EXAMINATION OF THE PROPOSED TRIBUNAL FOR THE PROSECUTION OF THE CRIME OF AGGRESSION COMMITTED BY RUSSIAN OFFICIALS

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ABSTRACT

The most significant threat to international peace and security since the Cold War has been deemed to be the Russian Federation's full-scale invasion of Ukraine. Along with the danger it posed, it put into question many aspects of public international law, including statehood, recognition, and self-determination. However, in September 2022, the proposal by the Council of Europe for the creation of an ad hoc tribunal to try the crime of aggression perpetrated by the Russian political and military leadership brought attention to a crime which has been controversial since World War II. To fully comprehend its significance and potential implications on the international community, examining the subject of the crime of aggression, and the proposal to prosecute it before an ad hoc tribunal is crucial. This paper examines the issue by first looking at how crime has evolved throughout history, second evaluating the ad hoc tribunals that established precedents for the proposed tribunal with their successes and flaws, third examining the practical issues like jurisdiction and the immunity of heads of state, and fourth interpreting the justifications advanced by Russia, and finally coming to a conclusion by evaluating all the findings that were introduced within the paper.

1. INTRODUCTION

The conflict between Russia and Ukraine started in early 2014 when Crimea a Ukrainian territory was invaded by Russian forces, this was followed by a referendum within the region and a declaration of independence.[1] In addition, three months later, Russian-backed separatist groups seized control of governmental institutions in the regions of Luhansk and Donetsk which are located in the eastern parts of Ukraine.[2] Two de-facto states under the names of "The Peoples Republic of Luhansk" and "Peoples Republic of Donetsk" were also established by the separatist groups.[3] Russia's full-scale invasion of Ukraine on February 24, 2022, was a turning point in the conflict between the two countries.[4] Several nations condemned the invasion, and measures were also taken to halt it, Russia's membership in the Council of Europe was abolished and several sanctions were imposed.[5] Based on Ukraine's admission of the International Criminal Court's jurisdiction, Kamir Khan, the prosecutor of the International Criminal Court (ICC), began an investigation into alleged international crimes perpetrated by Russia. Among these actions taken by the international community perhaps the most extraordinary one was the Council of Europe's call for establishing an ad-hoc international criminal tribunal to prosecute the crimes of aggression committed by Russia in April 2022.[6] The proposed tribunal was also supported by NATO[7] and the European Union

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[1] Thomas D. Grant, 'Annexation of Crimea' (2015) 109 Am J Int'l L 68

[2] Roman Kuibida, Liana Moroz & Roman Smaliuk, 'Justice in the East of Ukraine during the Ongoing Armed Conflict' (2020) 11 IJCA 1

[3] ibid.

[4] Michael Ramsden, 'Strategic Litigation in Wartime: Judging The Russian Invasion of Ukraine through the Genocide Convention' (2023) 56 Vand J Transnat'l L 131

5 ibid.

(EU).[8] Eventually, on 4 March 2023, the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) was established by the EU as a complementary institution for the prosecution of ICC aiming to fill any gaps, reasoning from Russia's rejection of ICC's jurisdiction on the crime of aggression and non-ratification of 2010 Kampala Amendments both by Russia and Ukraine.[9] This paper aims to evaluate the proposed tribunal by examining the evolution of the crime of aggression, other ad-hoc tribunals throughout history, and practical issues such as the jurisdiction of the tribunal and justification claims advanced by Russia for bringing a conclusion on the matter.

2. THE EVOLUTION OF CRIME OF AGGRESSION

States' had an unlimited right to wage wars in the nineteenth and early twentieth centuries. This absolute right was put into question first in the Hague Peace Conferences of 1899 and 1907. However, these conferences haven't resulted in a definite prohibition on waging a war between states.[10] The First World War caused an increase in the attempts to renounce war.[11]

Even though serious steps were taken on the issue of preventing the war as state action, there was no consensus on individual responsibility for the atrocities that came up due to the state of war. In 1914 when the war was about the start an Allied campaign that introduced the First World War as a crusade against a criminal coalition and promoted the idea of vengeance for the casualties that occurred during the war, led to pressure by France and England for the prosecution and trial of war criminals.[12] However, the timing was a problematic issue, even when the war ended the Allied powers hadn't reached a consensus on the matter. In 1919 at the peace conference in Paris, the issue was raised, and the Commission of Responsibilities of the Authors of the War and the Enforcement of Penalties which was

6 Council of Europe, 'Pace Calls for an Ad Hoc International Criminal Tribunal to Hold to Account Perpetrators of the Crime of Aggression against Ukraine - Portal - Www.Coc.Int' (Portal, 16 May 2022) <https://www.coc.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine> accessed 19 August 2023

7 NATO Post Madrid Summit: Fit For Purpose In The New Strategic Era, NATO Res (2022) 479

8 'Press Corner' (European Commission - European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7307> accessed 19 August 2023

9 'New Tribunal Announced to Prosecute Russian Crime of Aggression in Ukraine' (Visegrad Insight, 6 July 2023) <https://visegradinsight.eu/new-tribunal-announced-to-prosecute-russian-crime-of-aggression-in-ukraine/> accessed 20 August 2023

10 Werle G and Jessberger F, Principles of International Criminal Law (Oxford University Press 2014)

11 Werle & Jessberger (n 2)

12 Marrus MR, Nuremberg War Crimes Trial: 1945-46: A Documentary History (Bedford Books 1997)

composed of fifteen international lawyers was established. However, an agreement was almost impossible to reach.[13] James Willis, a counted authority on the issue stated in his notes that; the American member of the Commission Lansing was opposing the international punishment of war crimes, believing that it should be left to the military authorities of each state.[14] Allied Powers other than the United States, as stated in the Majority Report of the Commission of Responsibilities, insisted on the idea that even though the alleged immunity of a sovereign state was an inviolability within the municipal law and even if in some domestic law regulations head of state has the privilege of immunity in front of national courts, there should be a different approach in international law, because otherwise, greatest violation of law and customs of war would remain unpunishable and this would be a harm to the idea of a civilized community. They also proposed an international High Tribunal and the trial of the former Head of State with the consent of that state taken by the Treaty of Peace.[15] Another point that is crucial to be mentioned within the Majority Report of the Commission, through the context of the crime of aggression is the idea of prosecuting the as it is called in the report *"Acts Which Provoked the War and Accompanied Its Inception".*[16]

On the other hand, representatives of the United States opposed the idea of an international tribunal and charged people for violating the law of humanity in front of it. They also claimed that the responsibility of the Chiefs of States was an unknown area for both municipal and international law.[17] It was clear that there were some fundamental disagreements between the Allied Powers. However, the representatives of the powers reached a consensus on including four articles in the Treaty of Versailles on war crimes which was signed in May 1919 with Germany.[18] Article 227 of the Treaty of Versailles indicated that William II of Hohenzollern who was the former head of state of Germany would be tried in front of a particular international court which would be composed of five judges from each victory state, for his supreme offence against the international morality and the sanctity of treaties.[19] Although this article was added to the treaty, due to both the refusal of the

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[13] ibid.

[14] ibid.

[15] Commission of Responsibilities, Majority Report (1919)

[16] ibid.

[17] United States Representatives On The Commission of Responsibilities, Memorandum of Reservations To The Majority Report (1919)

[18] Marrus (n 2)

[19] Treaty Peace with Germany (adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188 (Treaty of Versailles)

government of the Netherlands for the extradition of the former Kaiser of Germany and Germany's non-cooperation this trial never came into existence.[20]

After the First World War responsibility of state administrators was still in question. However, in 1928, a significant step was taken for a comprehensive ban on states for waging a war. In the Preamble of the Kellogg-Briand Pact, state parties agreed on rejecting the war within their national policies.[21] However, there were practical problems because there was no mention of a certain definition of self–defence in the Pact and state parties released declarations that the Pact didn't restrict their right to self-defence, without a certain definition, a possibility of abuse was inevitable[22].

The end of the Second World War was a watershed moment for the attempts within the international community to restrict the war. United Nations Charter Article 2(4) regulates a prohibition on threat and use of force against other states' territorial integrity and political independence.[23] The Charter was also unique for indicating a specific definition of self-defence in Article 51. even though it has been questioned on several occasions. In the situations where a threat of peace occurred the counter-measures that will be taken were also regulated within the Charter. Article 39 gave broad authority to the United Nations Security Council (UNSC) to determine the situations where, as the Charter referred "any threat to peace, breach of the peace or act of aggression occurred and make recommendations or take the measures needed by the Chapter VII of the Charter.[24]

The posterior of the Second World War was also crucial for the evolution of individual responsibility. Following the Second World War four major powers of the Allied States had an agreement in principle, and a meeting was established in London where the basic structure of the Nuremberg War Crimes Trial was drafted.[25] Robert H. Jackson, an associate justice of the Supreme Court and the chief prosecutor for the United States in the Nuremberg Trials, was a key American figure in Nuremberg. His report introduced to President Truman on June 6, 1945, showcased the American approach and underlying fundamentals of the Nuremberg Trials which viewed that Nazi criminals should face a fair trial for causing a war and atrocities within it.[26] This American perspective was also reflected in the indictment of the

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[20] Marrus (n 3)

[21] General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57 (Kellogg-Briand Pact)

[22] ibid.

[23] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter)

[24] ibid.

[25] Marrus (n 4)

Nuremberg Trial as the first count "The Common Plan Or Conspiracy" The first count was also linked to the second "Crimes Against Peace"[27] In Article 6(a) of the Charter of the International Military Tribunal the Crimes Against Peace was defined as; "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances."[28]

Nuremberg Trials was the first time individual responsibility was established under an international treaty.[29] The Tokyo and Nuremberg Trials had a beneficial effect on implementing the criminalization of waging a war, although no other international criminal trial had jurisdiction over the crime such as the Iraqi Special Tribunal and International Criminal Tribunal For Yugoslavia. However, with the preparatory works of the Rome Statute and the debates before the Kampala, it is also showcased that there is no general opinio juris within the area.[30] Even though the Nuremberg Principles were recognised as a part of international law. The crime which indicates planning and waging a war remained unidentified.[31]

The non-identification issue of the crime of aggression resurfaced during the adoption of the ICC Statute. However, it also showcased that there was a knotted disagreement among the states about the identification of the crime of aggression.[32] There was also a division between the states about the authority that would be given to the UNSC to determine whether a proceeding would start before the court or not, about the crime of aggression. Eventually, it was decided that the certain decision about the definition of the crime and its jurisdiction should be left to the future adoption of a provision about the issue.[33] This resulted in Article 5(2) of the ICC Statute which stated that the court will exercise jurisdiction over the crime of aggression when the crime is defined and the procedure of its prosecution determined under the Statute.[34] After the adoption of the ICC Statute in July 2002 Special Working Group on the Crime of Aggression was established by the Assembly of States Parties to complete work that was unfinished on the crime of aggression.[35] The 2009 Proposal of the Special Working Group

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[26] ibid.

[27] ibid.

[28] Charter of the International Military Tribunal (adopted 8 August 1945)

[29] ibid.

[30] ibid.

[31] Kress C and von Holtzendorff L, "The Kampala Compromise on the Crime of Aggression" (2010) 8 Journal of International Criminal Justice 1179

[32] Kress & Holtzendorff (n 3)

[33] ibid.

[34] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UNTS 90

[35] Kress & Holtzendorff (n 5)

on the Crime of Aggression was a guide to the agreement at the Kampala Review Conference. The Proposal indicated the deletion of Article 5(2) of the Statute and insertion of Article 8bis which defines the crime of aggression and Article 15(bis) which regulates the jurisdiction of the court regarding the crime. Several options were proposed on the issue of jurisdiction by the Working Group. The proposed options were about whether the determination by the UNSC was needed or not and if such a determination did not exist, which bodies may authorize the prosecutor to proceed with the investigation.[36] The 2009 Proposal created an eligible environment for the First Review Conference of The ICC Statute in Kampala held on 31 May 2010 The conference aimed to reach an agreement on three topics. Inclusion of Article 8bis to the Statute which defines the crime of aggression, the role of the UNSC on the jurisdiction of the court over the crime of aggression and the role of state consent.[37] Numerous discussions were made and arguments put forward during the conference which will be examined deeply under the examination of the matter of jurisdiction. The Conference concluded with the adoption of Article 8bis, Article 15bis and Article 15ter. Article 8bis defined the crime of aggression as follows; *"the planning, preparation or execution, by a person as a position effectively to exercise control over to direct the political or military action, of a state, of an act of aggression which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."*[38] In the second paragraph of the article "act of aggression" was also defined and several examples were given.[39] Article 15bis regulated the jurisdiction of the court over the crime of aggression within two certain situations that were stated with Article 13(a) and 13(c) of the Statute, first, where the crime of aggression was committed has been referred to the Prosecutor by a State Party and second, where the Prosecutor started an investigation by his or her initiative according to the Article 15 of the Statute.[40] The fourth paragraph of Article 15bis was critical because it brought the requirements for the court's jurisdiction to be exercised over the state that committed the act of aggression, that the state concerned should be a state party to the statute according to Article 12 and haven't declared the refusal of the jurisdiction of the court by the Registrar.[41] Article 15ter stated the jurisdiction of the court over the crime of aggression where a referral was given by the UNSC. The crucial difference between the two situations was the

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[36] '2009 Proposal' Special Working Group on the Crime of Aggression (February 2009) ICC-ASP/8/Res.6.

[37] Kress & Holtzendorf (n 6)

[38] Rome Statute of the International Criminal Court, arts, 15bis, 15ter, 8bis (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

[39] ibid.

[40] ibid.

[41] ibid.

requirements stated in the fourth paragraph of Article 15bis was not needed for the court's jurisdiction to be exercised when there is a UNSC referral.[42] In that regard when a referral is made by the UNSC for the prosecution of a crime of aggression the requirements of state consent and membership to the Statute aren't needed.[43]

3. EXAMINATION OF INTERNATIONAL AD-HOC TRIBUNALS THROUGHOUT THE HISTORY

3.1. NUREMBERG AND TOKYO TRIBUNALS

The tribunals of Nuremberg and Tokyo were established for the trials committed by the Axis Powers during the Second World War. The uniqueness of the Nuremberg trials in contemporary international law was that it had overcome the two major obstacles before individual criminal responsibility under international law.[44] First, until the great atrocities caused by Nazi war criminals, states were regarded as the only subjects of international law rather than individuals and second states had a counter-policy against outside intervention derived from the concept of sovereignty.[45]

On November 1, 1943, a joint declaration by Roosevelt, Churchill and Stalin was published which states that after an achieved armistice with any government that had administrative authority over Germany, the Nazi Party members and officers would be sent back to the places where they committed such massacres and killings to be tried and punished and regarding the major criminals whose conduct had no particular location would be punished by joint action of Allied Governments.[46] This led to the establishment of the United Nations War Crimes Commission by the joint decision of seventeen Allied states and from early 1944 the commission made intense studies on the questions concerning the tribunal.[47] Eventually, it was decided by the four victory states of World War II, the United States, France, the United Kingdom and the Soviet Union that the perpetrators of the major crimes committed during the war would be tried before an international tribunal of their own.[48] The major reason for this decision was stated in The United Nations War Crimes Commission's "Report of Trials of War Criminals (1949) IX". In the report, the courts established in Leipzig

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[42] ibid.
[43] ibid.
[44] Werle & Jessberger (n 5) p. 1.
[45] ibid.
[46] M. Iqbal Tajik & Ahmad Ali, 'Nuremberg Trials' (1991) 10 JL & Soc'y 31
[47] ibid.
[48] Sascha-Dominik Bachmann, 'The Legacy of the Nuremberg Trials – 60 Years on' (2007) 2007 J S Afr L 532

after World War I to try and prosecute the German war criminals were regarded as ineffective and it was stated that an international tribunal would be proper to achieve the desired effectiveness.[49] On August 8, 1945, the London agreement was signed by the representatives from four major Allied powers, to the agreement the charter that established the International Military Tribunal was attached that specifies the crimes within the jurisdiction of the tribunal and the procedural methods that will be followed.[50]

The establishment process of the tribunal consisted of numerous disagreements between Allied Governments.[51] It should be noted that the idea to put Nazi war criminals before a fair trial was opposed by Churchill and the Lord Chancellor of the United Kingdom when it was first presented to them, they demanded the political execution of top Nazis.[52] During the discussions in London, another opposition was also raised by the Russian delegation which mainly resembled the one put forward by the United Kingdom during the intra-state discussions as mentioned above. Russians viewed that the criminality of the Nazi leaders was already determined by the heads of the governments with the Moscow and Crimea Declarations, therefore as the Russian representative General I.T. Nikitchencko put it, the criminality of those Nazi leaders was already recognized and the tribunal should only concern about their punishments.[53] Robert H. Jackson who was the representative of the United States at that time referred to the declarations of Moscow and Crimea as an accusation rather than a conviction, however, this statement did not cause the expected effect on the Russian conception regarding the issue.[54] Although there was no consensus between Russia and the other Western Allied Governments on the matter, it is possible to observe within the Nuremberg Charter that the United States' conception had prevailed over the Russian delegation's views, since the procedure that should be followed by the Court for ensuring the fair trial of the defendants was indicated in Article 16 of the Charter.[55] Russians objected to the competency of the tribunal to define aggression as well, it is evident that the background of this objection was the political concerns due to the non-aggression pact violated by the Soviet Union during the war.[56] This motive of the Soviet delegation was also showcased by

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[49] United Nations War Crimes Commission, Report of Trial of War Criminals (1949) 9

[50] Tajik & Ali (n 2) p. 33.

[51] Kenneth Anderson, 'Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials (1994) 7 Harv Hum Rts J 281

[52] Taylor (n 2) p. 493.

[53] Slean Cleanthes Ivrakis, "Soviet Concepts of International Law, Criminal Law and Criminal Procedure at the International Conference on Military Trials, London, 1945" Mercer Law Review, vol. 2, no. 2, Spring 1951, pp. 331-375.

[54] Taylor (n 3) p.499.

[55] Charter of the International Military Tribunal, Article 16, 8 August 1945, 82 UNTS 279

[56] Ivrakis (n 2) p. 365.

showing insistence to pin down the definition of the crime against peace to only the actions of European Axis powers.[57] This idea was opposed by Jackson and he made a counter-proposal that would comfort the Soviet delegation's concerns by limiting the jurisdiction of the Tribunal to only the crimes committed by "European Axis Powers".[58]

Charter of the International Military Tribunal, Article 6 lists the crimes that the court had jurisdiction over, According to that the Tribunal was authorised to prosecute and try three charges of crimes; "crime against peace, war crimes and crimes against humanity".[59] Article 7 stated that the official positions of the defendants would not exclude their responsibility for the crimes indicated in the Charter, whether as a head of state or government officials.[60] The judgement was delivered on October 1, 1946.[61] On 11 December 1946 with the adoption of Resolution 95(I) by the United Nations General Assembly (UNGA) the principles followed in the Nuremberg trials and the charter were recognized as principles of international law.[62]

International Military Tribunal put into criticism due to enforcement of retroactive law and referred to as the "prosecution of World War II's losing parties by the victors".[63] The reason for the *"ex post facto"* nature of the Nuremberg Trials was that the crimes that are listed in Article 6 of the Charter, were codified after they were committed by Nazi defendants.[64]

To deny the enforcement of ex-post facto law in the Nuremberg trials, the existence of applicable exceptions is needed.[65] That type of exception might be put forward by Kelsen who stated that the rule of non-retroactivity as he referred to "unknown law" is not without exceptions, the rule is only effective when the law is created by legislation, but not against when the law is created by a custom or judicial precedent.[66] The crimes that are listed in Article 6 of the charter were crimes against peace, war crimes and crimes against humanity.[67] The crime against peace as it was defined in Article 6 (a) of the Nuremberg Charter, is an act

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[57] Taylor (n 4) p.499.

[58] ibid.

[59] Charter of the International Military Tribunal, Article 6, 8 August 1945, 82 UNTS 279

[60] Charter of the International Military Tribunal Article 7, 8 August 1945, 82 UNTS 279

[61] Lippman, Matthew. 'Nuremberg' (1988) 6 Law Context: A Socio-Legal J 20

[62] UNGA Resolution 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946

[63] Bachmann (n 2) p.539.

[64] Appleman, John Alan. Military Tribunals and International Crimes. Westport, Conn: Greenwood Press, 1971; Indianapolis, Bobbs – Merill Co. HeinOnline

[65] Bachmann (n 3) p.541

[66] Kelsen, Hans, 'The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals (1945) Judge Advocate Journal 11

[67] Charter of the International Military Tribunal, Article 6, 8 August 1945, 82 UNTS 279

where an aggressive war was initiated, planned and waged in violation of international treaties or these acts were commonly participated by a plan or conspiracy. It was inevitable that these acts were criminalized at first under the Charter of the International Military Tribunal, however, it should be noted that they were already outlawed by international documents when the Charter was established.[68] Aggressive warfare as a state policy was first condemned after World War I by Article 227 of the Treaty of Versailles.[69] In addition, outlawing the aggressive war against other states was also confirmed with Article 1 of the Kellogg-Briand Treaty on 27 August 1928.[70] This view was also mentioned in the majority report that was published by the legal committee of the United Nations War Crimes Commission in 1945, in the report it was admitted that the acts committed by individuals to wage aggressive war were not constituting war crimes, however, they were viewed as acts against the principles of international law and good faith and therefore for the welfare of future generations criminal punishments against these acts should be provided.[71]

In regards to the war crimes that are listed in Article 6(b) of the Nuremberg Charter, these acts were already forbidden in 1899 and 1907 Hague Conventions and the Geneva Conventions of 1929, however, these documents haven't contained any penal provisions for such conducts during an aggressive war.[72] Even though there was a lack of punitive provisions in these documents, as it was stated by the Belgian delegate of the United Nations War Crimes Commission Mertens, until a codification that covers war crimes deeply, the individuals are bounded by the protection and governance of customs of international law.[73] Eventually, the Hague and Geneva Conventions regulations concerning the conduct during wartime were regarded as becoming part of customary international law and violations of these regulations concluded with the establishment of criminal responsibility for such acts under customary international law. [74]

Finally, the last type of crime that was listed in Article 6 (c) of the Charter was crimes against humanity.[75] The listed crimes in Article 6 (c) were; murder, extermination

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[68] Bachmann (n 4) p.542.

[69] Treaty of Peace with Germany (adopted 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188 (Treaty of Versailles)

[70] General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57 (Kellogg-Briand Pact)

[71] Doran, Hogan, 'Aggression as a Crime Under International Law and the Prosecution of Individuals by the Proposed International Criminal Court' (1996) Netherlands International Law Review

[72] Bachmann (n 5) p.543.

[73] United Nations War Crimes Commission, Law Reports of Trials of War Criminals. London, Published for the United Nations War Crimes Commission by H.M.S.O

[74] Murphy, John, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) Harvard Human Rights Journal 5

enslavement, deportation and persecution committed against civilians, It was possible to consider the criminality of such acts were established under already existing customary international law as long as they were linked to a war crime.[76] In regards to such acts that were not linked to a war crime, the acts that are concerned were already criminalised under international treaties and therefore under international customary law, and German domestic penal law practices as well.[77] For instance, Article 229 of the Treaty of Versailles stated that the people who committed crimes against the nationals of Allied Powers would face charges and be tried for them.[78]

The above-mentioned facts showcased that the exemption stated by Kelsen was achieved within the Nuremberg Charter due to forbidding such acts which had already become a practice in several international documents and international customary law. In addition, it should be noted that the sources of international law are international treaties, general customs, principles and judicial precedents, in that regard, it is not a logical approach to deny the justification of international law due to a lack of statutory documents where international community had no legislative body to establish such legal elements.[79] Finally, international law should evolve according to the needs of the international community as it happened in Nuremberg by providing punishment to the acts that became illegal under international customary law and practices,[80]

In Article 7 of the Nuremberg Charter the official position of defendants whether as a Head of State or an official within the government was denied as a reason for non-responsibility for the crimes listed in the Charter.[81]

It was emphasized by many scholars that with this regulation the Charter has violated the doctrine of immunity that halts a state's court from inquiring into the legality of public acts of another sovereign state, including the acts committed by the officials who were under the authority of that sovereign state.[82] In addition, the matter of whether individuals were subject to international law was also put forward by many.[83] These two issues were also

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[75] Charter of the International Military Tribunal, Artice 6 (c), 8 August 1945, 82 UNTS 279

[76] Bachmann (n 5) p.544.

[77] Willis Smith, 'The Nuremberg Trials' (1946) 32 ABA J 390

[78] (Treaty of Versailles 1919, Article 229)

[79] Doman (n 2) p.261.

[80] Tomuschat Christian, 'The Legacy of Nuremberg' (2006) Journal of International Criminal Justice 4

[81] Charter of the International Military Tribunal, Article 7, 8 August 1945, 82 UNTS 279

[82] F. Regan Nerone, 'The Legality of Nuremberg' (1965) 4 Duq U L Rev 146

[83] Doman (n 3) p.262

brought before the court by the defendants in Nuremberg as a defence.[84] The court in its judgement stated about the issue that;

"In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized."[85]

This statement shows that according to the court, the individuals were already obliged under international law and their conduct during warfare was governed by the regulations in the Hague and Geneva Conventions.[86] Therefore it makes no difference if the defendants were authorized by Germany or crimes listed under the Charter were not criminalised under German law, According to the Court, these individuals were responsible for their actions under international law which is separate from sovereign domestic law.[87]

Eventually, the criticism of Victor's justice can be linked with all the above-mentioned criticisms and questions on the Nuremberg Trials. Besides the flexible approach to the non-retroactivity discussed above, the main reason for these critics was the fact that Nuremberg had violated fundamental principles of justice by not prosecuting the atrocities caused by the Allied Powers such as; the Katyn massacre and the nuclear bombings of the Japanese cities Hiroshima and Nagasaki.[88] The political side of Nuremberg which prevailed over justice can also be observed during the limitation of the jurisdiction of the court to "the major criminal of the European Axis" to ease the political concerns of the Soviet Union.[89] In The International Military Tribunal for the Far East located in Tokyo, deep political intentions were also showcased.[90] In the trials that took place in Tokyo from 1946 to 1948, consequently, all of the defendants were convicted.[91] The main criticism made about the Nuremberg trials was also put forward against the tribunal in Tokyo, however, two significant occasions intensely criticized and showcased the political intention that affects judicial justice, first, mentioning the name of Japanese Emperor Hirohito was avoided by the U.S. prosecutors during the preparing process of the indictment although it was proved by numerous pieces of evidence

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[84] Jill M. Sears, 'Confronting the Culture of Impunity: Immunity of Heads of State from Nuremberg to ex parte Pinochet' (1999) 42 German YB Int'l L 125

[85] ibid.

[86] Henry T. King Jr., 'Nuremberg and Sovereignty (1996) 28 Case W Res J Int'l L 135

[87] ibid.

[88] William A. Schabas, 'Victor's Justice: Selecting Situations of the International Criminal Court' (2010) 43 J Marshall L Rev 535

[89] Sellars Kristen, 'Imperfect Justice at Nuremberg and Tokyo' (2008) The European Journal of International Law 21

[90] Werle & Jessberger (n 7) p.11.

[91] ibid.

that he was aware of the atrocities caused by the Japanese military during the World War II and, second the use of biological and chemical weapons by the Japanese army was excluded from the prosecution.[92] Another distinguishment of Tokyo from Nuremberg is that; there were also dissenting opinions submitted by several judges, the one that was the most noteworthy was certainly Justice Pal on behalf of India.[93] With his dissenting opinion, Pal viewed that the only perpetrator of aggressive military action during the Pacific War was not the Japanese Army, therefore he dissented from the judgement of the court.[94]

These criticism and questions raised must have been foreseen by Robert H. Jackson, on April 13, 1945, during his speech before the American Society of International Law in Washington on the issue of "The Rule of Law Among Nations", he emphasized the need for a fully independent tribunal, immune from political intentions of states."[95] Even though Jackson's insistence on an independent court, his vision never survived in Nuremberg and Tokyo totally, perhaps his speech even caused President Truman to ask him to step down from the Court and participate as a Chief Prosecutor of the United States.[96] However, it should also be noted that the American conception of the trials which also prevailed during the judicial processes in Nuremberg was to focus on these trials as justification of law rather than political vengeance.[97] The Chief Prosecutor for the U.S. Army Telford Taylor described sentencing as *"of twenty-one consecutive decisions was tiring and for the staff somewhat dull"*, This was a showcase of viewing the tribunal as non-different than any other criminal court, where the procedures and hearings continued according to law rather than the intent of an unjust revenge.[98]

3.2. INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA

In 1980 after the death of the long-term Communist leader of the Federal Republic of Yugoslavia, Josef Braz Tito, the centralised administration of the republic was harmed deeply, the leader of Serbia Slobodan Milosevic took action to re-centralise the state under Serbian political control, this approach encountered with solid opposition and advocacy of decentralisation by the leaders of Croatia and Slovenia, Franjo Tudjman and Milan Kucan.[99]

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[92] Zhang Wanhong, 'From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial (On the Sixtieth Anniversary of the Nuremberg Trials)' (2006) 27 Cardozo L Rev 1673

[93] Shuvra Dey, 'Dissenting Opinion of Justice Rabhabinod Pal on the Notion of Aggressive War: A Critical Evaluation (2015) 8 J E Asia & Int'l L 213

[94] Mark A. Drumbl, 'Memorializing Dissent: Justice Pal in Tokyo' (2020) 114 AJIL Unbound 111

[95] Taylor (n 5) p.494.

[96] ibid.

[97] Anderson (n 2) p.287.

[98] ibid.

These events were followed by the declaration of independence by Croatia and Slovenia on 25 June 1991 and a civil war started where atrocities occurred that resembled the violations of International Humanitarian Law during World War II.[100]

On 25 May 1993, the UNSC acted under Chapter VII of the United Nations Charter and adopted Resolution 827 that determined the reported mass killings and continuation of "ethnic cleansing" in the area as a threat to international peace and security, in that regard, it was decided to establish an ad-hoc tribunal to prosecute the violations of International Humanitarian Law occurred in the region.[101]

Under Article 2 to 5 of the International Criminal Tribunal for Former Yugoslavia (ICTY) Statute, the crimes that the tribunal had jurisdiction over were listed as; (1) grave breaches of the Geneva Conventions of 1949, (2) violations of the laws or customs of war, (3) genocide and (4) crimes against humanity.[102] The extent of the tribunal's jurisdiction was stated under Article 8 of the Statute, According to the Article territorial jurisdiction of the tribunal shall extend to the former Social Federal Republic of Yugoslavia and regarding the temporal jurisdiction it covers the crimes committed after 1 January 1991.[103] In its first annual report, the tribunal stated that *"one can discern in the statute and the rules a conscious effort to avoid some of the often-mentioned flaws of Nuremberg and Tokyo."*[104] There were many aspects of the tribunal in that regard, unlike the Nuremberg Tribunal the defence attorneys at ICTY had unlimited access to the evidentiary documents.[105] Article 10 of the Statute emphasized the principle of *non-bis-in-idem* which prevents double jeopardy and prohibited trials in the absence of the defendant.[106] Article 9 stated that the tribunal and domestic courts had concurrent jurisdiction on violations of the international humanitarian law, however, the primacy of the tribunal over national courts was also recognised.[107] In Article 14(5) of the International Covenant on Civil and Political Rights of 1966, the right of appeal was recognised as a 'fundamental element of individual civil and political rights'.[108] In accordance with that under Article 25 of the Statute appeal proceedings were introduced and the right to

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[99] Penny K. Christopher, 'No Justice, No Peace?: A Political And Legal Analysis of the International Criminal Tribunal for the Former Yugoslavia' (1999) Ottawa Law Review 30

[100] ibid.

[101] United Nations Security Council, Resolution 827 (25 May 1993) UN Doc S/RES/827

[102] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/827 (25 May 1993), arts 2,3,4,5

[103] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/827 (25 May 1993), art, 8

[104] (Annual Report of the International Tribunal), U.N. Doc. S/1994/1007, A/49/342 (1994)

[105] Michael P. Scharf, 'A Critique of the Yugoslavia War Crimes Tribunal' (1997) 25 Denv J Int'l L & Pol'y 305

[106] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/837 (25 May 1993), art, 10

[107] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/827 (25 May 1993), art, 9

[108] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 2

appeal of defendants was recognised.[109] In Article 24 punishments imposable by the Tribunal were listed, contrary to the Nuremberg Tribunal, the death penalty was excluded from the ICTY Statute. [110]Although the ICTY Statute covered the many flaws of the Nuremberg and Tokyo trials, the most significant innovative aspect of the Tribunal which was its establishment by the authority given to the UNSC under Chapter VII of the United Nations Charter, also raised questions regarding the legality of its establishment.[111]

This aspect was controversial and some scholars in that context questioned the legal basis of the court by stating that an international criminal tribunal had to be established with an international agreement to respect the jurisdiction of sovereign states within their territory.[112] However, it can be observed that most scholars viewed the establishment of the tribunals as legal, according to their view the measures to maintain international peace and security under Chapter VII of the United Nations Charter were listed to indicate examples rather than limit the measures that can be implemented by the UNSC.[113] In *Prosecutor v Tadic,* the defendant put forward the same issue before the tribunal and claimed that the establishment of the court was against the United Nations Charter and due to that the tribunal had to reject the jurisdiction. The Appellate Body decided that the establishment of the tribunal was by the law and in accordance with Article 41 of the Charter which states "*The Security Council may decide what measures not involving the use of armed force are to be employed...*"[114] The establishment of the ICTY by a UNSC Resolution caused some controversy regarding the tribunal's impartiality and objectivity as well, although the tribunal was established by the UNSC representing the international community rather than the victors of the conflict, it was apparent that the UNSC was not a merely neutral side.[115] Several economic sanctions were imposed by the UNSC against the Serbs but the same approach wasn't followed when the actions of "ethnic cleansing" were also committed by the Croatian side during the conflict.[116]

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[109] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/827 (25 May 1993), art, 25

[110] International Criminal Tribunal for the Former Yugoslavia, *Statute,* UN Doc S/RES/827 (25 May 1993), art 24

[111] Daphna Shraga & Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 Eur J Int'l L 360

[112] Kolodkin, A. Roman, 'An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia, in Clark S. Roger & Sann Madeleine (ed.), The Prosecution of International Crimes: a Critical Study of the International Tribunal for the Former Yugoslavia (Transaction Publishers 1996) 169.

[113] ibid.

[114] Prosecutor v. Tadic (ICTY Appeals Chamber), IT-94-1-AR72, (1999) ICTY Juris 5

[115] Micheal P. Scharf, 'An Assessment of the Yugoslavia War Crimes Tribunal' (1996) 2 ILSA J Int'l & Comp L 655

[116] ibid.

The tribunal also faced problems when it was established, first of all, the conflict was continuing within the territory where the perpetrators of the international crimes were located, in addition, the negotiations between the representatives of the United Nations (UN), United States, EU, Russian Federation and the leaders of the parties that are sides of the conflict were on going to establish a peace agreement.[117]

Before the establishment of the tribunal, a series of resolutions was adopted which notified the people within the former Yugoslavia that they were bound to act according to existing international humanitarian law and the Geneva Conventions, The controversial crime of aggression in the Nuremberg Charter was also excluded from the jurisdiction of the tribunal, these actions aimed to avoid the scepticism of ex post facto law enforcement towards the tribunal.[118]

Although this scepticism and criticism derived from it tried to be avoided, some practices of the tribunal were questioned in that context.[119] The legality of the tribunal's jurisdiction was challenged as well by Dusko Tadic regarding Articles 2 and 3 of the ICTY Statute which indicated the grave breaches of the Geneva Conventions and violations of customs of war as crimes under the jurisdiction of the tribunal, it was claimed by Tadic that there was no international conflict within the region of Prijedor, which was a prerequisite of the crimes that were indicated in the regarding Articles.[120] The Appeals Chamber decided on the matter that Article 2 of the Statute applied only to international conflicts, however, regarding Article 3 tribunal stated that it applied to war crimes whether they were committed during internal or international conflicts, The tribunal reasoned its decision by stating that the distinction between the internal or international warfare lost significance, as far as the welfare of human beings concerned.[121] This decision of the tribunal was evaluated as a progressive development of international law by some scholars such as Theodor Meron.[122] However, it also raised ex post facto law criticism, in addition to that due to the tribunal extending its jurisdiction the credibility of the tribunal as a precedent to other ad hoc tribunals and the permanent international criminal court was harmed.[123]

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[117] Shraga & Zacklin (n 2) p.361.

[118] Scharf, 'An Assessment of the Yugoslavia War Crimes Tribunal' (n 2) p.306.

[119] ibid.

[120] Aaron K. Baltes, 'Prosecutor v. Tadic: Legitimizing the Establishment of the International Criminal Tribunal for the Former Yugoslavia' (1997) 49 Me L Rev 577

[121] ibid.

[122] Meron Theodor, 'International Criminalization of Internal Atrocities' (1995) 89 Am. J. Int'l L. 554

[123] Scharf, 'An Assessment of the Yugoslavia War Crimes Tribunal' (n 3) p.307.

Ethnicity was a significant factor during the conflicts in the Balkans, this was also reflected in the trials before the ICTY. It was obvious from statistics that Serbs were more likely to be found guilty before the tribunal and when they were found guilty by the tribunal they were charged with longer sentences as well.[124] This was an aspect of the tribunal that cast doubt on its accountability, the belief that there was discrimination against them during the proceedings before the tribunal was strong amongst Serbs, and this issue was indicated by international commentators as well.[125] Carla Del Ponte, the third prosecutor of the ICTY must have acknowledged this problem, during her time of work, the conflict in the Kosovo region was recently concluded, and she introduced the policy of even-handedness and indicated her willingness to prosecute the crimes committed by Kosovar Albanians against Serb minority to secure peace in the region.[126]

Even though the tribunal was criticised for several reasons and had some flaws regarding its accountability as a precedent to the other international criminal tribunals, it also had many practical contributions to international criminal law.[127] First, it narrowed the distinction between international and non-international conflicts regarding the application of laws or customs of war.[128] In addition, the doctrine of command responsibility was clarified in the landmark "*Celebici Case*", in which four defendants were tried before the Tribunal for atrocities committed in the prison camp located in Celebici, where Bosnian Croats and Muslims held Serbs as prisoners.[129] The Tribunal disagreed with the prosecution's claim that a chain of command was not necessary for the responsibility of a superior from the acts of subordinates.[130]

3.3. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The year after the establishment of the ICTY, organised massacres that amount to genocide according to the investigations conducted by the UN experts, occurred in Rwanda.[131] The distinction between Hutus and Tutsis, two main ethnic groups in Rwanda was first exploited by the colonial rulers of the country, Germany and Belgium. [132] For more than one

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[124] Meernik (n 2) p.147.

[125] ibid.

[126] Vlaming (n 2) p.99.

[127] Thomas W. Pittman, 'International Justice: The International Criminal Tribunal for the Former Yugoslavia' (2016) 55 Judges J 6

[128] ibid.

[129] Daryl A. Mundis, 'Introducing Note To ICTY (Appeals Chamber): Prosecutor v. Delalic (Celebici Case)' (2001) 40 International Legal Materials 3

[130] Jeniffer M. Rockoff, 'Prosecutor v. Zejnil Delalic (The Celebici Case)' (2000) 166 Mil L Rev 172

[131] Jaana Karhilo, 'The Establishment of the International Tribunal for Rwanda' (1995) 64 Nordic J Int'l L 683

hundred years the violence between these two ethnic groups of Rwanda had occurred on numerous occasions and eventually, in 1990 militant Tutsi refugees who fled from the massacres committed by Hutus attacked northern Rwanda under the name of Rwandan Patriotic Front (RPF), the war between the RPF and the government of Rwanda that consisted of Hutus turned into a guerilla conflict.[133] In August 1993, the Arusha Accords started and the parties of the dispute agreed upon a new administration where the power was shared between the two parties, in addition, the arrangements necessary for the establishment of this new government would be made under the UN supervision.[134] However, on the evening of 6 April 1994, President of Rwanda Juvenal Habyarimana died after his plane crashed due to a missile attack on the way to Kigali.[135] The death of President Habyarimana followed by broadcasts from the Radio Mille Collison, a radio channel sponsored by the state of Rwanda, held the RPF responsible for the attack and ordered all Tutsis to be killed.[136] Following that from April to July 1994 more than 500,000 Tutsis were killed systematically.[137] Finally, with the adoption of Resolution 955, the UNSC acted under Chapter 7 of the United Nations Charter and decided to establish the (ICTR) to prosecute the crime of genocide and other violations of international humanitarian law.[138]

In Article 7 of the ICTR Statute, the territorial jurisdiction of the tribunal was determined as the territory of Rwanda and neighbouring states in terms of violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction was indicated in the same article as well, according to the article the tribunal had jurisdiction over the crimes committed between 1 January 1994 and 31 December 1994.[139] The violations of the international humanitarian law also occurred in the refugee camps situated in neighbouring states where members of the defeated Hutu army encountered the refugee Tutsis, this was the reason for the extension of the jurisdiction to those states.[140]

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[132] ibid.

[133] ibid.

[134] Beloff R. Jonathan, 'Peace and Compromise, Idealism and Constraint: The Case of Arusha Peace Accords in Rwanda and Burundi' (2019) 13 Genocide Studies and Prevention: An International Journal 2

[135] Alesse Smeulers & Lotte Hocx, 'Studying the Microdynamics of the Rwandan Genocide' (2010) 50 Brit J Criminology 435

[136] ibid.

[137] Jeffrey Herbst, 'The Unanswered Question – Attempting to Explain the Rwandan Genocide' (2001) 80 Foreign Aff 123

[138] United Nations Security Council, Resolution 955 (8 November 1994) UN Doc S/RES/955

[139] International Criminal Tribunal for Rwanda, *Statute,* UN Doc S/RES/955 (8 November 1994), art 7

[140] Shraga & Zacklin, 'The International Criminal Tribunal for Rwanda' (n 2) p.506.

The crimes that the tribunal was authorised to prosecute were listed under Articles 2-4 of the Statute as; genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.[141]

The relationship between the Government of Rwanda and ICTR was unstable, in the early days of the tribunal there was a race between the tribunal and the government to take those responsible for the grave crimes into custody, the relations improved when war broke out in the Democratic Republic of Congo, deflected the attention of the government from the prosecutions.[142] This nature of the relationship between the Rwandan Government and the ICTR distorted the fairness of the tribunal, For instance, former prosecutor of the tribunal Carla Del Ponte investigated the RPF members allegedly responsible for the systematic massacres in Kigali and others, however, the government refused to cooperate with the tribunal regarding these investigations and, thus indictments could not be submitted due to insufficient evidence.[143] Following that, Del Ponte's responsibilities were limited to ICTY by the UNSC and a new post for the prosecutor of the ICTR was created.[144] The new prosecutor Hassan Jallow reached an agreement with the Government and left the prosecution of the RPF members who were responsible for the massacres in 1994 to the Rwandan Prosecutor General.[145] Even though this compromise of Jallow benefitted the effectiveness of the tribunal, it allowed the Rwandan Government to avoid the prosecution of high-profile RPF members who were responsible for violations of international humanitarian law and harmed the accountability of the tribunal deeply.[146]

Even though the ICTR had many obstructs on its way, the main conflict in Rwanda where the mass violations of international humanitarian law were committed, was concluded already, crimes committed were documented and the locations of the responsible people were known.[147] This caused the early trial of several high-level perpetrators.[148] This was a showcase of deliberate justice to the African leaders who violated the fundamental rights of their

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[141] International Criminal Tribunal for Rwanda, *Statute,* UN Doc S/RES/955 (8 November 1994), art 2,3,4

[142] Carroll (n 2) p.180.

[143] Sara Kendall & M.H. Nouwen, 'Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda' (2016) 110 Am J Int'l L 212

[144] United Nations Security Council, Resolution 1503 (28 August 2003) UN Doc S/RES/1503

[145] Peskin Victor, 'Victor's Justice Revisited: Rwandan Patriot Front Crimes and the Prosecutorial Endgame at the ICTR in Strauss Scott & Waldorf Lars (ed.), Remaking Rwanda; State Building and Human Rights after Mass Violence (Critical Human Rights 2011) p.180.

[146] Haskell Leslie & Waldorf Lars, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences' (2011) 34 Hasting Int'l & Comp. L Rev 49.

[147] Shraga & Zacklin 'The International Criminal Tribunal for Rwanda' (n 4) p.502.

[148] Alexandra A. Miller, 'From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape' (2003) 108 Penn St L Rev 349

citizens and enjoyed freedom,[149] due to Article 3 of the Charter of the Organization of African Unity, which prevents interference of members to each other's internal matters.[150] Besides that the ICTR was the first international tribunal that submitted a judgement for genocide,[151] it interpreted the definition of genocide to include rape to international criminal law, and since Nuremberg, it was the first tribunal that held a judgement against a former head of state.[152]

3.4. SPECIAL COURT FOR SIERRA LEONE

The civil war in Sierra Leone between the Government of Sierra Leone (GOSL) and the Rebel United Front (RUF) was one of the most violent conflicts in the 20th century.[153] In Lome, Togo, a peace agreement between GOSL and RUF was signed in 1999, the parties of the conflict agreed upon granting amnesty to the members of the RUF, it should be also noted that a reservation was put to the amnesty article of the agreement by the UN representative.[154] The objections to the amnesty provisions of the Lome Peace Agreement, continued conflicts in Sierra Leone and the request from the GOSL caused the UN to consider establishing an international criminal tribunal for Sierra Leone.[155] In Resolution 1315 the UNSC authorized the Secretary-General to negotiate with the GOSL to establish a special court.[156] The bilateral agreement between the GOSL and the UN which included the Statute of the Special Court was signed on 16 January 2002 in Freetown.[157]

The establishment of the Special Court for Sierra Leone (SCSL) by a bilateral agreement rather than a Chapter VII Resolution was the most significant difference between the court and ad-hoc tribunals (ICTR and ICTY).[158] This aspect of the SCSL avoided the questions raised during the Tadic case before ICTY, whether the establishment of the court was by the Charter of the United Nations or not.[159] In addition, it had many effects on the court, In Articles 2 to 5 of the Statute of the Special Court the crimes that the court had jurisdiction over were listed, due to the unique nature of the court besides international crimes such as; crimes against humanity, violations of Article 3 common to the Geneva Conventions

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[149] Peter (n 4) p.701.

[150] Organization of African Unity Charter (1963), OAU Doc. CAB/LEG/23.15

[151] Kendall & Nouwen (n 2) p.219.

[152] Miller (n 2) p.361.

[153] Celina Schocken, 'The Special Court for Sierra Leone: Overview and Recommendations (2002) 20 Berkeley J Int'l L 436

[154] Abdul Tejan-Cole, 'Painful Peace: Amnesty Under the Lome Peace Agreement in Sierra Leone (1999) 3 Law Democracy & Dev 239

[155] Schocken (n 2) p.442.

[156] United Nations Security Council, Resolution 1315 (14 August 2000) UN Doc S/RES/1315

[157] Charles Chernor Jallah, 'Special Court for Sierra Leone: Achieving Justice' (2011) 32 Mich J Int'l L 395

[158] Omer Yousif Elagab, 'The Special Court for Sierra Leone: Some Constraints' (2004) 8 Int'l J Hum Rts 249

[159] Stuart Beresford, 'The Special Court for Sierra Leone: An Initial Comment' (2001) 14 LJIL 635

and of Additional Protocol II, and other serious violations of international humanitarian law, crimes under Sierra Leonean law was also included to the Statute.[160] However, unlike ICTY and ICTR the court hasn't got any primacy regarding the courts of third-party states, this was a major weakness of the court in terms of defendants and evidence located outside of Sierra Leone.[161] The temporal jurisdiction of the court was unique due to Article 9 of the Lome Peace Agreement which granted amnesty to the RUF members.[162] The reservation put by the Special Representative of the UN to this provision disclaimed that this amnesty would not be implemented due to the violation of international humanitarian law.[163] This was reflected in Article 10 of the SCSL Statute, which stated that any amnesty granted to anyone who falls into the jurisdiction of the court would not be a bar to prosecution in terms of Articles 2 to 4.[164] In Article 1 of the Statute, the beginning date for the temporal jurisdiction of the court was determined as 30 November 1996.[165] However, due to the amnesty provisions of the Lome Peace Agreement, the court had jurisdiction over crimes under Sierra Leonean Law from July 1999.[166] Temporal jurisdiction of the court was open-ended, because of the possibility of conflict in the region to be continued.[167]

Overall, the SCSL had accomplished a lot in terms of international criminal justice, the non-applicability of amnesties was a clear deterrent message that such crimes would not go unpunished.[168] The defendants were granted the minimum guarantees and rights, especially indicated in Article 14 of the International Covenant on Civil and Political Rights.[169]

3.5 EXTRAORDINARY CHAMBERS OF AFRICA

The Extraordinary Chambers of Africa (EAC) which was established by an agreement between the Senegal and African Union (AU) might be a good precedent for an international tribunal established with the cooperation of a regional organisation and conduct a trial of a head of state. The establishment process of the EAC should be examined to interpret the regional approach to establishing an international criminal tribunal.

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[160] Special Court for Sierra Leone (Statute of the Special Court for Sierra Leone) 2002, 2178 UNTS 137 arts 2,3,4,5

[161] Schocken (n 3) p.447

[162] Daniel J. Macaluso, 'Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone' (2001) 27 Brock J Int'l L 347

[163] ibid.

[164] Special Court for Sierra Leone (Statute of the Special Court for Sierra Leone) 2002, 2178 UNTS 137 art 10

[165] Special Court for Sierra Leone (Statute of the Special Court for Sierra Leone) 2002, 2178 UNTS 137 art 1

[166] Schocken (n 4) p.443

[167] ibid.

[168] ibid.

[169] Beresford (n 3) p.647

Before the establishment of the EAC, an indictment against Hissene Habre who was a former president of Chad was quashed by Dakar Appeals Court reasoning that the crimes Habre allegedly committed were not stated under the Penal Code and a criminal proceeding against a foreigner can not be initiated before the Senegalese courts, Dakar Appels Court also rejected the extradition request made by Belgium afterwards because Habre was granted with immunity under customary international law as a former head of state, even though Chad gave its consent for the trial of Habre before foreign courts.[170] However, an application was made to the Committee Against Torture by an association of victims of the Habre regime, claiming that Senegal failed to fulfil its obligations under Articles 5 and 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984 (CAT) by not taking legal actions against an alleged torturer present in its territory or extradite him to Belgium.[171] International Court of Justice (ICJ) ruled in the same way after an application made by Belgium on 20 July 2012.[172] In response, the government of Senegal consulted about the problem with the AU, as a response the AU tasked Senegal with the trial of Habre on behalf of Africa, before a Senegalese court, and thus Senegal started to implement the necessary reforms to its judicial structure for the trial of Habre.[173] These reforms were brought before the ECOWAS Court by Habre, claiming that he was subjected to ex-post-facto law and that his trial by these reforms would be a violation of non-retroactivity.[174] The ECOWAS Court stated in its decision that to try and prosecute Habre with new laws is a violation of Habre's rights and non-retroactivity and such trial can only be conducted before a court that has an international character.[175] Subsequently, the AU prompted and advocated Senegal for the creation of an international ad hoc court, eventually, an agreement was reached between them on 24 August 2012 that established the EAC.[176]

The EAC was a good example of a regional organisation cooperating with a state for the establishment of an international tribunal, however, in terms of several aspects it differentiates from the proposed tribunal by the EU. Firstly, the EAC was a hybrid court which was implemented into the judicial system of Senegal,[177] rather than an impartial

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[170] Suhong Yang, 'Can Hybrid Courts Overcome Legitimacy Challenges?: Analyzing the Extraordinary African Chambers in Senegal' (2020) 11 Geo Mason Int'l LJ 45

[171] Daley J. Birkett, 'Victims' Justice: Reperations and Asset Forfeiture at the Extraordinary African Chamber' (2019) 63 J Afr L 151

[172] Question Relating to the Obligation to Prosecute or Extradite *(Belgium v. Senegal)* (Judgement) (2012) ICJ Rep 422

[173] Emmanuele Cimiotta, 'The First Steps of the Extraordinary African Chanbers' (2015) 12 J Int'l Crim Just 177

[174] ibid.

[175] Sarah Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem' (2013) 11 J Int'l Crim Just

[176] ibid.

tribunal. The EAC was at the edge of being an internationalised court, the only aspects that determined it as international were its application of universal jurisdiction on international crimes, foreign judges taking part besides Senegalese judges in the tribunal and the cooperation of the AU.[178] Chad was a member of the AU and the aim of establishing such a court was an effort of legitimacy regarding the fact that African leaders should be tried before an African court in terms of achieving the participation of victims, which is much harder to achieve with a tribunal based in Western States.[179]

Even though there are several differences between the EAC and EU proposed tribunal, the EAC can be a contributive precedent in terms of its reliance on universal jurisdiction regarding the trial of a foreign head of state for international crimes.[180] It is almost certain that the internationality of the proposed tribunal will be a topic of discussion that will continue even after the trial if European States manage to conduct it.

4. EXAMINATION OF JURISDICTION AND HEAD OF STATE IMMUNITY IN TERMS OF PROPOSED TRIBUNAL

In terms of the prosecution and trial of the crime of aggression committed by Russian officials, especially Vladimir Putin some notions concerning international criminal law should be examined deeply, such as; universal jurisdiction and the head of state immunity. Universal jurisdiction and the crime of aggression are both controversial issues, in addition when two notions are added together it establishes a combination that is crucial not just regarding the proposed tribunal but the international community as well.[181]

Under international law, there are five types of jurisdiction which are; territorial, nationality, passive personality, protective and universal.[182] Universal jurisdiction, regardless of perpetrators' and victims' nationality or the place where the crime was committed, provides jurisdiction to every state in terms of a limited type of crimes, which is different from the other types of jurisdictions that require a connection between the prosecuting state

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[177] Christopher Sperfeldt, 'The Trials Against Hissene Habre: Networked Justice and Reparations at the Extraordinary African Chambers' (2017) 21 Int'l J Hum Rts 1243

[178] Williams (n 2) p.1152

[179] Venarisse V. Verga, 'Extraordinary African Chambers in the Senegalese Courts: A Regional Mechanism Enforcing International Criminal Justice' (2016) 61 Ateneo LJ 721

[180] Williams (n 3) p.1153

[181] Michael P. Scharf, 'Universal Jurisdiction and the Crime of Aggression' (2012) 53 Harvard International Law Journal 358

[182] Kenneth C. Randall, 'Universal Jurisdiction Under International Law' (1988) 66 Tex. L. Rev. 785

and the committed crime.[183] It is widely accepted that the oldest exercise of the universal jurisdiction was against the crime of piracy.[184]

Exercise of jurisdiction was extended to war crimes and crimes against humanity after the Second World War by the international community, trials in Nuremberg and Tokyo were based on this type of jurisdiction.[185] Following the Second World War, individuals were also tried before domestic courts based on universal jurisdiction for war crimes and crimes against humanity, for instance, Adolph Eichmann,[186] and John Demanjuk[187] were tried by Israel for Nazi atrocities committed during the Second World War. there were notable trials outside the context of atrocities during World War II as well, Desire Munyaneza was convicted for genocide, crimes against humanity and war crimes committed in Rwanda before the Canadian courts.[188] The extradition of Augusto Pinochet was also significant because he was a former president of Chile, the House of Lords decided based on universal jurisdiction that the extradition of Pinochet by the United Kingdom to Spain in terms of torture committed in Chile in the 1980s was by the law reasoning that international crimes do not grant the head of state immunity.[189]

On 12 June 2010, at the International Criminal Court Review Conference in Kampala, Uganda participating states reached a consensus on the amendments that would define the crime of aggression under the Rome Statute and enable the ICC to exercise jurisdiction over the crime.[190] This consensus was reached after several compromises.[191] First, the crime of aggression was referred to as a "leadership crime" this unlike other international crimes limited the prosecution of the crime of aggression to the presidents, prime ministers and most responsible leaders such as ministers and generals.[192] Second, an understanding was adopted that the Kampala amendments would not provide an interpretation that states shall have the obligation to prosecute the crime of aggression committed by other state officials before their domestic courts.[193] This was an outcome of the United States approach during the conference,

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[183] ibid.

[184] Huang Yao, 'Universal Jurisdiction Over Piracy and East Asian Practice' (2012) 11 Chinese J Int'l L 623

[185] ibid.

[186] William Schabas, 'The Contribution of Eichmann Trial to International Law' (2013) 26 LJIL 667

[187] Xavier Phillippe, 'The Principle of Universal Jurisdiction and Complementary: How Do the Principles Intermesh' (2006) 88 Int'l Rev Red Cross 375

[188] Fannie Lafontaine, 'Canada's Crime Against Humanity and War Crimes Act On Trial' (2010) 8 J Int'l Crim Just 269

[189] Melinda White, 'Pinochet, Universal Jurisdiction, and Impunity' (2000) 7 Sw J L & Trade Am 209

[190] Kai Ambos, 'The Crime of Aggression After Kampala' (2010) 53 German YB Int'l L 463

[191] ibid.

[192] Keith A. Petty, 'Sixty Years in the Making: The Definition of Aggression for the International Criminal Court' (2008) 31 Hastings Int'l & Comp L Rev 531

the representatives of other states in Kampala were persuaded by delegations of the United States and some other allies to adopt such an understanding that would prevent member states from prosecuting crime of aggression before domestic courts.[194]

The issue of understanding adopted after the persuasion of the United States brings out the question of "whether the Nuremberg set out a precedent for states to exercise universal jurisdiction over the crime of aggression or not." The Nuremberg trials were cited by most international courts such as; ICTY and ICTR as a precedent for universal jurisdiction applied over international crimes.[195] It is known that the Nuremberg Tribunal exercised jurisdiction over "crime against peace" in addition to crimes against humanity and war crimes, also with the adoption of UNGA Resolution 95(I) the crimes under the Charter of the Nuremberg Tribunal became part of the customary international law.[196] The key factor that caused the emergence of the idea that the crime of aggression was not described under the Nuremberg Charter and had not gained the status of a crime under customary international law was the fact that even though, in the draft of the Code of Crimes Against the Peace and Security of Mankind presented by the International Law Commission in 1996, the existence of the crime of aggression as a crime under international law was confirmed under Article 16, the elements and definition of it was not mentioned.[197] This might be the grounds for the United States' approach in Kampala as well.[198]

Besides above mentioned issues, the nature of the crime of aggression being a crime which its prosecution held limited to the highest administrator of states such as; presidents, prime ministers and government officials that have authority over military actions of a state brings out the matter of head of state immunity in terms of the proposed tribunal as well. The immunity of the government leaders and heads of state was regarded as infinite before the Second World War, this immunity was reflected in the contemporary international documents as well, such as the Vienna Convention of 1969.[199] However, it should be noted that these instruments do not mention the responsibility of the heads of state in terms of violations of international criminal law.[200] In addition, any immunity regarding international crimes was

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[193] States Parties of Rome Statute, Resolution RC/ Resolution 6 (11 June 2010) Annex III 4. 5.

[194] Scharf, 'Universal Jurisdiction and the Crime of Aggression' (n 4) p.365

[195] ibid.

[196] UNGA Resolution 95 (I), Affirmation of the Principles of the International Law Recognized by the Charter of the Nuremberg Tribunal, 11 December 1946

[197] Noah Waisbord, 'Prosecuting Aggression' (2008) 49 Harv Int'l LJ 161

[198] Scharf, 'Universal Jurisdiction and the Crime of Aggression' (n 5) p.365

[199] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 554, art 29, 39(2)

denied in the Nuremberg Charter, Rome Statute and statutes of SCSL, ICTR and ICTY.[201] This approach was followed by some domestic courts as well.[202] When former president of Chile Augusto Pinochet was arrested in the United Kingdom, regarding two arrest warrants issued by the United Kingdom magistrates after the request of Spanish Courts based on the European Convention on Extradition, the House of Lords of England and Wales denied the head of state immunity in terms of universal jurisdiction.[203] Pinochet's extradition was requested based on the accusation against him that he committed torture and organised a conspiracy to commit torture.[204] The two arrest warrants were immediately taken before the High Court by Pinochet's counsel, regarding the first arrest warrant the Divisional Court of the Queen's Bench Division held that it was inappropriate because the crimes which the extradition was requested for were not listed under the United Kingdom Extradition Act.[205] In terms of the second arrest warrant, it was ruled that Pinochet was granted immunity, due to his acts which he accused of being official acts conducted during his duty as a head of state.[206] This decision was legally based on Section 20 of the United Kingdom State Immunity Act which grants immunity to heads of state in accordance with the 1961 Vienna Conventions on Diplomatic Relations.[207] However, on 24 March 1999, the decision of the High Court was rejected by the House of Lords, it was decided by a majority of six to one that Pinochet was not immune from the responsibility for the act of torture and conspiracy to torture in terms of the acts committed after the United Kingdom ratification of the Torture Convention on 8 December 1988.[208]

Three years after the Pinochet case, on the *"Arrest Warrant Case"* between Congo and Belgium the ICJ brought a more conservative perspective regarding the matter of head-of-state immunity.[209] The application of the Democratic Republic of Congo (DRC) against Belgium on 17 October 2000 brought out similar issues to the Pinochet case, such as; the universal jurisdiction in terms of serious international crimes and head of state immunity regarding the accusation of the foreign minister of the DRC.[210] The main substance of the case

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[200] Mikhail Wladimiroff, 'Former Heads of State on Trial' (2005) 38 Cornell Int'l LJ 949

[201] ibid.

[202] ibid.

[203] Andre Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 Eur J Int'l L 237

[204] Michael Tate, 'The Pinochet Case (1999) 142 Law & Just – Christian L Rev 87

[205] Bianchi (n 2) p.240

[206] ibid.

[207] ibid.

[208] Rachel Swain, 'A Discussion of the Pinochet Case (House of Lords Decision of 24 March 1999) Noting the Juxtaposition of International Relations and International Law Perspectives' (2000) 69 Nordic J Int'l L 223

[209] Campbell McLahian, 'Pinochet Revisited' (2002) 51 Int'l & Comp LQ 959

was the warrant for the arrest of Yerodia Ndombasi for grave breaches of the 1949 Geneva Conventions, 1977 Additional Protocols and crimes against humanity committed during the war in Congo.[211]

In its decision, the court indicated four situations where head of state immunity can not be applicable (i) It is possible for them to be subject to criminal proceedings in their own country (ii) they can be tried before foreign domestic courts (iii) when they leave their official duty they will not be granted with immunity fort he acts they committed before and after their time of duty (iv) it is possible to try them before certain international courts.[212] In the context of ICJ's ruling, the heads of state can be prosecuted and tried before a court that is not a part of their state's judicial system only if their state waives the immunity granted to them or if they are subjected to criminal proceedings before an international court. However, this decision brought up to matter of the needed aspects to refer to a court as "international". This issue became the focus of the international community when in 2003 the prosecutor of SCSL issued an indictment on Charles Taylor who was the president of the Republic of Liberia at that time and an international arrest warrant was issued against him by the SCSL afterwards.[213] The Republic of Liberia was motivated to file a complaint against Sierra Leone by referring to the Arrest Warrant case between the DRC and Belgium and claiming that the SCSL was not an international court and thus was not an exception of head of state immunity in terms of their current president.[214] However, the jurisdiction of the ICJ was rejected by the Republic of Sierra Leone in accordance with Article 36(2) of the ICJ Statute and thus the filing did not result in any litigation and the Appeal Chamber of the SCSL held on the issue after the defence motion that the court was established by an agreement between all member states of the UN and Sierra Leone, thus the establishment of it was truly international.[215] In the context of the proposed tribunal, the applicability of universal jurisdiction over the crime of aggression, which Russian officials were accused of and head of state immunity through the scope of the Arrest Warrant Case of the ICJ are undoubtedly crucial matters. In addition, even if an international tribunal will be managed to establish such a prosecution it is almost certain that the issue of an arrest warrant by the SCSL against Charles Taylor showcased that the

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[210] Chanaka Wickramashinga, 'Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)' (2001) 50 Int'l & Comp LQ 670

[211] ibid.

[212] Wladimiroff (n 2) p.960

[213] ibid.

[214] Sarah M. N. Nouwen, 'The Special Court for Sierra Leone and the Immunity of the Taylor: The Arrest Warrant Case Continued' (2005) 18 LJIL 645

[215] International Court of Justice Statute (1945) 1 UNTS 993, Statute of the International Court of Justice, 24 October 1945, art 36(2)

identification of that tribunal as "international" would become a topic of disagreement as well.

5. EXAMINATION OF JUSTIFICATION CLAIMS ADVANCED BY RUSSIA

On 21 February 2022 the two de-facto states established by pro-Russian separatists in Eastern Ukraine were recognised by Russian President Vladimir Putin, this step allegedly authorised Russian soldiers to invade those regions, that were recognised as Ukrainian territory.[216] The war initiated by Russia afterwards was a clear violation of Article 2(4) of the United Nations Charter which prohibited the use of force on states within their international relations.[217] The analysis of Vladimir Putin's statements reveals that his justifications for the illegal invasion of Ukraine were based on two concepts. First, he made the accusation that Neo-Nazis overrun Ukraine following a coup, which was inconsistent with the historical reality and logic.[218] Second, he mostly cited the case of Kosovo as a precedent for Russia's actions in Eastern Ukraine arguing that Russia met the humanitarian needs of the Russian minority there and the merger of four occupied regions after referendums were legal since the ICJ held that the Declaration of Independence of Kosovo was by the international law.[219]

The conflict in Kosovo dates back to the 1980s when its autonomy was revoked by the Serb nationalist Slobodan Milosevic and thus, its self-governance was ended, following that Milosevic established martial law in the region and the Albanian population was persecuted from public services and the situation that resembled a civil war emerged.[220] NATO reasoning that the 1995 Dayton Agreement brought a late peace in Bosnia, sent troops to the Kosova border and demanded that Serbs halt their actions immediately.[221] After this warning had not affected the Serbian side NATO initiated a bombing campaign against the Serb targets on 24 March 1999, after 11 weeks defeated Serb forces were retreated from Kosovo.[222] This action of NATO was without a doubt a violation of Article 2(4) of the United Nations Charter.[223] Following the end of NATO's military operations, the UNSC adopted Resolution 1244 and

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[216] "Ukraine: Putin Announces Donetsk and Luhansk Recognition" *BBC News* (2022)

[217] Charter of the United Nations, 26 June 1945, 1 UNTS XVI, Article 2(4)

[218] Marples DR, "Vladimir Putin Points Out to History to Justify His Ukraine Invasion, Regardless of Reality" *The Conversation* (March 7, 2022)

[219] Pineles DB, "How the 'Kosovo Precedent' Shaped Putin's Plan to Invade Ukraine" (2002) BalkanInsight, (https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine)

[220] Korab R. Sejdiu, 'The Revival of a Forgotten Dispute: Deciding Kosovo's Future' (2006) 3 Rufgers J L & Urb Pol'y

[221] ibid.

[222] Peter Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Thoeries' (2009) 8 Chinese J Int'l L 47

[223] ibid.

claimed authority over the situation by bringing Kosovo under the UN mandate.[224] From 1999 to 2008 the Kosovan institutions were managed to be established under UN observance, eventually assuming that it would have the support of the United States and EU On 17 February 2008 the Assembly of Kosovo issued a Declaration of Independence and the Republic of Kosovo was founded.[225]

Following the request of Serbia, an Advisory Opinion from the ICJ was requested by the UNGA on the question "Is the unilateral declaration of Kosovo in accordance with the law ?"[226] In its Advisory Opinion, the ICJ held that there is no prohibition of declaration of independence in international law and recognised the right of self-determination in international law which can result in the creation of a new state.[227]

The similarity between the process concluded with the declaration of independence by Kosovo and the merger of the four occupied regions after referendums raised some questions such as; "What was the difference between NATO bombings and Russia's military actions in terms of the independence of Kosovo being recognised by most of the states while the merger of four regions with Russia was not?" and "If the declaration of independence of Kosovo was by the international law why the establishment of two de-facto states was not in terms of the right to self-determination?"

From its first emergence in international law during the decolonisation process right to self-determination was deemed problematic because if such a right of one group was respected it automatically meant the denial of the same right in terms of the other group.[228] The Aland Islands dispute in the 1920s was a clear reflection of it where allowing the Swedish-speaking Finns to secede from Finland also meant undermining the self-determination of Finland.[229] When the judgements held by judicial bodies in the past on the matter examined it can be observed that the interpretation of the term "self-determination" had shifted throughout history. In 1971 the ICJ held in its advisory opinion on Namibia that the right to self-determination existed in the positive international law.[230] Four years after the Namibia decision, in its Advisory Opinion on the Western Sahara court's view, was shifted, the court while accepting the existence of the right to self-determination, held that there were

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[224] United Nations Security Council, Resolution 1244 (10 June 1999) UN Doc S/RES/1244

[225] Colin Warbrick, 'I. Kosovo: The Declaration of Independence' (2008) 57 Int'l & Comp L Q 675

[226] Elena Cirkovic, 'An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence (2010) 11 German LJ 895

[227] ibid.

[228] Robert MacCorquadale, 'Self-Determination: A Human Rights Approach' (1994) 48 Int'l & Comp. L.Q. 857

[229] Martti Kaskenniemi,' National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 Int'l & Comp, L.Q. 241

[230] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Hum Rts Q 186

not any sovereignty ties during the Spanish colonization between Western Sahara and Morocco or Mauritania, thus the matter should be decided by the UNGA by the application of the principle of self-determination, it was a clear reconceptualization of the term in court's view that the term started to be interpreted as principal rather than an enforceable right.[231] In this context, it is possible to view that the courts reinvented the notion of self-determination by interpreting it as an open-ended principle rather than an enforceable right and thus separating it from the right to secede, the term reinterpreted as a right to be taken seriously in terms of minorities which was not amount to a right to secede.[232] Regarding the Advisory Opinion on Kosovo court explained its decision by stating that it answered the question of whether or not the declaration of independence by Kosovo was in accordance with international law in a narrow context and it did not answer the legal consequences of the declaration such as; whether the Republic of Kosovo gained statehood or did the recognition of other states' legal effects had validity.[233]

In this context, by viewing the above-mentioned facts it is possible to state that, the emergence of two de-facto states after secession from Ukraine and the merger of the occupied regions with Russia can not be by international law in terms of the right to self-determination because the notion was interpreted by the international entities as not amount to the right to secede. In addition regarding Kosovo, the NATO bombing and the UNSC Resolution 1244 that established the UN Administration in the region were responses to a grave humanitarian need and that humanitarian need also granted legitimacy to the declaration of independence of Kosovo and its recognition by the community of states.[234] This was an aspect that did not occur in Eastern Ukraine where there was not any sign of oppression sighted or documented against the Russian minority within the area.

Overall human rights violations that occurred in the case of Kosovo which legitimized the independence of the Kosovar people have not emerged in terms of Russian people located in Eastern parts of Ukraine. Therefore the claims of humanitarian intervention by Russia as set out by the events in Kosovo as a precedent can not be seen as a valid ground for the legitimacy of the actions committed by Russia.

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[231] ibid.

[232] ibid.

[233] Peter Hilpold, 'The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question' (2009) 14 Austrian Review of International and European Law 259

[234] Hilpold, 'The Kosovo and International Law: Looking for Applicable Theories' (n 2) p.61

6. CONCLUSION

In the International Criminal Court Review Conference held in Kampala, participating states reached a consensus on the characterization of the crime of aggression as a leadership crime and limited its jurisdiction to the heads of state.[235] In that regard, the Arrest Warrant Case between DRC and Belgium is crucial in terms of the proposed tribunal for the prosecution of the crime of aggression committed by Russian government officials because it indicated the necessary circumstances for the trial of heads of state.[236] The possibility of Russia's waiver regarding the officials who are accused of the crime of aggression is extremely low in the current situation of the conflict. This brings out the option of a trial before an international court. In terms of the ICC, according to Article 15bis of the Rome Statute, a prosecution over a crime of aggression can not be started by the initiative of the prosecutor or another member state because Russia is not a member state of the statute.[237] The only possible option for a prosecution against Russian officials before the ICC as stated in Article 15ter is the UNSC referral made to the Prosecutor under Chapter 7 of the Charter of the United Nations.[238] However, the veto right of Russia as one of the five permanent members of the UNSC under Article 27 of the UN Charter is a possible obstruct before a Chapter 7 Resolution which refers to the prosecutor of the ICC to initiate an investigation.[239] The veto right of Russia also blocks the option of establishing an international tribunal with a Resolution under Chapter 7 of the UN Charter like in the examples of ICTY and ICTR.

In that case, cooperation with the EU as an international body while conducting such a trial might be the most appropriate option. However, this approach might also put the internationality of the court into jeopardy because the EU is not an organisation in which all states are represented. This issue was also put forward by Charles Taylor as a motion during his trial before the SCSL, claiming that the court was not an international tribunal that had the authority to try a head of state.[240] Even though the EAC can be a precedent for an international court established with the cooperation of a regional organisation, it had some differences with the proposed tribunal as mentioned above.

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[235] Nicolaos Strapatsas, 'The Crime of Aggression' (2005) 16 Crim LF 89

[236] Arrest Warrant Case (*Democratic Republic of Congo v Belgium)* (Judgement) (2002) ICJ Rep 3.

[237] Rome Statute of the International Criminal Court, art 15bis (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

[238] Rome Statute of the International Criminal Court, art 15ter (adopted 17 July 1998, entered into force 1 July 2002 2187 UNTS 90

[239] Charter of the United Nations, 26 June 1945, 1 UNTS 16, Article 27

[240] Kai Ambos & Ousman Nijkam, 'Charles Taylor's Criminal Responsibility' (2013) 11 J Int'l Crim Just 789

The legitimacy of the proposed tribunal is another matter that should be discussed. In 2007, during Alec Roche Annual Lecture at Oxford University, former president of the ICTY, Judge Theodor Meron answered the question *"Does international criminal justice work ?"* by indicating four criteria; (1)to be able to find and try the alleged perpetrators, (2)conduct a fair trial, (3) deterrent effect on international crimes (4) promoting peace and healing.[241] In terms of the first criterion, in the current situation of the conflict, this might be the most struggling and uncertain challenge before the proposed tribunal, it is most likely impossible to bring Vladimir Putin and Russian high-ranking officials before a court located in Hague or Strasbourg. This issue was also faced during the early years of ICTY, where the ongoing conflict was an obstruct before bringing the most responsible perpetrators to the tribunal.[242] The SCSL precedent[243] also showcased that the extradition of the perpetrators from the states outside of Europe will be a political problem and weakness of the tribunal given that some African states are in good relations with Russia rather than Western allies.

In order to provide a fair trial, which was the second criterion determined by Judge Meron, the rights of suspects and accused under the International Covenant on Civil and Political Rights of 1966[244] should be guaranteed. This was also followed by other international ad-hoc tribunals such as ICTR, ICTY and SCSL. However, the legitimacy of the tribunal would be harmed in terms of fairness due to the non-prosecution of acts of aggression committed by Western states, especially the United States, for instance, the 2003 U.S. invasion of Iraq, the 2001 NATO invasion of Afghanistan and 1965 U.S invasion of Dominic Republic.[245] Bringing Russian officials who allegedly committed the crime of aggression before a tribunal while none of the above-mentioned events followed by any prosecution against individuals might cause the criticism of unfairness deriving from the politics like in the case of Tokyo trials where bombings of Hiroshima and Nawazaki never prosecuted[246] or the belief amongst Serbs that they were determined as sole perpetrators because the numbers of indictments issued against Serbs by the ICTY were much higher than the ones issued against other nations such as Croatians and Bosnians.[247] In addition to that, the European Council, EU[248] and NATO[249] are actively supporting Ukraine since the beginning of the

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[241] Theodor Meron, *The Making of International Criminal Justice: A View From The Bench: Selected Speeches* (2011) 139

[242] Vlaming (n 3) p.94

[243] Schocken (n 6) p.447

[244] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171

[245] Micheal J. Glennon, 'The Black-Prase Crime of Aggression' (2010) 35 Yale J Int'l L 71

[246] Wanhong (n 3) p.1676

[247] Meernik (n 3) p.147

conflict. These organisations are also giving their support to the proposed tribunal, this is a factor that might cause the criticism of victors' justice likewise the Nuremberg trials,[250] put the impartiality of the tribunal into suspicion and harm its credibility as well.

The third criterion stated by Meron was deterrence in terms of international crimes. It is almost crystal clear that the establishment of the proposed tribunal will have a deterrent effect regarding that the crime of aggression was a crime that was never prosecuted before an international tribunal rather than Nuremberg.[251] which its prosecution and trial over the crime in the contemporary context is controversial as mentioned above.

Final and the fourth criterion of Meron was to promote peace and healing, however, the effects of establishing such a court on the ongoing conflict are questionable, it might be provocative in terms of the Russian side, and in addition, it might harm the possible peace negotiations between the parties as well. This was also the case with the ICTY, several press reports indicated that David Owen and Cyrus Vane the mediators on behalf of the EU and UN for the Yugoslavian Civil War, viewed the establishment of the ICTY as having complicating effects on their peacemaking missions.[252]

Overall, the matter of the proposed tribunal for prosecuting the crime of aggression committed by Russian officials is a complex issue, because the plan for conducting a trial over a crime of aggression based on universal jurisdiction is unprecedented. The U.S. approach during the Kampala Review Conference that prevented states from implementing universal jurisdiction over the crime of aggression is also another issue that will be the topic of discussion throughout the process. However, as Micheal P. Scharf stated; in international criminal law great developments are never risk-free.[253]

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[248] 'European Council Reiterates EU Support to Ukraine "as Long as It Takes"' (*EU NEIGHBOURS east*, 30 June 2023) <https://euneighbourseast.eu/news/latest-news/european-council-reiterates-eu-support-to-ukraine-as-long-as-it-takes/> accessed 10 September 2023

[249] 'NATO PA President Condemns Russia's Illegal & Illegitimate 'elections ...' (*NATO PA President Condemns Russia's Illegal & Illegitimate 'Elections' in Occupied Ukrainian Regions*) <https://www.nato-pa.int/news/nato-pa-president-condemns-russias-illegal-illegitimate-elections-occupied-ukrainian-regions> accessed 10 September 2023

[250] Stuart A. Scheingold, 'Nuremberg Reconsidered: Conot's Justice at Nuremberg (1985) 1985 Am B Found Res J 375

[251] Charter of the International Military Tribunal, Article 6(a), 8 August 1945, 82 UNTS 279

[252] David P. Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' (1994) 5 Crim LF 401

[253] Scharf 'Universal Jurisdiction and Crime of Aggression' (n 6) p.389