



Outline of Theoretical and Practical Issues of the Tribunal for Russia's Crime of Aggression



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1) INTRODUCTION

The blind strives for contention, domination upon foes or their extermination belong to ancient instincts of a human being, rooted in the reptile brain and constantly acquiring new forms with the development of society.

It is indisputable, that the phenomena of wrongdoing *which causes an inevitable liability, imposed by society* is the consequence of such an instinct, and in certain sense can be considered as the psychological basis of criminal law. The point is that by establishing rules of conduct, especially during warfare, humanity enforces another instinct, of self-preservation, which is common for all known species.

We, the Institute for Conflict Studies and Analysis of Russia (IKAR), believe that there are certain reiterating patterns, piercing the whole history of known mankind. These patterns can be computed and used for forecasts of the development of events, especially during wartime as an apotheosis of delusions of various hostile social groups, including nations and states, igniting conflicts and unleashing wars.

Our mission, as a non-government and non-partisan think-tank, is to explore Russian society, its dynamics, for working out effective means of opposition, accurate prediction of the events, solving issues of international security, preventing crimes of aggression, as well as solutions for effective liability of atrocities and compensation of damages.

We stand on the holistic approach hence use the full range of scientific methods—our group relies on the data, collected in the course of monthly sociological surveys in different countries, including Russia, as well as the data, collected, sorted, arranged, and, finally, voiced and visualized by our experts in the fields of international law, diplomacy, economics, war affairs.

This specific paper aims to highlight the problematic issues that have arisen from the establishment of a tribunal against Russia, to attract the attention of scholars, politicians and influencers to vital points of this process, and at the same time to define the distracting factors and false aims.

As it was neatly outlined by Professor Olivier Corten, *“it is necessary to reflect on the innovative character of this proposed tribunal, ... [t]he legal basis for the tribunal’s creation, ... [t]he problems of immunity ... [a]s well as questions of enforcement and implementation, ... [d]ecisive question of legitimacy”*.¹

Whilst there are already a large number of task forces and groups of scholars, which presented their own vision of models of the tribunal, there still remain certain blind spots.

Accordingly, to move on with the outline it is worth mentioning the points, which are vital.

- *The prime* issue is the legal basis of the tribunal, which includes the problem of jurisdiction, in particular, over crimes of aggression and the model of tribunal.

¹ Olivier Corten and Vaios Koutroulis ‘[Tribunal for the crime of aggression against Ukraine - a legal assessment](#)’, p. 13.

- *Secondly*, the principle of immunity seems to remain an unsolved issue.
- *Thirdly*, we consider the necessity of positioning the ecocide as a global threat.
- *Fourthly*, we focus on the matters of proper investigation of crimes.
- *Finally*, the outline formulates the problem of compensation and the possible yet idle tools.

It is critical to say, that the number of problematic issues with regard to the tribunal is uncountable, and to our belief the crime of aggression, as the gravest international crime, should be placed first. However, we intentionally skip it for the purpose of brevity, inspecting jurisdiction issues implying that indictment for Russian war criminals must include crime of aggression charge.

We are sincerely committed to promoting justice, accountability, and the rule of law, and hope that this outline will serve as a helpful addition to roadmaps, already being developed by policymakers, legal practitioners, and scholars to better understand the challenges associated with the establishment of a tribunal against Russia. We believe that a thorough understanding of these issues will ensure effective solutions that promote justice.

2) JURISDICTION

a) WHY IS HYBRID MODEL NOT THE BEST OPTION?

Since the beginning of the full-scale invasion on February 24, 2022, world community of scholars and legal practitioners began to discuss the need for elaboration of the tribunal against Russia, in particular her current leaders², shifting accent to a creation of so-called '*hybrid*' tribunal.

² See e.g. in a chronological order, L. D. Johnson, '[United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes](#)', Just Security, 1 March 2022; S. Vasiliev, '[Aggression against Ukraine: Avenues for Accountability for Core Crimes](#)', EJIL:Talk!, 3 March 2022;

P. Sands, '[Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity Philippe Sands, a powerful personal plea for the world to hold a tribunal like the one which condemned Hitler's henchmen](#)', Daily Mail, 4 March 2022; K. Jon Heller, '[Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea](#)', Opinio Juris, 7 March 2022; J. Trahan, '[U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model](#)', Just Security, 7 March 2022; C. McDougall, '[Prosecuting Putin for his Crime of Aggression Against Ukraine: Part Two](#)', Oxford Human Rights Hub, 8 March 2022; T. Dannenbaum, '[Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine](#)', Just Security, 10 March 2022; C. McDougall, '[Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics](#)', Opinio Juris, 15 March 2022; K. Jon Heller, '[The Best Option: An Extraordinary Ukrainian Chamber for Aggression](#)', Opinio Juris, 16 March 2022; D. Akande, '[Use of force under international law – The case of Ukraine](#)', 62nd meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, France, 25 March 2022, pp. 6-7, §28;

O. Owiso, '[An Aggression Chamber for Ukraine Supported by the Council of Europe](#)', Opinio Juris, 30 March 2022; J. Anderson, '[Ukraine: "The momentum is there for a tribunal on aggression"](#)', 'Interview of Mykola Gnatovsky, professor of international law at the University of Kyiv and special advisor to Ukraine's Ministry of Foreign Affairs, JusticelInfo.net, 12 April 2022; J. H. Anderson, '[A Nuremberg for Russia's Crime of Aggression?](#)', JusticelInfo.net, 22 April 2022; United Nations General Assembly, Letter dated 12 August 2022 from the representatives of Latvia, Liechtenstein and Ukraine to the United Nations addressed to the Secretary - General, Chair's summary of an event organized by the permanent missions of Latvia and Liechtenstein to the United Nations in June 2022, reported in UN General Assembly, Hathaway,

While this idea may seem appealing on the surface, a closer examination reveals that it may not be the most effective solution to address the Crime of Aggression in Ukraine. For the sake of conciseness, the reasons should be reduced into the following.

First, a hybrid tribunal may not have the necessary legal authority to prosecute crimes of aggression.

The Crime of Aggression is a complex legal concept that requires a clear legal framework. While there have been efforts to codify the crime of aggression under international law, it is not yet recognized as a specific crime under domestic law in many countries, including Russia, which is not part of the Rome Statute.

Ukrainian domestic criminal law defines the crime of aggression in Art. 437 of the Criminal Code of Ukraine; nevertheless, the sentences, envisaged by this article (up to 12 years of imprisonment) are irrelevant, to say the least, in comparison to the gravity of offense, and will definitely not satisfy common sense of justice.

As such, a hybrid tribunal may not have the legal authority to prosecute individuals for the Crime of Aggression, and may instead be limited to prosecuting related crimes such as war crimes or crimes against humanity.

Secondly, a hybrid tribunal within Ukraine's court system could suffer from defects due to Ukraine's constitutional law and other factors.

Article 125 of the Ukrainian Constitution explicitly forbids the establishment of extraordinary and special courts. However, there are attempts to mitigate this issue, and the recent endorsement by the U.K. Government³ and Germany's Minister of Foreign Affairs⁴ for an *ad hoc* aggression tribunal in Ukraine is indeed promising.

Noteworthy, that the U.K.'s stance on the tribunal's integration into Ukraine's national justice system with some international elements is problematic. This approach may lead to a tribunal that is ineffective or even detrimental, potentially derailing diplomatic efforts. It is essential to establish a

¹'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I), An agreement between the United Nations and Ukraine can pave the way', Just Security, 20 September 2022; A. Reisinger Coracini, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II), Jurisdiction and Composition', Just Security, 23 September 2022; J. Trahan, 'The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III), How Many to Prosecute, Immunity, Amnesty and More', Just Security, 26 September 2022;

D. Scheffer, 'The Case for Creating a Special Tribunal to prosecute the Crime of Aggression Committed Against Ukraine (Part IV), Information Sharing, Victim participation, Outreach and More', Just Security, 28 September 2022.

³The Rt Hon James Cleverly MP, and The Rt Hon Victoria Prentis KC MP 'UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine', press release, January 20, 2023

⁴'Strengthening International Law in Times of Crisis' - Speech by Foreign Minister Annalena Baerbock in The Hague

fully international tribunal to ensure that high-level leaders allegedly responsible for the crime of aggression are not immune to prosecution. Besides it is challenging to see how the U.K.'s proposed model for an aggression tribunal in Ukraine can comply with Ukraine's Constitution, keeping in mind it cannot be amended while the country is under martial law or a state of emergency, which is presently the case. Thus, as in comprehensive manner explained by Professor Oona Hathaway and Ukrainian lawyer Alexander Komarov⁵ Ukraine's Constitution prohibits the creation of any hybrid tribunal within the Ukrainian court system.

Nevertheless, even if we leave aside obstacles contained in the domestic legislature, a hybrid court would inevitably need to navigate the legal systems of both Ukraine and international law, which can be complex and time-consuming. Furthermore, assembling a tribunal with both Ukrainian and international judges and prosecutors would require extensive coordination and cooperation, which may not be easily achieved in a politically unstable environment like Ukraine. These factors could result in significant delays and costs, potentially hindering the timely delivery of justice.

Thirdly, any hybrid tribunal would face increased fairness challenges.

A hybrid court is typically staffed by both domestic and international personnel, which could raise questions about the impartiality of the tribunal, especially in view of the history of confirmed political interference in the judicial system; therefore, presence of domestic judges and prosecutors could lead to concerns about bias and lack of independence.

There is another substantial aspect of this point. As it was precisely outlined by Luis Moreno Ocampo, former Chief Prosecutor of the new and permanent International Criminal Court “*(T)he proposal to create an ad hoc international tribunal to prosecute Russians (and perhaps also Belarusians) instead of removing the exceptional limits imposed on the ICC jurisdiction on aggression crime will consecrate selective justice*”⁶.

While admitting the counterargument, that taking a long-term view of international law reform, that proposition might not stand the test of time⁷, majority of scholars are inclined to think that Rome Statute, viz. restriction in article 15bis(5)⁸, that precludes the ICC from exercising

⁵ Alexander Komarov and Oona A. Hathaway “Ukraine’s Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression” , April 5, 2022

⁶ Luis Moreno Ocampo ‘Ending Selective Justice for the International Crime of Aggression’, January 31, 2023

⁷ Chile Eboe-Osuji ‘Letter to Editor: On So-Called Selectivity and a Tribunal for Aggression Against Ukraine’, February 10, 2023.

⁸ <https://ihl-databases.icrc.org/en/ihl-treaties/icc-statute-amendment-arts8bis-15bis-15ter-2010/article-15bis?activeTab=default>

jurisdiction when the crime of aggression is committed in the territory of a State party. We shall return to this point in Subsection C.

Finally, a hybrid tribunal may not be the most effective mean to address the root causes of the crime of aggression in Ukraine. The nature of crime of aggression lies deeply in social and political factors, such as territorial disputes, ethnic tensions, and economic interests. While a hybrid tribunal may address the immediate consequences, it may not resolve the causes of the conflict, not to mention any preventive effect.

Surely, it is crucial to take into account the experience of various tribunals, such as the Nuremberg and Tokyo military tribunals, the international criminal tribunals for Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, the Extraordinary African Chambers, and the Kosovo Specialist Chambers. Despite an in-depth analysis of these models is beyond the scope of this outline we concur with Professor Corten that two key points should be highlighted. Firstly, with the exception of NIMT and IMTFE, none of the existing international or hybrid ad hoc criminal tribunals have been given jurisdiction over the crime of aggression. Secondly, none of the precedents can be directly applied to the situation in Ukraine, and even drawing analogies requires caution due to substantial differences⁹.

To briefly summarize, it is highly likely that a hybrid model is not capable of resolving all current tasks of international justice in the context of Russo-Ukrainian war and a more comprehensive approach is required.

b) ROLE OF THE ICC

Despite not being a signatory to the ICC Statute, Ukraine has submitted two declarations consenting to the jurisdiction of the Court for crimes committed within its borders starting from November 21, 2013¹⁰. On March 2, 2022, the Office of the Prosecutor launched an investigation into crimes within the Court's jurisdiction that occurred on Ukrainian soil following several countries' referral of the situation in Ukraine to the ICC¹¹.

Still, ICC's Prosecutor has no authority to investigate the Russians for the crime of aggression.

⁹ Olivier Corten and Vaios Koutroulis "Tribunal for the crime of aggression against Ukraine - a legal assessment" by, Université libre de Bruxelles, PE 702.574 - December 2022, p. 13.

¹⁰ Embassy of Ukraine to the Kingdom of the Netherlands, [Declaration of 9 April 2014, covering acts committed between 21 November 2013 and 22 February 2014](#), 9 April 2014; Ministry of Foreign Affairs of Ukraine, [Declaration of 8 September 2015, covering acts committed since 20 February 2014](#), M. Dmytro Kuleba, 8 September 2015.

¹¹ International Criminal Court, 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.

The obstacle is grounded in Article 15 bis (5) of the Rome Statute, amended in 2010, establishing: *“In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”* Russia is not a state party; therefore, the ICC has no jurisdiction to investigate Russian nationals involved in the crime of aggression against Ukraine.

We described a neat amendment, proposed by Luis Moreno Ocampo and supported by Chile Eboe-Osuji, in the previous Section of this Outline.

Moreover, Professor Corten demonstrated an option to exercise jurisdiction, envisaged by the ICC Statute, which is a referral by the UNSC. In this scenario, the limitation on jurisdiction identified earlier does not apply, meaning the UNSC can refer to the ICC in case of an act of aggression committed by one state against another, regardless of whether both states accept the ICC's jurisdiction.

Nonetheless, according to the ICC Statute, this referral must be made by the UNSC acting under Chapter VII of the UN Charter. Given that it is highly unlikely that such a resolution will be adopted, Dr. Corten poses a question if the UNGA can refer a situation to the ICC instead of the UNSC.

Due to the limitations of UNGA's authority, it is uncertain whether it can refer a situation to the ICC and give the court jurisdiction against the will of the states involved. This was confirmed by the discussions within the International Law Commission (ILC) about the draft ICC Statute, where some members of the ILC had proposed giving UNGA the power to refer situations to the ICC, especially when the UNSC is blocked by a veto. However, it was ultimately decided not to include such a provision as the General Assembly lacks the authority under the UN Charter to directly affect the rights of states against their will, especially concerning criminal jurisdiction issues.

Surely, things are different with respect to genocide, crimes against humanity and war crimes, as a result of Article 12 (2) and (3) of the ICC Statute. Here, the ICC's Prosecutor can exercise the Court's jurisdiction also over nationals of a non-State Party if the relevant crimes were allegedly committed on the territory of a State Party or of a non-State Party that, as is the case with Ukraine, has accepted the Court's exercise of jurisdiction. Therefore, current ICC's Prosecutor Khan is left with no choice but to abstain from looking into the allegations that crimes of aggression have been committed¹², which in turn means, that he is compelled to conduct his investigations in a constricted manner.

¹² Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: [“I have been closely following recent developments in and around Ukraine with increasing concern.”](#)

c) *Ad Hoc* TRIBUNAL

All modalities of the establishment of the Tribunal for the Russian Crime of Aggression (TRCA) with the exclusive authority to investigate and prosecute leaders accountable for the Russian military's aggression against Ukraine are generating a common and in fact, sole tension point, purported clash with the ICC for all stages of proceedings: evidences, arrest warrants, detentions and execution of the Tribunal's decision.

We support the view that the TRCA could enhance the ICC's inquiries and enforcement efforts, particularly for aggression - the critical offense under the Rome Statute of the ICC - which the ICC does not have jurisdiction over concerning Russian activities in Ukraine.

With that, a group of authors, including Ambassador David Scheffer in Just Security series assert, that the establishment of the TRCA can and should advance the efficient and comprehensive application of international criminal justice in the months and years ahead¹³. Dr. Scheffer advocates the approach, that the task of investigating and prosecuting the crime of aggression inflicted upon Ukraine must be carried out in a newly-created international tribunal like the TRCA.

Leaving aside the immunity issue that poses a separate issue for international justice, Dr. Scheffer explains that the TRCA should be a vehicle of cooperation, rather than competition, with the ICC, and provides with an appropriate algorithm. In brief, to mitigate the conflict of jurisdictions, given that the TRCA is a criminal tribunal endorsed by the GAUN under the UN-Ukraine treaty, it is reasonable to contend that the Relationship Agreement between the International Criminal Court and the United Nations should govern the relationship between the TRCA and the ICC. It is even possible for the UN-Ukraine treaty to explicitly state this and utilize Articles 15-20, which address "Cooperation and judicial assistance," of the Relationship Agreement in relation to the TRCA. This would foster a cooperative partnership between the ICC and TRCA.

It is noteworthy, that the idea of involving UNGA into the process of creation of TRCA was proposed a bit earlier by the group of scholars of the Ukraine Task Force of The Global Accountability Network. In their Proposal for a Resolution by The United Nations General Assembly¹⁴ and accompanying proposal for a statute of a special tribunal for Ukraine on the crime of aggression.

¹³ Ambassador David Scheffer 'Forging a Cooperative Relationship Between International Criminal Court and a Special Tribunal for Aggression Against Ukraine', October 25, 2022, Just Security

¹⁴ Ambassador (Ret.) Hans Corell, The Honorable Irwin Cotler, P.C., O.C, O.Q., Ad.E., Professor David M. Crane, Lotta Lampela 'Proposal For A Resolution By The United Nations General Assembly And Accompanying Proposal For A Statute Of A Special Tribunal For Ukraine On The Crime Of Aggression', September 7, 2022, Ukraine Task Force of The Global Accountability Network

As explains the lead author of the mentioned proposal, Hans Corell, the reasoning is based on his experiences negotiating the agreement between the United Nations and Sierra Leone for the Special Court for Sierra Leone (SCSL) at the request of the Security Council as well as negotiations with Cambodia for the Extraordinary Chambers in the Courts of Cambodia (ECCC) at the request of the General Assembly¹⁵. The Special Court for Sierra Leone was created by an agreement between the UN and Sierra Leone on 16 January 2002. After a request from Cambodia and the establishment of a Group of Experts to study the issue of a tribunal, the promulgation of the Law on the ECCC was “[w]elcome[d]” by the General Assembly.¹⁶

While the SCSL was a new institution, the ECCC became chambers within the Cambodian court system¹⁷. This means that the ECCC were created upon a recommendation by the UN General Assembly. It is important to remember, that when the ECCC’s creation was first contemplated, it was not envisioned to be a tribunal within the Cambodian Court system. The original version as well as the final one did not affect the assessment that either could be established with resort to the General Assembly.¹⁸

However, we have already expressly said, that creation of extraordinary chambers with foreign personnel, as well judiciary mechanisms unknown by the domestic law will face an unbearable challenge in Ukraine—beginning with Constitution prohibitions, up to fairness issues, in case hybrid model will be implemented.

As for the proposed by Dr. Scheffer, TRCA model, it essentially eliminating the issue of possible jurisdiction conflict between ICC’s and the ad hoc tribunal, which, in fact, is the only theoretical issue within that model.

There is another option, declared by the Parliamentary Assembly of the Council of Europe’s Resolution 2482 (2023)¹⁹ advocating for a special international criminal tribunal for the crime of aggression; this could have become a suitable model, which would resolve the outlined risk. However, the proposed model formally is hybrid, because it stipulates creation of the *ad hoc* tribunal only for crime of aggression trials, within the framework of ICC’s activity with regard to other crimes.

¹⁵ Hans Corell ‘A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly’, February 14, 2023, Just Security

¹⁶ see also GA Res. 57/228 (requesting resumption of negotiations and “recommending” various features); GA Res. 57/228B (approving draft agreement on cooperation).

¹⁷ Government of Cambodia, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), at NS/RKM/0801/12 (eccc.gov.kh).

¹⁸ Hans Corell ‘A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly’, February 14, 2023, Just Security

¹⁹ Resolution 2482 (2023) Legal and human rights aspects of the Russian Federation’s aggression against Ukraine

3) PROBLEM OF IMMUNITY

Prosecuting Russian officials outside Russia, without Russia's consent, implicates two types of immunities under international law: (i) personal immunity (*ratione personae*): immunity which applies to certain high-level State officials because of the specific office they currently hold and (ii) functional immunity (*ratione materiae*): immunity which attaches to State officials more generally in respect of acts performed in an official capacity.

Therefore, it is critical to define a solid reasoning for the mentioned immunities be disregarded by the tribunal. In turn, this reasoning is dependent on several factors.

The recent survey²⁰ of International Renaissance Foundation in an extensive manner retrieves two key features of the tribunal, holding power to disregard personal immunity: an international court acts on behalf of the international community and exercises jurisdiction on behalf of a multiplicity of States.²¹

Judges Eboe-Osuji, Morrison, Hofmański, and Bossa also identified certain elements which do not remove a court's "international" character.²² An international court may be regional or universal in orientation; ad hoc or permanent in duration; apply civil, criminal or both types of law; and apply public international law, private international law, national law, or any combination of these²³. The judges expressly stressed that an international court may apply domestic law: "*an international court does not lose its character as such, merely because its work requires it to apply the domestic law of one or more States.*"²⁴

The mentioned survey covers the application of both types of immunities in the framework of tribunals of different models: (i) the Special Tribunal established according to a resolution from the United Nations General Assembly (UNGA) by agreement between the UN and Ukraine or between Ukraine and a regional organization, namely the European Union (EU) and/or the Council of Europe (CoE) (UNGA Model); (ii) The Special Tribunal, established by an agreement between Ukraine and the EU and/or CoE without an UNGA resolution (Fully Regional Model). (iii) The Special Tribunal, established by an agreement between Ukraine and other States (Multilateral Model); (iv) The Special

²⁰ International Renaissance Foundation, Open Society Justice Initiative 'Immunities and a Special Tribunal for the Crime of Aggression against Ukraine', February 2023.

²¹ Ibid. p.10.

²² ICC, Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 57.

²³ International Renaissance Foundation, Open Society Justice Initiative 'Immunities and a Special Tribunal for the Crime of Aggression against Ukraine', February 2023. P.14

²⁴ ICC, Appeals Chamber, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański, and Bossa, para. 57.

Tribunal established as a Ukrainian internationalized court (Internationalized Model)²⁵. As such we shall not reiterate the pros and contras of each mode.

Instead, we shall emphasize another crucial to our view point, to be taken into account—*non bis par idem* principle. The point is that the Russian top-levels atrocities will put all efforts to avoid responsibility, using decisions of domestic ‘kangaroo’ courts, or tribunals, consisting of the pariah states favoring Russia, to invoke *non bis per idem*. There is no firm answer to the question, how to neutralize that risk, however we suggest that the immediate creation of TRCA in conjunction with establishing an unambiguous definition of ‘internationality of court’ to the statute of TRCA will allow to disregard all *non bis par idem* invocations.

Therefore, equally with regard to the immunity issue an *ad hoc* tribunal yet seems to be the most efficient model.

4) ECOCIDE CASE MUST BE BROUGHT TO A DIFFERENT LEVEL

It has been a lengthy journey to establish ecocide as an international crime, with numerous endeavors made to define it throughout history²⁶.

The term ‘ecocide’ was coined by the American biologist and bioethicist Arthur W. Galston (1920–2008) at the Conference on War and National Responsibility in Washington (1970). He proposed to use this term to describe the catastrophic consequences of the application of the herbicide Agent Orange during the war in Vietnam when the American military spread about 200 mln gallons of this defoliant during the period from 1962 to 1970. It was used for the destruction of forests to reveal the positions and routes of the Vietnamese army. Arthur W. Galston argued that the wide-scale spread of the defoliant destroys the important ecological niches of the region.

Ministry of Environment protection of Ukraine has established a hotline for citizens to report cases of Russian hostilities affecting the environment, amounting to over 2000 reports²⁷. The latest edition of summary of the reports indicates, that in the past year:

- Ukraine has had to absorb or neutralize the impact of 320,104 explosive devices.
- Almost one-third of the country (174,000 sq km) remains potentially dangerous.

²⁵ International Renaissance Foundation, Open Society Justice Initiative ‘Immunities and a Special Tribunal for the Crime of Aggression against Ukraine’, February 2023. P.4

²⁶ For detailed explication see See Anastacia Greene, ‘The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?’, 30 Fordham Envtl. L. Rev. (2019), Vanessa Schwegler, ‘The Disposable Nature: The Case Of Ecocide And Corporate Accountability’, Amsterdam Law Forum, [S.I.], v. 9, n. 3, p. 71-99, July 2017,

²⁷ ‘Little Green Mayhem’, the Economist, January 14, 2023.

- Debris includes 230,000 tonnes of scrap metal from 3,000 destroyed Russian tanks and other military equipment.
- A hundred and sixty nature reserves, 16 wetlands and two biospheres are under threat of destruction.
- A “large” number of mines in the Black Sea threaten shipping and marine animals.
- Six hundred species of animals and 880 species of plants are under threat of extinction.
- A third of Ukrainian land is uncultivated or unavailable for agriculture.
- Up to 40% of arable land is not available for cultivation.

Altogether the losses from land, water and air pollution amounted to \$51.4bn, estimated Oleksandr Stavniychuk, the deputy head of the department of environmental control and methodology, at a recent workshop in Kyiv²⁸.

Whilst the context of this term is intuitively clear, the constitution of ecocide as *corpus delicti* is not so obvious.

Article 8(2)(b)(iv) of the Rome Statute and Article 35(3) of the first Additional Protocol Additional to the Geneva Conventions of 8 June 1977 consider ecocide, namely the intentional launch of an attack in the knowledge that it will cause “*widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*”, a war crime.

However, the precision of such definition is still being discussed internationally. At the latest report the European Law Institute (ELI) published its final report on ecocide²⁹. The report not only provides a definition of ecocide, it also contains Model Rules for an EU Directive and a Council Decision that ELI hopes will both “*contribute to the inter-institutional negotiations in the EU on the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law*” and will “*inspire legislative developments beyond the EU*”; worth to mention that the definition of ecocide proposed by ELI faced a certain criticism, in particular, for the “overly narrow”³⁰ definition.

²⁸ Jonathan Watts, ‘The ‘silent victim’: Ukraine counts war’s cost for nature’, The Guardian, February 20, 2023.

²⁹ ‘ELI Report on Ecocide. Model Rules for an EU Directive and a Council Decision’, The European Law Institute, January 19, 2023

³⁰ Kevin Jon Heller ‘ELI’s Overly Narrow Definition of Ecocide’, *Opinio Juris*, February, 23, 2023.

Noteworthy that the discussion revolves even around the issue what has to constitute the legal framework of prosecution of the ecocide, in particular some of the approaches imply the necessity of a solid national legislature basis³¹.

For the purposes of this Outline we shall note, that the Article 441 CCU defines “ecocide” as the “*mass destruction of flora or fauna, poisoning of the atmosphere or water resources, and other actions that have or may cause an environmental disaster*’. Leaving aside the matter of broadness of such definition it should be emphasized, that current Ukrainian legislature does not comply with the EU legislation in force, in particular methodologies of damages calculation. Moreover, Ukrainian law enforcement agencies are not capable of comprehensive investigation of this crime, despite 11 criminal proceedings, being processed currently by the General Prosecutor’s Office.

Moreover, Ukrainian legislature leans on the soviet threshold limit values (TLV), which inevitably leads to inadmissibility and irrelevance of the calculation of the environmental damages. The European Union–Ukraine Association Agreement envisages, that the ecological legislature on Ukraine must be brought into accordance with the core act of the EU, namely Environmental Quality Standards Directive, 2013/39/EU, Maximum Allowable Concentration Environmental Quality Standards and Predicted No Effect Concentration (PNEC) acts, however this has not been done yet.

The main idea we advocate for is that the indictment of Russian officials must include ecocide charges; during a discussion of issues arising from the establishment of the tribunal, held in Kyiv on February 27, 2023, President of IBA Mark Ellis stated that, “*ecocide case must be brought to a different level*”. To our view, this, primarily includes the evidence collection procedures and correct evaluation of the damages to be included to the compensation claims.

Therefore, the urgent tasks are implementation of EU recommendations into Ukrainian legislature and establishment of a valid and credible mechanism to collect, preserve and explore the evidences for the accurate assessment of environmental harm.

5) PRACTICAL ISSUES OF INVESTIGATION AND EVIDENCE COLLECTION

The rules of evidence in international criminal law vary as per the model used to establish a specific tribunal.

Surely, ICC’s Rules of Procedure and Evidence are currently the most up-to-date, and are being used as a pillar of investigation of Russian’s war crimes.

³¹ Darryl Robinson, ‘[The Ecocide Wave is Already Here: National Momentum and the Value of a Model Law](#)’, Just Security, February 23, 2023.

In September 2022 Ukraine received guidelines, which have been developed jointly by Eurojust, the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network') and the Office of the Prosecutor of the International Criminal Court³².

These guidelines substantially elaborated the Guidelines on Joint Investigation Teams Involving Third Countries³³ and are directed towards civil society organizations to strengthen their initiatives in collecting and preserving records of international crimes and human rights violations for the purposes of accountability. More specifically, they help these organizations to focus on how such projects can be used within criminal justice proceedings, both within national courts, the ICC or ad hoc tribunal.

As a result, a number of digital platforms and applications have been created in Ukraine, which significantly simplify the collection of evidence of Russian war crimes: RussianWarCriminals (shtab.net); Application eyeWitness to Atrocities; Program WarCrimes (supported by the Office of the Prosecutor General of Ukraine; Chat bot WarCrime Ministry of Justice of Ukraine; Chat bot State ecoinspection for documenting crimes against the environment; Chat bot TRIBUNAL UA @tribunal_ua_bot; The "Cultural Crimes" portal to collect evidence of the destruction of historical and cultural monuments by the Russian army; "Russia will pay" project for documenting material damages. War crimes reports can also be sent directly to the Chief Prosecutor of the International Criminal Court in The Hague, Karim A. A. Khan, by e-mail otp.informationdesk@icc-cpi.int.

We believe that a major issue is that all these channels are not interlinked, so the further collection and preservation of collected evidences, not to mention the processing of data for the trials seems to be a challenging task.

Another essential point is that Ukrainian military are typically the first ones at the scene of any disaster. Though the Armed Forces of Ukraine have to secure and save all survivors while simultaneously carrying on the mission, crucial pieces of evidence may be lost or destroyed forever. That is why it is crucial that domestic and international investigative teams are thoroughly trained, so they can arrive quickly to the scene and collect evidence to be given to international justice authorities.

³² European Union Agency for Criminal Justice Cooperation 'Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations'

³³ European Union Agency for Criminal Justice Cooperation 'Guidelines on Joint Investigation Teams Involving Third Countries', June 2022

In the context of ecocide, independent of the government, conservation groups have mobilized and repurposed themselves to gather evidence. Ukraine's biggest environmental NGO, Ecoaction has collated reports of more than 840 incidents and collaborated with Greenpeace to plot them on an interactive "environmental damage map"³⁴. Using satellite images, they have measured and highlighted the biggest physical impacts.

International Scientific and Expert Center for Monitoring the Consequences of Military Armed Conflict suggest the network of mobile laboratories, to ensure the immediate estimation of specific indexes.³⁵

Justice is a process that takes time; for instance, it took about 10 years to bring those responsible in Syria to justice. Hence, society needs to comprehend that evidence collected today may not be used until decades later. Keeping this in mind will help us realize how long the road ahead of us truly is when seeking legal accountability and true justice for all.

6) REPARATIONS AND REMEDY

a) GENERAL CONSIDERATIONS

Notwithstanding the expiration of one year since the commencement of hostilities, the issue of reparations remains insufficiently expounded, constituting the least developed aspect.

In May, the President of Ukraine, Volodymyr Zelenskyy, directed the formation of an operational panel comprising experts in international law to design a modality aimed at obtaining restitution for the destruction inflicted on Ukraine by Russia's incursion. Simultaneously, Columbia Law School launched the International Claims and Reparations Project (ICRP) with the aim of examining legal frameworks for such a mechanism³⁶.

In course of several month after the beginning of Russo-Ukrainian war scholars and legal practitioners of the ICPR arrived to a conclusion, that that existing international bodies such as the International Court of Justice (ICJ) and European Court of Human Rights are not well suited to resolve the number of claims arising from the war in Ukraine, disregarding international arbitration for the same reason³⁷.

³⁴ https://maps.greenpeace.org/maps/gpcee/ukraine_damage_2022/

³⁵ 'Ukraine calls for creation of Intl Scientific, Expert Center for Monitoring Consequences of Armed Conflicts', Interfax Ukraine, May, 30, 2023.

³⁶ 'Columbia Law School to Advise Ukraine on International Claims and Reparations' Press release, May 19, 2022.

³⁷ Cosmo Sanderson 'Ukraine pushes for war claims commission' Global Arbitration Review, October 10

Instead, ICPR working group, being inspired by examples of the Iran-United States Claims Tribunal (IUSCT), the United Nations Compensation Commission (UNCC), and the Eritrea-Ethiopia Claims Commission (EECC), has settled on the idea of an international claims commission, which would be set up through an agreement between Ukraine and interested states. The commission could address the claims of states and private parties arising loss or damage suffered under international law as well as claims arising from investments, contracts and measures affecting property rights³⁸. The key features of that idea had been set forth in May, 2022³⁹ already, reducing the purposes of the Commission to the “(i) *adjudicating claims for compensation*; (ii) *preserving or collecting Russian assets for paying awards*; and (iii) *providing a means of enforcing awards on compensation*”. However, the authors admit that these examples were “*relatively successful*”⁴⁰.

Following these researches, United Nations General Assembly (UNGA) sitting in its 11th Emergency Session approved Res. L.6/2022 entitled “Furtherance of Remedy and Reparation for Aggression against Ukraine”.

The resolution, which passed by 94 votes to 14 (with 73 abstentions), recognizes that Russia must be held accountable for any violations of international law in or against Ukraine. It also recommends the need for the establishment of an “*international mechanism for reparation for damage, loss or injury*” arising from Russia’s internationally wrongful acts.

The resolution goes on to recommend that UN member states cooperate with Ukraine in creating an international register of damage to serve as a record of “*claims information*” and to “*promote and coordinate evidence-gathering*”.

Whilst the investigation and evidence collection procedures (including assessment of the damages) constitutes a separate yet urgent issue, the legal framework for the procurement of the redress still remains uncertain, as the mentioned Resolution is abstract on that issue, urging to “*an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine.*”

Yest another mechanism is envisaged by the Rome Statute, which establishes a distinct entity, namely the Trust Fund for Victims. Upon the conclusion of a trial, the Trial Chamber holds the power to direct a convicted individual to provide reparations to the victims of the crimes for which the said person was found blameworthy. The reparations may consist of financial compensation, restitution

³⁸ Cosmo Sanderson ‘[Ukraine pushes for war claims commission](#)’ Global Arbitration Review, October 10.

³⁹ Chiara Giorgetti, Markiyan Kliuchkovsky and Patrick Pearsall ‘[Launching an International Claims Commission for Ukraine](#)’, May 10, 2022, Just Security

⁴⁰ Ibid.

of assets, rehabilitation, or symbolic reparations, such as apologies or memorials. The Court may grant reparations either to an individual or collectively, depending on its assessment of which modality is most appropriate for the affected victims in the specific case.

An advantage of collective reparations is that they provide relief to an entire community and help its members to rebuild their lives, such as the building of victim services centers or the taking of symbolic measures. Furthermore, States Parties to the Rome Statute have established a Trust Fund for Victims of crimes within the jurisdiction of the ICC and for their families in order to raise the funds necessary to comply with an order for reparations made by the Court if the convicted person does not have sufficient resources to do so.

Moreover, it is a welcoming news that the USA have started the procedure of cooperation with the ICC. On Dec. 30, 2022, President Joe Biden signed into law the 2023 Consolidated Appropriations Act⁴¹, which includes a “War Crimes Accountability” provision amending the American Servicemembers Protection Act of 2002 (ASPA)⁴². The War Crimes Accountability provision permits funding for investigations and prosecutions of foreign nationals, and assistance for victims and witnesses, related to the situation in Ukraine.

b) COMMERCIAL ARBITRATION AS AN *AMICUS CURIAE*

Despite commercial arbitration is a well-established form of dispute resolution, being efficient, impartial, and widely respected in the international business community, respected scholars and practitioners admit that it is unsuitable mean of resolving compensation claims against Russia.⁴³

At the same time the case law and practical solutions of ICA are immense, to compare with the activities of international claims commissions, amounting to nearly 400 cases.

That is why we are convinced that the formation of the tribunal against Russia presents a unique opportunity to leverage the expertise of an established form of dispute resolution in the realm of international criminal justice.

In short, drawing in the experience of international commercial arbitration into the process of establishing the *ad hoc* tribunal over Russia’s crime of aggression might offer following opportunities.

⁴¹ 2023 Consolidated Appropriations Act

⁴² American Servicemembers Protection Act of 2002 (ASPA)

⁴³ See footnote 37

Firstly, the selection of judges could be based taking into account their possible experience in commercial arbitration, therefore all judgements regarding claims for redress, especially with regard to claims arising in course of ecocide trial, will have utter legitimacy.

Secondly, architecture of international commercial arbitration is extremely flexible and at the same time fully complies with the idea of justness. Accordingly, importation of the procedures as production of evidences, their examination, conducting the hearings and alike might increase the effectiveness of trials as well as solidify their fairness.

Thirdly, as it was outlined during virtual panel hosted by Squire Patton Boggs by Pavlo Byelousov, there are claims that potentially could be brought before investor-state and commercial arbitral tribunals from: (i) foreign investors against Russia over the assets expropriated or damaged in the occupied and illegally annexed regions, (ii) foreign investors who were expelled from the Russian market due to war-related sanctions (iii) Russian investors against Ukraine for expropriation or other damage relating to their Ukrainian assets⁴⁴. Therefore, it is crucial for Ukraine to determine a common reasoning for denying claims of the third type and ensure the ability to provide the tribunals with necessary evidences in cases of the first two kinds.

Surely, some may argue that implementation of exclusively arbitration procedures into the trials over Russian atrocities may be considered in some sense as legitimizing their actions.

However, we suggest that such importation will underline that the justice is delivered, and the right for the defense is respected.

7) SUMMARY OF URGENT TASKS

Russian war against Ukraine is a *sui generis* situation, and a critical challenge for the international relations and security, generating global threats. Therefore, it is crucial to outline the urgent issues to be addressed.

Foremostly, it is vital to bring forth the crime of aggression as a prime and most serious charge, and in this regard the ad hoc model, constituted by an agreement with United Nations, involving International Criminal Court, seems to be the most suitable model, allowing to disregard immunities of Russian atrocities.

⁴⁴ [Energy disputes and war in Ukraine](#), Global Arbitration Review, January 24, 2023.

Secondly, it is critical to ensure the efficiency of investigation procedures and security of evidence collection and maintaining processes, and possibly seek for the creation of a unified database.

Third, both constitution the tribunal as well as international claims commission and requires workgroups of scholars and practitioners in the area of commercial arbitration.

Fourth, ecocide charges must be brought, including compensation claims.

We are aware, that this outline is far from comprehensiveness, nevertheless we keep our faith that it can become a certain call for action and basis for further extensive researches.