (*EJIL: Talk!*, 7 March 2022) minute 42:50-43:45.

³⁹⁵ Statute, *supra* note 4, Article 61(2).

³⁹⁶ EJIL: The Podcast!, *supra* note 347, minute 20:35-21:35.

³⁹⁷ *The Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11), 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' *Pre-Trial Chamber II* (23 January 2012) para 426-427.

³⁹⁸ PILPG, *supra* note 163, minute 28:00-34:00.

³⁹⁹ AP News, 'China Vows Not to Sell Arms to Any Party in Ukraine War' (14 April 2023).

⁴⁰⁰ ICC, *supra* note 26.

message to Russian officials that the international community is watching and will hold them accountable for their actions.⁴⁰¹ This highlights the possible impact of ICC decisions beyond its own jurisdiction and underscores the importance of seeking accountability for international crimes.

6.3. Will the ICC Prosecutor Apply the Same Swift Action in Other Cases?

While the ICC's prompt action in issuing arrest warrants presents opportunities for the Court, it also raises fundamental questions about international criminal justice. These include issues related to prioritisation of crimes and victims, resource allocation for conflicts, and concerns about selectivity and equal application of justice.⁴⁰² As a result, the Prosecutor faces pressure to demonstrate the same level of decisiveness in other cases, such as the investigations into the situations in Palestine or Myanmar, where limited resources and lack of support from other states may present a challenge.⁴⁰³

Therefore, it is essential for the Prosecutor to address these potential challenges and prioritise other investigations to avoid ongoing criticism of selective justice and allegations of hypocrisy, particularly in cases where powerful states like the US and the UK are not being investigated for alleged atrocity crimes, such as in the situations of Afghanistan and Iraq, partly due to lack of support from some Western States.⁴⁰⁴ The perception of double standards and selective enforcement of international criminal law could undermine the ICC's legitimacy and credibility among some countries and communities. The ICC should be an independent and impartial judicial institution that operates based on the rule of law and international legal principles. Therefore, it is important for the Prosecutor to base his decisions on evidence and legal standards so that the outcome of a case does not necessarily affect the ICC's legitimacy or credibility in other cases.

6.4. Preliminary Findings

This chapter explored the opportunities and challenges associated with the prospects of bringing individuals accused of committing international crimes in Ukraine to trial in The Hague. Analysis of recent arrest warrants issued against Vladimir Putin and Maria Lvova-Belova highlighted complexities of international criminal justice and the role of the ICC in promoting justice and accountability for victims. While the likelihood of bringing Putin to trial in The Hague is uncertain, the warrants have symbolic value and present opportunities for the Court to promote justice and

⁴⁰¹ EJIL: The Podcast!, *supra* note 347, minute 2:05-2:55.

⁴⁰² Jackson, *supra* note 28.

⁴⁰³ Janet Anderson, 'ICC Arrest Warrants against Putin: What Do Experts Say?' (*JusticeInfo.net*, 21 March 2023).

⁴⁰⁴ *ibid.*

accountability for victims and demonstrate its commitment and ability to act decisively answering the widespread calls for justice and accountability.

Three main opportunities were identified: demonstrating the Court's ability to act decisively and efficiently, sending a message to perpetrators that they too could be held accountable for their actions, and influencing international relations. However, bringing perpetrators to trial in The Hague also poses significant challenges such as the enforcement of arrest warrants and pressure to show the same decisiveness in other cases to counter criticism of selective justice and allegations of hypocrisy. In addition, the widespread support from Western countries for holding Russian perpetrators accountable compared to other investigations may feed into the criticism that the Court is serving Western interests. To address these challenges the Court could remind States Parties of their widespread call for accountability and urge them to show same support for other investigations and fulfil their obligations under the Statute in relation to the arrest and surrender of suspects.

If the ICC succeeds in prosecuting Putin or other perpetrators for atrocities committed in Ukraine, it has the potential to significantly enhance the legitimacy and credibility of the ICC and thereby provide the Court with an opportunity to address the criticism of selective justice and an African bias. However, it is important to acknowledge that the prospects of such a prosecution currently appear remote.

7. Concluding Reflections

“The situation in Ukraine must also set a new standard for concerted action to achieve global accountability for international crimes. From Kharkiv to Khartoum, from Kyiv to Cox’s Bazar, survivors should feel this sense of collective urgency and benefit from the innovation we see we are now capable of.”⁴⁰⁵

ICC Prosecutor Karim Khan, 2023

In light of the unprecedented ICC investigation into grave crimes committed in Ukraine, this study set out to identify the opportunities and challenges associated with the investigation and to provide suggestions on how these can be addressed to ensure justice and accountability for victims in Ukraine and potentially beyond. This was done through the analysis of three important aspects of the investigation: complementarity, evidence collection, and bringing perpetrators to trial in the Hague. The findings have shed light on several key aspects that are crucial for ensuring justice and accountability for victims of atrocity crimes thereby fulfilling the Court’s mandate as stated in the Statute.

While the principle of complementarity has emerged as a central aspect of the investigation, challenges exist in Ukraine's limited capacity to conduct fair and impartial trials. If Ukraine fails to adequately investigate crimes by its own forces or hands out disproportionate sentences, it could undermine the ICC's legitimacy as success is not only dependent on the number of cases brought to trial in the Hague, but that justice is achieved either domestically or internationally. In relation to evidence collection, the ongoing armed conflict and the prevalence of information manipulation and disinformation also pose challenges in relation to the accessibility of evidence to build robust cases, as well as the risk of over-documenting due to the vast amount of information.

However, the ICC has several opportunities to address these challenges in its work towards ensuring justice and accountability for atrocities committed in the Russia-Ukraine war. These opportunities include cooperation with Ukraine under the principle of complementarity, cooperation with States Parties and non-States Parties, as well as international and regional organisations. Indeed, the current cooperation between the ICC Prosecutor and the Prosecutor General of Ukraine demonstrates the effectiveness of complementarity when supported by enhanced ICC field presence and cooperation not only between the ICC and the host State, but also with other member States and organisations, as evidenced by the JIT. This support enables national authorities to investigate and prosecute alleged international crimes, including the crime of aggression, while also

⁴⁰⁵ Office of the Prosecutor, *supra* note 145.

strengthening national justice systems through positive complementarity. In addition, the vast amount of available evidence, particularly digital evidence, presents a significant opportunity for the ICC to construct robust criminal cases against individual perpetrators.

While the prospects of bringing perpetrators to trial in the Hague, such as Vladimir Putin, seem remote as of now, the recent issuance of arrest warrants for Putin and Maria Lvova-Belova presents an opportunity for the ICC to demonstrate its commitment to justice and accountability. However, enforcing arrest warrants and the criticism of selective justice are significant challenges, which should be addressed by actively reminding States Parties of their widespread call for accountability and urge them to show equal support for other investigations. This way, the OTP has the ability to demonstrate the same swift action in other cases.

Ultimately, the ICC investigation in Ukraine and the progress made by the Court so far present an opportunity to address previous criticism raised towards the Court and maintain the support and cooperation of States Parties, as well as the trust of affected communities, which is crucial in ensuring the ICC's continued impact in promoting international criminal justice and upholding international law. These experiences can be used to move closer to achieving its mandate of ending impunity for the most serious crimes of international concern in other situations as well. However, as we have yet to see the outcome of the investigation in Ukraine, there is still a risk of the ICC failing which will undeniably have an impact on the legitimacy and support for the Court in the future given the unprecedented support the investigation has received.

While this study focuses primarily on the ICC, it is important to acknowledge that there are other mechanisms through which accountability and justice for victims can be pursued, including accountability for the crime of aggression. This will briefly be addressed in the following.

7.1. Other Avenues for Accountability

Due to the complex and extensive nature of the crimes committed in Ukraine, expecting Ukraine to handle them alone, even with international support, is unrealistic. Additionally, the ICC's capacity for investigation and prosecution is limited. Therefore, it is necessary to explore alternative measures within the international criminal justice system that can complement the ICC's mandate of ending impunity and ensuring justice and accountability such as accountability for the crime of aggression and the exercise of universal jurisdiction.

A potential solution to the jurisdictional limitations of the ICC regarding the crime of aggression, as suggested in the literature, is the establishment of an *ad hoc* international court specifically for the crime of aggression either as a special or hybrid tribunal.⁴⁰⁶

Ukraine and other states have demanded the creation of a special tribunal for the crime of aggression, which may serve as a manifestation of the international community's position towards aggressors and complement the ongoing work of the ICC in the common pursuit of accountability but raises concerns of selective justice.⁴⁰⁷

States like the US, which previously opposed establishing an *ad hoc* tribunal due to concerns over repercussions from the 2003 invasion of Iraq, recently has shown openness to the idea of an internationalised national court *i.e.* a hybrid tribunal.⁴⁰⁸ While this is a step forward, critics say that weak proposals tend to carry the risk of weak results,⁴⁰⁹ as this kind of hybrid court may not encompass the crime of aggression under international law, and it is uncertain whether it would have the jurisdiction to hold Putin accountable considering personal immunities.⁴¹⁰ To ensure accountability and uphold the rule of law, it is essential to choose a tribunal model that has jurisdiction to hold leaders accountable for the crime of aggression and not grants them automatic personal immunity.⁴¹¹

However, creating an *ad hoc* international court to prosecute Russians without addressing the ICC's jurisdictional limitations on the crime of aggression, raises concerns about selective justice and the Courts effectiveness in addressing all atrocity crimes as intended. It is therefore crucial that States Parties review the Kampala amendments to address the inadequacy of the investigation in Ukraine.⁴¹² This could involve considering options such as amending the amendments or potentially remove the crime of aggression entirely to find a lasting way forward.⁴¹³ In the words of the Prosecutor to the ASP in December 2022: we must “explore how to strengthen this institution that you are collectively part of and that has been collectively built so that we can meet the needs of

⁴⁰⁶ Claus Kreß, Stephan Hobe, and Angelika Nußberger, 'The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System' (*Just Security*, 23 January 2023).

⁴⁰⁷ *ibid.*

⁴⁰⁸ Michael Scharf and others, 'The United States' Proposal on Prosecuting Russians for the Crime of Aggression Against Ukraine Is a Step in the Right Direction' (*Just Security*, 6 April 2023).

⁴⁰⁹ Jennifer Trahan, 'Don't Be Fooled By U.S. Smoke and Mirrors on the Crime of Aggression' (*Just Security*, 14 April 2023).

⁴¹⁰ Kreß, Hobe, and Nußberger, *supra* note 406.

⁴¹¹ Trahan, *supra* note 409.

⁴¹² Luis Moreno Ocampo, 'Ending Selective Justice for the International Crime of Aggression' (*Just Security*, 31 January 2023).

⁴¹³ 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).

today, but also the requirements of tomorrow.”⁴¹⁴ But it remains uncertain how the States Parties perceive this matter and whether they are willing to re-evaluate the political compromise reached with the Kampala amendments.

Another avenue for accountability lies in the exercise of universal jurisdiction by foreign national courts. Several European states, including Germany, Poland, Spain, and Sweden have launched official investigations into the atrocities committed in Ukraine. This approach provides an additional path for victims to seek criminal justice, expanding the possibilities for accountability, although the States are likely to only prosecute a few cases each. However, universal jurisdiction is also encountering several challenges that need to be addressed, including issues related to immunity *ratione personae*, potential overlaps in investigations and linguistic and cultural barriers.⁴¹⁵

7.2. Further Research

While there is a significant focus on courtroom accountability through prosecutions in the domestic and international calls for justice and accountability in Ukraine, it is crucial to recognise the broader dimensions of transitional justice beyond the courtrooms. Further research could therefore be conducted to identify relevant transitional justice measures to Ukraine such as truth-seeking initiatives and reparations, while considering the unique contexts and circumstances.⁴¹⁶ Additionally, it is worth considering the ICC's role in peace negotiations and whether the demand for justice and accountability hinders or complements the prospects of peace.

One thing is certain, if a peace agreement is reached, Ukraine will still face significant challenges, as individuals involved in the conflict and witnesses to extensive destruction and the killing of innocent people will be the ones who are tasked with rebuilding the country.

⁴¹⁴ ICC, ‘ASP 21: Opening Remarks of the ICC Prosecutor Karim A. A. Khan KC’ (*YouTube*, 9 December 2022) minute 19:40-20:00.

⁴¹⁵ Michael Scharf and others, ‘High War Crimes Court of Ukraine for Atrocity Crimes in Ukraine’ (*Opinio Juris*, 29 July 2022).

⁴¹⁶ Kateryna Busol and Rebecca Hamilton, ‘Transitional Justice in Ukraine: Guidance to Policymakers’ (*Just Security*, 2 June 2022).

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