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## Can the International Community Break Away from the Legacy of Selectivity from the Nuremberg and Tokyo Tribunals?

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## **INTRODUCTION**

The purpose of this work is to analyze how the legacy of selectivity from the Nuremberg and Tokyo tribunals has influenced international law and the International Criminal Court's ability to seek justice for victims of international crime. The end of World War II gave the Allied powers the ability to choose which international criminals to prosecute and how. The Allied powers were cemented as world superpowers with the authority to dole out justice by seizing the opportunity to put the losers of the war on trial rather than line them up for a firing squad. The selectivity from the tribunals and the Allied power bias will be highlighted in the international response and the International Criminal Court's ability to investigate other situations of conflict after World War II. Specifically, analyzing the difference in the international response to the situation in Afghanistan and the situation in Ukraine will show the International Criminal Court's struggle with the legacy of selectivity and an opportunity to turn away from it. I will argue that the Nuremberg and Tokyo model of international justice through selectivity has prevented the International Criminal Court from either effectively seeking or achieving justice where world superpowers and former Allied powers are involved, specifically the United States and Russia, and discuss what needs to change to reach justice for all international victims.

## **PRELIMINARY STATEMENT**

The issue grappled with here, is whether the international community, specifically the International Criminal Court, will be able to turn away from the practice of selectivity solidified in international law by the Nuremberg and Tokyo tribunals to pursue a policy of equal accountability in an effort to accomplish justice for all victims, instead of politically favored victims.

## **THESIS**

The principles of selectivity from the Nuremberg and Tokyo trials have visibly impeded the International Criminal Court's pursuit for justice against world superpowers, such as the United States in connection with Afghanistan. However, the same influence of selectivity on the Court that often works to undermine investigations against world superpowers, powered by political and financial support, has recently allowed the Court to pursue charges against Russia in connection with the situation in Ukraine. To accomplish global justice, the international community and International Criminal Court must turn away from Nuremberg and Tokyo's selectivity and treat all international criminal situations with the same vigor as the situation in Ukraine.

## **ANALYSIS**

### **I. The Legacy of the Nuremberg and Tokyo Tribunals**

This section will give the basic background of the International Military Tribunal at Nuremberg and Tokyo and discuss the choices made for prosecuting international crimes committed during World War II. The Nuremberg and Tokyo trials created precedent in International Criminal Law that still influences international law today, especially the fact that the prosecutions were led by Allied Powers only. While the Tribunal is revered for its implementation of trials instead of immediate mandatory executions, there are multiple areas where the Tribunal fell short on principles of fairness and implemented a new era of 'Victor's Justice'. It is no new concept that the winners of wars dole out the punishments and executions for the vanquished, but the Nuremberg and Tokyo trials have been praised for their commitment to justice despite only prosecuting the losers of World War II despite evidence of international law violations on the winning side.

Notably, there were no neutral parties involved in the establishment of the tribunal for Nuremberg. The Nuremberg trials were presided over by judges from the four Allied nations and the trials were led by Chief Prosecutor and US Supreme Court Justice Robert Jackson.<sup>1</sup> By the end of the trials, 12 Nazi leaders were sentenced to death, 3 sentenced to life imprisonment, 4 sentenced to temporary prison terms, and 3 were acquitted.<sup>2</sup> The trials lasted 216 days and only tried Nazis for crimes committed during the war.<sup>3</sup> Arguably, the Nuremberg trials had the potential to keep going and prosecute all international law offenders and thus have a much larger impact on accountability in international law.

The Tokyo trials had similar flaws and outcomes, although the tribunal in Tokyo appointed some judges from neutral countries, like Justice Pal from India, to avoid the criticism of a show trial that Nuremberg received.<sup>4</sup> However, the tribunal was ordered by United States citizen and the Supreme Commander of the Allied Powers, General Douglas MacArthur, and the United States was responsible for the arrests and led the trials of the Japanese leaders.<sup>5</sup> There is also evidence that Japanese Emperor Hirohito was not prosecuted by the tribunal to keep political relations between the US and Japan benevolent and to not risk Japan falling to communism due to regime change.<sup>6</sup> Essentially, the entire tribunal in Tokyo was controlled by the United States, which was responsible for obvious violations of international law against Japanese citizens.<sup>7</sup>

Commenting on whether the Allies could have been tried for international crimes committed during World War II, Professor Scharf wrote that:

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<sup>1</sup>The National WWII Museum, *War Crimes on Trial: The Nuremberg and Tokyo Trials*, Nov. 24, 2020, at 4 <https://www.nationalww2museum.org/war/articles/nuremberg-and-tokyo-war-crimes-trials>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4-5.

<sup>5</sup> *Id.*

<sup>6</sup> Jyot Arora, LL.M., *Tokyo & Yamashita War Crime Tribunals: An Instrument for Victor's Justice*, June 24, 2019, at 5.

<sup>7</sup> *Id.*

The States which tried the Nuremberg defendants were arguably guilty of many of the same sorts of crimes for which they sat in judgment over their former adversaries. Had Germany and Japan won the war, American leaders could just as easily have been prosecuted for crimes against humanity in relation to the dropping of the atomic bombs, firebombing civilian centers, and conducting unrestricted submarine warfare. Soviet leaders could have been prosecuted for waging aggressive war and mistreatment of prisoners with respect to the forcible annexation of the Baltic States and appalling records of the Soviets regarding the treatment of prisoners of war.<sup>8</sup>

To demonstrate violations of international law by the Allied powers, one can simply point to the use of targeting civilians and inhumane treatment of dissidents and prisoners of war. A deliberate policy of targeting civilian populations in Germany during World War II was adopted by the British Bomber Command.<sup>9</sup> The bombings created firestorms that rose more than 7,000 feet and ripped through suburbs like hurricanes.<sup>10</sup> This tactic was used on Dresden, which was filled with refugees fleeing the looming Soviet Red Army and had no German troops, and the death toll was estimated to be 60,000-100,000 people.<sup>11</sup> The United States forces employed the same civilian bombing tactics in Japan, creating firestorms that killed 85,000 civilians in Tokyo.<sup>12</sup> The death toll from the firestorms were more than the casualties from the atomic bombs the US dropped on Hiroshima and Nagasaki, also largely targeted at civilians.<sup>13</sup>

The Soviets are believed to be responsible for the murder of 15,000 Polish military officers, intellectuals, and professionals in the Katyn Forest during their occupation in 1940.<sup>14</sup> The Soviets transported Polish citizens to the woods, made them kneel before mass graves, and

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<sup>8</sup> Steven W. Becker, *The Inequality of Hard: Unpunished Allied Atrocities, the Nuremberg Fallacy, and Why Global Criminal Justice Remains a Mirage*, THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE, Aug. 2013, at 3.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

shot them in the back of the head.<sup>15</sup> The Allied powers also committed violations of international law in their treatment of prisoners of war, where 800,000-1,000,000 German prisoners of war captives died of starvation, overcrowding, exposure, and disease.<sup>16</sup> The camps were run by France and the US, and adopted different classifications for the POW to bypass Geneva Convention requirements for treatment of prisoners of war.<sup>17</sup> The policy of the camps left more Germans dead than in the battles on the western front in northwest Europe from 1941-1945 and prevented the Red Cross from delivering trains full of food.<sup>18</sup> The treatment of these people by the Allied powers violated concepts of international law set out in the third and fourth Geneva Conventions before 1949 protecting prisoners of war and civilians, which were also later outlined in the Rome statute for the International Criminal Court in 1998.<sup>19</sup>

The evidence of war crimes and crimes against humanity committed by the Allied powers was certainly enough to prosecute, or at the very least could have had a formal investigation to give the appearance of equal accountability in international law. To keep the prestige and precedential value of the Nuremberg Trials, both for its show of intolerability of Nazism and for its forbidding of the chain of command defense, a different tribunal could have been created to address Allied crimes during World War II. The international community could have used a different theater for prosecuting Allied crimes, just as the Japanese were prosecuted separately from the Nazis, but instead the alleged and well documented international crimes of the Allied powers have gone unpunished. The international community had an opportunity to set a

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<sup>15</sup> Steven W. Becker, *The Inequality of Hard: Unpunished Allied Atrocities, the Nuremberg Fallacy, and Why Global Criminal Justice Remains a Mirage*, *supra*, at 3.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 7-8.

<sup>19</sup> *The Geneva Conventions of 1949 and their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

precedent of accountability for all sides, where any international criminal would face consequences despite being on the winning or losing side of conflict.<sup>20</sup>

The legacy of selectivity and lack of accountability by the Allied Powers in the establishment and empowerment of the International Military Tribunal at Nuremberg and Tokyo cemented the practice of Victor's Justice into international law by allowing for prosecutions and inquiries to be controlled and given legitimacy only by the victorious. While the International Criminal Court that was established in 1998 has not directly implemented the practice of selectivity, the legacy from Nuremberg and Tokyo has influenced its jurisdiction heavily which has impeded goals of international justice. Specifically, the legacy of the Nuremberg and Tokyo tribunals have kept the International Criminal Court from effectively investigating and prosecuting the alleged crimes of the world superpowers, such as the United States and Russia. In a groundbreaking announcement in March 17, 2023, the ICC issued two arrest warrants against Russian officials, the first steps taken to prosecute a world superpower other than simply opening an investigation since the Court was established.<sup>21</sup> The precedent setting arrest warrants have the potential to rid the ICC of the legacy of selectivity from Nuremberg and Tokyo, and could finally give the ICC an opportunity to pursue justice in all violations of international law rather than violations committed by less politically powerful groups.

## **II. The International Criminal Court**

This section will give background on the International Criminal Court and how it has been influenced since it was established by the superpower nations of the world. The United Nations General Assembly convened in Rome, Italy in July 1998 to establish an International Criminal

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<sup>20</sup> Matthew Lippman, *NUREMBERG: FORTY FIVE YEARS LATER*. CONNECTICUT JOURNAL OF INTERNATIONAL LAW, Fall, 1991. at 15.

<sup>21</sup> *Ukraine*, INTERNATIONAL CRIMINAL COURT, Feb. 2022, <https://www.icc-cpi.int/situations/ukraine>



Court.<sup>22</sup> There was growing pressure to establish a permanent international judicial body since 1948, when the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>23</sup> The impetus for a sitting international court grew in 1989 when Trinidad and Tobago requested the consideration of an international court resume after drug trafficking concerns, and in 1993 in response to the conflict in the former Yugoslavia that included genocide, war crimes and crimes against humanity.<sup>24</sup> The UN Security Council initially responded to these issues with ad hoc tribunals, such as the ad hoc International Criminal Tribunal for the Former Yugoslavia, to prosecute the crimes.<sup>25</sup>

The goals of establishing the International Criminal Court, laid out by the United Nations, are to achieve justice for all, end impunity, help end conflict, remedy the deficiencies of ad hoc tribunals, deter future war criminals, and to take over when national criminal justice institutions are unable or unwilling to act.<sup>26</sup> Critics of the International Criminal Court point out the low number of convictions, selectivity, and limited jurisdiction.<sup>27</sup> The limited jurisdiction of the ICC directly impacts the selectivity of who is prosecuted by the Court. The jurisdiction of the ICC, set forth in the Rome Statute Article 12, is limited to either states that were a party to the statute at the creation of the Rome Statute, thereby accepting the jurisdiction of the Court; to situations where one or more of the States are parties to the Statute where either the conduct in question occurred on the State's territory, or "the state of which the person accused of the crime is a national"; and if a State who was not a party to the Statute declared the acceptance of the ICC's

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<sup>22</sup> *Rome Statute of the International Criminal Court*, UNITED NATIONS, (1998-1999)  
<https://legal.un.org/icc/general/overview.htm>

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017)  
<https://www.justsecurity.org/47717/icc-making-difference/>

jurisdiction with respect to the crime in question.<sup>28</sup> Article 12 limits jurisdiction essentially to those States who accept the legitimacy of the ICC for crimes they commit, or crimes committed in their territory.<sup>29</sup> While the vehicles giving the ICC jurisdiction in the Rome Statute seem logical initially, they actually provide loopholes for nations committing international crimes by allowing those nations to opt out of liability with the International Criminal Court. While the ICC is an instrument of complementarity and is not meant to usurp domestic law when domestic law works properly<sup>30</sup>, the limits in jurisdiction have allowed nations that purport to punish violations of international law by their citizens without actually adhering to those proclamations escape liability.

How can an International Criminal Court, with the stated goals of justice for all, be effective with such limitations?<sup>31</sup> It is plainly obvious that those who wish to be excluded from liability for war crimes, crimes against humanity, and crimes of genocide, can simply just not subscribe to the Court.<sup>32</sup> At least, this was an ongoing critique of the ICC until March 17, 2023, when the ICC issued arrest warrants for Russian Federation President Vladimir Putin and the Commissioner for Children’s Rights Maria Lvova-Belova.<sup>33</sup> Before these arrest warrants, the ICC had only dared to open an investigation in which one of the parties was a world superpower and an Allied power of World War II – the United States in the situation in Afghanistan – but the Court had never issued arrest warrants or announced culpability of a world superpower until this point. Could this be the

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<sup>28</sup> *Rome Statute of the International Criminal Court*, INTERNATIONAL CRIMINAL COURT. (RS-Eng pdf), (July 17, 1998) at 15.

<sup>29</sup> *Id.*

<sup>30</sup> ICTJ.org, *What is Complementarity? National Courts, the ICC, and the Struggle Against Impunity*. <https://www.ictj.org/sites/default/files/subsites/complementarity-icc/>

<sup>31</sup> *Rome Statute of the International Criminal Court*, UNITED NATIONS, (1998-1999) <https://legal.un.org/icc/general/overview.htm>

<sup>32</sup> Jane Stromseth, *Is the ICC Making a Difference?*, JUST SECURITY (Dec. 6, 2017) <https://www.justsecurity.org/47717/icc-making-difference/>

<sup>33</sup> *Ukraine*, INTERNATIONAL CRIMINAL COURT, Feb. 2022, <https://www.icc-cpi.int/situations/ukraine>

turning point where the International Criminal Court sheds the Nuremberg and Tokyo legacy by holding all international criminals accountable?

Notably, the United States and Russia are not parties to the Rome Statute and have not declared acceptance of the ICC's jurisdiction. Both countries have, in fact, stated that the ICC is illegitimate.<sup>34</sup> While countries that are not a party to the Rome Statute and do not accept ICC jurisdiction will not be open to the Court's authority within their borders, their nationals can still open themselves to liability by committing international crimes against those people and territories who are under ICC jurisdiction, sanctions from other countries condemning the international violations, and by traveling to ICC jurisdiction territories where parties to the ICC are obligated to arrest those that the Court has charged with international crimes.<sup>35</sup> These are precisely the mechanisms by which the International Criminal Court can hold the United States accountable for international crimes in Afghanistan, and Russia for international crimes in Ukraine.<sup>36</sup>

### **III. The Situation in Afghanistan**

This section will provide background for the International Criminal Court's investigation into the Situation in Afghanistan, the United States response to the investigation, and the international crimes reported.

Afghanistan joined the ICC in 2003, giving the Court jurisdiction over war crimes, crimes against humanity, and genocide in Afghanistan or by Afghan nationals.<sup>37</sup> ICC Prosecutor

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<sup>34</sup> Adam Keith and Nika Jeiranashvili, *In ICC Investigation Of 2008 Russia-Georgia War Crimes: Don't Let Justice Delayed Become Justice Denied*. (Sept. 23, 2022) <https://www.justsecurity.org/83169/in-icc-investigation-of-2008-russia-georgia-war-crimes-dont-let-justice-delayed-become-justice-denied/>

<sup>35</sup> Marlise Simons, Charlie Savage and Anushka Patil, *Here's what to know about the I.C.C.'s arrest warrant for Putin*, THE NEW YORK TIMES, (March 17, 2023) <https://www.nytimes.com/2023/03/17/world/europe/putin-icc-arrest-warrant-war-crimes.html>

<sup>36</sup> *Id.*

<sup>37</sup> *ICC: Afghanistan Inquiry Can Resume*, HUMAN RIGHTS WATCH, (Oct. 31, 2022) <https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>

Luis Moreno Ocampo opened a preliminary investigation of the situation in Afghanistan in 2006, but the ICC prosecutor's office did not request permission to launch a full investigation until 2017 under Prosecutor Fatou Bensouda.<sup>38</sup> After the Court's pre-trial chamber denied the request in 2019, the Court was criticized for "compromising judicial independence to avoid confrontation with the US" and then the ICC Appeals chamber approved the Prosecutor's request in 2020.<sup>39</sup> Bensouda announced her investigation would consider potential crimes committed by Taliban, Afghan forces, and US forces which would also be liable for treatment of detainees justified by "the war on terror".<sup>40</sup> Although the United States is not a party to the Rome Statute, the United States would fall under ICC jurisdiction by committing war crimes on Afghanistan territory.<sup>41</sup> Originally under the Clinton administration, the US signed the Rome Statute, but had not ratified the treaty.<sup>42</sup> The Bush administration revoked the US signature from the Rome Statute, persuaded the UN Security Council to pass exemptions for "peacekeeping forces, preventing soldiers from non-ICC member countries from being investigated or prosecuted, and attempted to form bilateral immunity agreements with other nations to keep them from supporting the ICC."<sup>43</sup> The Obama administration did not ratify the Rome Statute, and the Trump administration blatantly discredited the ICC.<sup>44</sup>

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<sup>38</sup> Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Sept. 8, 2020)

[https://ecfr.eu/article/commentary\\_why\\_america\\_is\\_facing\\_off\\_against\\_the\\_international\\_criminal\\_cou/](https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/)

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Katherine Gallagher, *The ICC must hold the US accountable for crimes in Afghanistan*, THE GUARDIAN (Feb. 16, 2018) <https://www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan>

<sup>42</sup> Anthony Dworkin, *Why America is Facing Off Against the International Criminal Court*, EUROPEAN COUNCIL ON FOREIGN RELATIONS (Sept. 8, 2020)

[https://ecfr.eu/article/commentary\\_why\\_america\\_is\\_facing\\_off\\_against\\_the\\_international\\_criminal\\_cou/](https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/)

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

In June of 2020, then-President Trump issued an executive order which leveraged sanctions against the ICC, specifically naming Bensouda and Mochochoko.<sup>45</sup> While the US sanction on the ICC do not directly affect the prosecutors, because their salaries are paid in euros, the US could sanction organizations and companies that do business with the ICC in attempt to eliminate the investigations into the Afghanistan situation.<sup>46</sup> Since the Biden administration, the sanctions on the ICC have been removed, but there has been no announcement from the US supporting the legitimacy of the ICC, nor an explicit declaration to cooperate with the Court.<sup>47</sup> As of October 2021, ICC prosecutor Karim Khan sought to narrow the investigation into the situation in Afghanistan by deprioritizing and excluding conduct by the United States and its allies, including US-backed Afghan government forces, squarely focusing on the crimes of the Taliban and other affiliated groups.<sup>48</sup> This request for a change in scope is undoubtedly attributed to the backlash from the United States.

The United States' reaction to the investigation in Afghanistan is a prime example of how a world superpower can undermine the legality of the ICC and create roadblocks to investigations and justice for those harmed in international conflict. Upon hearing news that prosecutor Khan intended to narrow the scope of the investigation, Shaharзад Akbar, former chair for Afghanistan's Independent Human Rights Commission, stated "This decision reinforces the perception that these institutions set up in the West and by the West are just instruments for the West's political agenda."<sup>49</sup> While critics point out that narrowing the scope of the investigation reveals the Court's susceptibility to politics and "basically suggest[s] that only one

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *ICC: Afghanistan Inquiry Can Resume*, HUMAN RIGHTS WATCH, (Oct. 31, 2022) <https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>.

<sup>48</sup> Alice Speri, *HOW THE U.S. DERAILED AN EFFORT TO PROSECUTE ITS CRIMES IN AFGHANISTAN*, THE INTERCEPT, (Oct. 5, 2021) <https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/>

<sup>49</sup> *Id.*

side of the conflict is worthy of investigation,” others point out that with the United States no longer in the mix impeding the entire investigation, at least some justice may be reached from the prosecution of Taliban crimes.<sup>50</sup> However, there is well documented evidence of crimes that give rise to ICC jurisdiction committed by the United States’ forces and their allies in Afghanistan.

Research by the Human Rights Watch has uncovered evidence of violation of international law by Afghan forces, Taliban, and US forces where torture and mistreatment of detainees by US military and CIA has been documented since the US invasion in 2001.<sup>51</sup> In November 2020, there was “credible information” found by a war crimes inquiry that Australian Special Forces were responsible for unlawfully killing 39 civilians and detainees in Afghanistan.<sup>52</sup> This finding prompted the Afghanistan Independent Human Rights Commission to implore other nations to investigate possible humanitarian violations and unlawful killings attributable to their forces in Afghanistan, specifically the UK and the US.<sup>53</sup> Perhaps unsurprisingly, neither the UK nor the US has complied with the Afghanistan Independent Human Rights Commission’s request.<sup>54</sup>

In regard to the US involvement, there are many instances of harm to civilians. The US recently admitted that the August 29, 2021 drone strike in Kabul, previously called a “righteous strike”, was a mistake that left ten civilians dead instead of terrorist targets.<sup>55</sup> Among the dead were seven children and one humanitarian worker.<sup>56</sup> Action on Armed Violence published data

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<sup>50</sup> *Id.*

<sup>51</sup> *ICC: Afghanistan Inquiry Can Resume*, HUMAN RIGHTS WATCH, (Oct. 31, 2022) <https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>

<sup>52</sup> Yu Ning, *How US evades responsibility for war crimes in Afghanistan*, GLOBAL TIMES (Sept. 27, 2021) <https://www.globaltimes.cn/page/202109/1235240.shtml>

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

in May 2021 which showed 3,977 casualties were attributed to US airstrikes in 2016-2020, 1,598 of which were children.<sup>57</sup> More reports show that in 2010 twelve American soldiers formed a secret “kill team” allegedly responsible for blowing up and shooting Afghan civilians at random in the Kandahar province and collecting the victims’ fingers as trophies.<sup>58</sup> The evidence of torture and treatment of detainees by the US likely constitutes violations of international law as well. In March 2020, the ICC said it had enough information to prove US forces “committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence” in Afghanistan between 2003 and 2004.<sup>59</sup>

The US has domestic jurisdiction over US nationals who committed crimes while in Afghanistan, but the likelihood of justice from the US legal system is slim at best.<sup>60</sup> The author of *how US evades responsibility for war crimes in Afghanistan*, Yu Ning, rightly points out that “Washington [D.C.] has been claiming to defend ‘human rights’ all day long. But when international institutions try to investigate its crimes against humanity, it shamelessly undermined fairness and justice by slapping sanctions.”<sup>61</sup> The US has also avoided prosecuting any US officials, military, CIA, or private contractor involved in war crimes and crimes against humanity in Afghanistan.<sup>62</sup> After the investigation into the situation in Afghanistan was approved on appeal, the US blatantly pressured the Afghanistan government to oppose ICC jurisdiction when then-Secretary of State Mike Pompeo flew to Kabul a day before the Afghan

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<sup>57</sup> Yu Ning, *How US evades responsibility for war crimes in Afghanistan*, GLOBAL TIMES (Sept. 27, 2021) <https://www.globaltimes.cn/page/202109/1235240.shtml>

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Katherine Gallagher, *The ICC must hold the US accountable for crimes in Afghanistan*, THE GUARDIAN (Feb. 16, 2018) <https://www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan>

government petitioned the ICC to defer to Afghanistan domestic investigations.<sup>63</sup> The way the ICC investigation into Afghanistan is playing out, the lack of US cooperation, and shaky Afghan cooperation, damages the Court's credibility for other situations involving the world superpowers or the former Allied powers. However, the ICC investigation of the Situation in Ukraine has played out much differently.

#### **IV. The Situation in Ukraine**

This section will give background on the investigation into the Situation in Ukraine, Russia's reaction to the investigation, and the international crimes that have been alleged. The international community's response to the Situation in Ukraine seems to be the inverse of the reactions to the Situation in Afghanistan, despite both situations involving armed conflict and severe casualties.

Ukraine is not a party of the Rome Statute but has twice declared acceptance of ICC jurisdiction. First, the government of Ukraine declared acceptance of ICC jurisdiction for alleged crimes committed on Ukrainian soil from November 2013 to February 2014; the second declaration expanded the jurisdiction from February 20, 2014 and onwards.<sup>64</sup> On February 28, 2022, just 4 days after the initial attacks by the Russian military in Ukraine, the ICC Prosecutor Khan requested authorization to investigate.<sup>65</sup> On March 2, 2022, the Prosecutor opened the investigation and states the scope included any war crimes, crimes against humanity or genocide in Ukraine since November 21, 2013 to the present.<sup>66</sup> Almost exactly a year later, March 17, 2023, the ICC issued arrest warrants for Russian President Vladimir Putin and the Commissioner

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<sup>63</sup> Katherine Gallagher, *The ICC must hold the US accountable for crimes in Afghanistan*, THE GUARDIAN (Feb. 16, 2018) <https://www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan>

<sup>64</sup> *Ukraine*, INTERNATIONAL CRIMINAL COURT, Feb. 2022, <https://www.icc-cpi.int/situations/ukraine>

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



for Children’s Rights Maria Lvova-Belova for crimes under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.<sup>67</sup> The Court announced that “each suspect bears responsibility for the war crime of unlawful deportation of population and that unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children.”<sup>68</sup>

Like the United States, Russia is not a party to the Rome Statute but has availed itself to liability by crimes committed on Ukrainian territory.<sup>69</sup> The reality of enforcement of the arrest warrants against Russia are slim since the ICC cannot go into Russia and put Lvova-Belova and Putin in handcuffs, but the warrants are symbolic step.<sup>70</sup> Even though the Russian government has dismissed the arrest warrants as having “no significance whatsoever,” if either of the Russian officials step foot in an ICC member state they will immediately be arrested and taken to The Hague.<sup>71</sup> Stephen Rapp, former ambassador of the Office of Global Criminal Justice in the US State Department, commented on the significance of the warrants, stating “either Putin is placed on trial at The Hague, or he is increasingly isolated, and dies with this hanging over his head.”<sup>72</sup>

The ICC alleges that Russian officials have taken hundreds of Ukrainian children from orphanages to Russia, where they have since been given up for adoption to Russian homes.<sup>73</sup> Prosecutor Khan stated that the acts of deportation “demonstrate an intention to permanently remove these children from their own country. At the time of these deportations, the Ukrainian

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Marlise Simons, Charlie Savage and Anushka Patil, *Here’s what to know about the I.C.C.’s arrest warrant for Putin*, THE NEW YORK TIMES, (March 17, 2023) <https://www.nytimes.com/2023/03/17/world/europe/putin-icc-arrest-warrant-war-crimes.html>

<sup>70</sup> *Id.*

<sup>71</sup> International Criminal Court issues arrest warrant for Putin over war crimes in Ukraine CBC p. 2- 7

<sup>72</sup> Marlise Simons, Charlie Savage and Anushka Patil, *Here’s what to know about the I.C.C.’s arrest warrant for Putin*, THE NEW YORK TIMES, *Supra* (2023)

<sup>73</sup> Anthony Deutsch and Toby Sterling, *ICC judges issue arrest warrant for Putin over war crimes in Ukraine*, REUTERS, (March 17, 2023) <https://www.reuters.com/world/europe/icc-judges-issue-arrest-warrant-against-putin-over-alleged-war-crimes-2023-03-17/>

children were protected persons under the Fourth Geneva Convention.”<sup>74</sup> The Ukrainian government alleges more than 16,000 children have been illegally transferred and Yale University researchers have found that “Russia has held at least 6,000 Ukrainian children in at least 43 camps and other facilities as part of a 'large-scale systematic network.’”<sup>75</sup> The BBC reports that Lvova-Belova spoke about efforts to indoctrinate Ukrainian children in September 2022, complaining that children removed from Ukraine spoke badly of Putin and were singing the Ukrainian anthem.<sup>76</sup> She also claimed that she has already adopted a 15-year-old boy from Mariupol, Ukraine.<sup>77</sup>

There have been other alleged crimes committed against Ukrainians by Russians that were not listed in the arrest warrants. The Human Rights Watch published an article in April 2022 detailing known international humanitarian law violations thus far in Ukraine.<sup>78</sup> There is evidence of crimes against Ukrainian civilians by Russian forces, such as multiple cases of repeated rape, summary execution, and violence directed specifically at civilians.<sup>79</sup> Parties to the conflict in Ukraine are liable under international humanitarian law, the Geneva Conventions of 1949, the First Additional Protocol to the Geneva Conventions, and customary law.<sup>80</sup> “The laws of war prohibit willful killing, rape and other sexual violence, torture, and inhumane treatment of captured combatants and civilians in custody.”<sup>81</sup>

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<sup>74</sup> Anthony Deutsch and Toby Sterling, *ICC judges issue arrest warrant for Putin over war crimes in Ukraine*, REUTERS, (March 17, 2023) <https://www.reuters.com/world/europe/icc-judges-issue-arrest-warrant-against-putin-over-alleged-war-crimes-2023-03-17/>

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH (Apr. 3, 2022) <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

On March 4, 2022, there is evidence that Russian forces in Bucha gathered five Ukrainian men and executed one of them. A witness stated that “soldiers forced the five men to kneel on the side of the road, pulled their T-shirts over their heads, and shot one of the men in the back of the head.”<sup>82</sup> There is evidence that Russian soldiers in the Chernihiv region rounded up six men and executed all of them on February 27, 2022.<sup>83</sup> Witnesses said soldiers took the six men from their respective homes and when a mother of one of the men asked another group of Russian soldiers what would happen, the soldiers informed her they were going to be questioned and released.<sup>84</sup> “Instead, they led these six men away, took them to the far end of the village, and shot them.”<sup>85</sup> The mother stated, “they were laying there, There were gunshots to their heads. Their hands were tied behind their backs.”<sup>86</sup> Another witness said the same group of soldiers took all of the wood from the village, leaving the locals with no way to cook or heat their homes.<sup>87</sup>

One family recounted entering a basement of a two-story building with other locals to shelter from the constant bombings.<sup>88</sup> Inside the basement, there was a woman with wounds to her chest and leg.<sup>89</sup> The wounded in the basement told the family that the day before, the woman had been shot “when Russian soldiers stormed the basement and threw a smoke grenade inside. Several people panicked and ran outside where Russian soldiers fired at them... and a 14-year-old child was shot and killed.”<sup>90</sup> In another instance of Russian forces attacking sheltering civilians, a Russian soldier beat his way into a school building where local Ukrainians were

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<sup>82</sup> *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH (Apr. 3, 2022) *supra*. <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

hiding.<sup>91</sup> The soldier picked a woman from the group, “took her to a classroom on the second floor, where he pointed a gun at her and told her to undress... The whole time he held a gun near [her] temple or put it into [her] face.”<sup>92</sup> He shot at the roof of the building twice “and said it was to give [her] more ‘motivation’.”<sup>93</sup> As for other violations, US ambassador to the United Nations, Linda Thomas-Greenfield, stated that Russia is in violation of the Geneva Convention due to its use of outlawed vacuum bombs and cluster munitions in its invasion.<sup>94</sup> In addition, the Red Cross’s efforts to evacuate 200,000 civilians from Mariupol failed for multiple days straight, with both Ukraine and Russia claiming that the other was responsible for the bombs preventing humanitarian aid.<sup>95</sup>

Russia is also facing liability from the ‘annexation’ of Crimea because Ukraine gave the ICC jurisdiction for crimes arising from November 2013 and onward. The invasion of Russia into Crimea in 2014, which was then a part of Ukraine, has a plethora of documented human rights violations by Russian forces. Violations include house raids, abductions, Russian authorities consigning Crimean dissidents to psychiatric institutions, and detaining political prisoners, among other violations.<sup>96</sup> Crimean Tartars, an ethnic group previously targeted and forcibly departed from Crimea under Stalin in the era of the Soviet Union, were targeted again in 2014.<sup>97</sup> The Crimean Tartar people were the most visible group opposed to the Russian invasion

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<sup>91</sup> *Ukraine: Apparent War Crimes in Russia-Controlled Areas*, HUMAN RIGHTS WATCH (Apr. 3, 2022) *supra*. <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Derek Saul, *War Crimes in Ukraine? Here’s What Russia’s Been Accused of and What Comes Next*, FORBES, (Mar. 6, 2022) <https://www.forbes.com/sites/dereksaul/2022/03/06/war-crimes-in-ukraine-heres-what-russias-been-accused-of-and-what-comes-next/?sh=20217cbc23c4>

<sup>95</sup> *Id.*

<sup>96</sup> Brian Dooley, *CRIMEA OFFERS DISTURBING BLUEPRINT FOR RUSSIAN TAKEOVER OF UKRAINE*, HUMAN RIGHTS FIRST, (Mar. 25, 2022) <https://humanrightsfirst.org/library/crimea-offers-disturbing-blueprint-for-russian-takeover-of-ukraine-2/>

<sup>97</sup> Brian Dooley, *CRIMEA OFFERS DISTURBING BLUEPRINT FOR RUSSIAN TAKEOVER OF UKRAINE*, HUMAN RIGHTS FIRST, (Mar. 25, 2022) <https://humanrightsfirst.org/library/crimea-offers-disturbing-blueprint-for-russian-takeover-of-ukraine-2/>

and were deliberate victims of Russian authorities launching a “wave of repression” to enforce submission to the annexation of Crimea and to silence dissenters.<sup>98</sup>

In 2020, the Human Rights Protection Group published an article detailing evidence of war crimes committed by Russia in the forcible annexation of Crimea.<sup>99</sup> The evidence shows Russian forces used human shields to prevent Ukrainian forces from engaging in combat.<sup>100</sup> Additionally, there was evidence armed Russian soldiers, so called ‘little green men’, were clad in uniforms without any insignia, and other Russian soldiers dressed as Ukrainian soldiers to infiltrate local military sites and create illusions of pro-Russian sentiment in Crimea.<sup>101</sup> In February 2019, the ICC was informed of Russian forces deliberately using civilians as shields while the Russians blocked or seized Ukrainian military objects to prevent Ukrainian forces from opening fire.<sup>102</sup> This set of facts constitutes the use of human shields, which is a war crime under the Fourth Geneva Convention, Article 28; the 1977 Additional Protocol to the Geneva Convention, Article 51; and Article 8 of the Rome Statute of the ICC.<sup>103</sup>

#### **V. Will the International Criminal Court Turn to the Situation in Afghanistan with the Same Fervor as the Situation in Ukraine?**

This section will analyze possible reasons why the International Criminal Court response was different for Afghanistan and Ukraine despite similar types of war crimes and crimes against humanity occurring in each conflict. The response from the international community was completely different for each situation even though both were active war zones at the time ICC investigations were opened. By March 2, 2022, 40 ICC member nations submitted a State Party

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<sup>98</sup> *Id.*

<sup>99</sup> Halya Coynash, *Russia Actively Used Human Shields and Committed Other War Crimes in its Annexation of Crimea*, HUMAN RIGHTS PROTECTION GROUP. (Jan. 31, 2020) <https://khpg.org/en/1580352391>

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

referral to the ICC to investigate the situation in Ukraine, and by April that number rose to 43.<sup>104</sup> The US has voiced approval of the ICC taking action against Russia for crimes in Ukraine as well, President Biden stated that the arrest warrants from the ICC are justified in light of the clearly committed war crimes.<sup>105</sup>

The investigation in Afghanistan was opened by the request of the prosecutor, not any State referrals, and ICC member states pressured the Court through funding in opposition to the investigation.<sup>106</sup> The ICC operates with limited resources and an annual budget paid for by its member states, which can easily make the limited resource problem a political one.<sup>107</sup> It seems the only nation calling for justice for crimes in Afghanistan is China. China has stated that the US and its allied must be held accountable for human rights violations in the War in Afghanistan, but the nation has also attempted to establish a relationship with the Taliban after their recent takeover of Afghanistan.<sup>108</sup>

Some opine that the difference in international response to Afghanistan and Ukraine is due to ethnic and geographical differences. There are notions that the “Ukraine conflict fits into a different narrative and arouses different biases than the conflicts of the Global War on Terror that were conducted in non-Western territory, among non-White populations, with mostly Muslim victims and combatants.”<sup>109</sup> The conflict in Ukraine more closely resembles “a clear war

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<sup>104</sup> *Ukraine*, INTERNATIONAL CRIMINAL COURT, Feb. 2022, <https://www.icc-cpi.int/situations/ukraine>

<sup>105</sup> Antoinette Radford & Frank Gardner, *Putin arrest warrant issued over war crime allegations*, BBC NEWS, (March 18, 2023) <https://www.bbc.com/news/world-europe-64992727>

<sup>106</sup> Alice Speri, *HOW THE U.S. DERAILED AN EFFORT TO PROSECUTE ITS CRIMES IN AFGHANISTAN*, THE INTERCEPT, (Oct. 5, 2021) <https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/>

<sup>107</sup> *Id.*

<sup>108</sup> Matthew Loh, *China says US and its allies must be held accountable for human rights violations in Afghanistan*, INSIDER, (Aug 24, 2021) <https://www.insider.com/china-says-us-held-accountable-human-rights-violations-actions-afghanistan-2021-8>

<sup>109</sup> Belquis Ahmadi, Kate Bateman and Scott Worden, *Intolerance of Atrocity Crimes in Ukraine Should Apply to Afghanistan*, UNITED STATES INSTITUTE OF PEACE, (Apr. 28, 2022) <https://www.usip.org/publications/2022/04/intolerance-atrocity-crimes-ukraine-should-apply-afghanistan>

of aggression committed by a European nation with imperial ambitions against another European nation,” invoking similar circumstances of World War II.<sup>110</sup> However, these authors fail to note that the invasion of Ukraine in 2022 was not the first instance of aggression committed by a European nation with imperial ambitions since World War II.

The Russian forcible annexation of Crimea in 2014 aside, Russia also invaded Georgia in 2008. In fact, the types of international crimes claimed and committed were similar to those committed in World War II. A 2009 EU investigation found that war crimes were committed against Georgian civilians and rejected the possibility that Georgia committed genocide in South Ossetia, as Russia claimed.<sup>111</sup> In 2016 more than 30 people testified, providing evidence for the alleged ethnic cleansing of 20,000 Georgians living near South Ossetia who were burned out or driven out of their homes, a rocket attack in the town of Gori, and the torture of Georgian prisoners.<sup>112</sup> A rocket attack, an Iskander SS-26 rocket, was activated in Gori’s central square in August 2008, 11 civilians and a Dutch journalist was killed.<sup>113</sup> The shrapnel and cluster mark evidence that was found in the journalist’s body was able to prove the rocket was Russian made.<sup>114</sup>

June 30, 2022, the ICC issued arrest warrants for three men, but no officials, charging them with war crimes in connection to Russia’s invasion of Georgia in 2008.<sup>115</sup> The ICC prosecutor found that South Ossetian forces, the rebel group backed by Russia, was responsible for a “forcible displacement campaign”, destroying 5,000 homes and driving out “at least 75 percent

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<sup>110</sup> *Id.*

<sup>111</sup> Luke Harding, *Georgia accuses Russia of war crimes during 2008 Conflict*, THE GUARDIAN, (May 23, 2018) <https://www.theguardian.com/world/2018/may/23/georgia-accuses-russia-war-crimes-2008-conflict>

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Adam Keith and Nika Jeiranashvili, *In ICC Investigation Of 2008 Russia-Georgia War Crimes: Don’t Let Justice Delayed Become Justice Denied*. (Sept. 23, 2022) <https://www.justsecurity.org/83169/in-icc-investigation-of-2008-russia-georgia-war-crimes-dont-let-justice-delayed-become-justice-denied/>

of the region’s ethnic Georgian population,” amounting to crimes against humanity.<sup>116</sup> The ICC began to investigate the situation in Georgia in 2016, without significant international community support. Up until the spring of 2022, the European Union and the United States discussed very little regarding the ICC investigation in Georgia.<sup>117</sup> The charges and arrest warrants were not sought until six years after the investigation was opened, likely because of the war Russia has been waging in Ukraine since 2022. The authors of *In ICC Investigation of 2008 Russia-Georgia War Crimes: Don’t Let Justice Delayed Become Justice Denied*, noted that no government directly forced the ICC’s “extraordinarily slow approach”, but many of the European members of the ICC kept the ICC’s budget static when it needed resources to properly conduct the investigation.<sup>118</sup> They also noted that there was no indication any of the ICC European members were willing to diplomatically support an unprecedented ICC prosecution of a major world power like Russia.<sup>119</sup>

The lack of urgency and enthusiasm from the international community to investigate and appropriate member state funds to the situation in Georgia shows that the difference between the situations in Ukraine and Afghanistan are not simply due to aggression in Europe reflecting World War II events. If a full throttle investigation is spurred by similar aggression as World War II, then the international community likely would have jumped on the opportunity to hold Russia accountable for international crimes in Georgia and Crimea. The more likely answer for the lack of vigor in these cases is the legacy of the Nuremberg and Tokyo tribunals, where the winners of World War II decided how and who to prosecute and became the superpower nations of the world. In Afghanistan, Georgia, and Crimea, the ICC lacked political support to assert

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*



jurisdiction in areas where clear war crimes and crimes against humanity had been committed. World superpowers like the US pressured other nations through bilateral agreements to not support the legality of the International Criminal Court and member states influenced the ICC's ability to investigate through funding mechanisms.

The International Criminal Court has an opportunity with the situation in Ukraine to show that the Court can reach swift and effective justice against a world superpower. However, there is an equal likelihood that the influence of other world superpowers will persist in their influence on the ICC. For example, the US and European countries have shown support for the condemnation of Russian crimes in Ukraine, resulting in political and financial support from 43 member states and nonmember states. The unprecedented interest in the Ukrainian situation has uncovered the greatest weakness in the international justice system, that is that international justice institutions "can only be as strong as the commitment of the States supporting them."<sup>120</sup>

Although the world superpower influence in the situation of Ukraine is beneficial to quickly get investigations and prosecutions underway, it highlights the truth that other ICC situations have not benefitted similarly solely from differences in political support. The exposure of the weakness of necessary state support for the international justice system means the system could fail if the situation in Ukraine happens to reinforce the selectivity legacy of Nuremberg and Tokyo rather than implement universal accountability.<sup>121</sup> The aftermath of World War II and the Nuremberg and Tokyo trials gave the Allied powers the superpower status they hold in the world today, which accounts for their influence so heavy on the ICC as to impede justice. To have any

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<sup>120</sup>Christopher "Kip" Hale and Leila Nadya Sadat, *How International Justice Can Succeed In Ukraine And Beyond*. JUST SECURITY (Apr. 14, 2022) <https://www.justsecurity.org/81086/how-international-justice-can-succeed-in-ukraine-and-beyond/>

<sup>121</sup> Christopher "Kip" Hale and Leila Nadya Sadat, *How International Justice Can Succeed In Ukraine And Beyond*. JUST SECURITY (Apr. 14, 2022) <https://www.justsecurity.org/81086/how-international-justice-can-succeed-in-ukraine-and-beyond/>

chance of ridding international law of the debilitating legacy of the Nuremberg and Tokyo trials, the superpowers must submit to and revitalize the ICC to achieve real justice.

Some have suggested steps in which the international community, especially the superpower nations, can “use the positive energy around investigating and prosecuting atrocities in Ukraine to build momentum and resources to investigate all ongoing atrocities with equal vigor.”<sup>122</sup> The first step requires the United States and the international community to “treat their urgent focus on Ukraine atrocities as the rule rather than the exception.”<sup>123</sup> The next step would require nations to essentially put their money where their mouth is, to “follow up words with financial and political support to investigate atrocities in Afghanistan, including a US government review of whether war crimes or crimes against humanity occurred.”<sup>124</sup> These steps must be taken to return to the original principle of international law and justice, that those who are responsible for committing and perpetuating atrocities should be held accountable.<sup>125</sup> Equal treatment should be given to the victims of international crimes as well, so that Ukrainians and Afghan victims have an equal chance of getting justice.<sup>126</sup> Scholars also opine that the crimes in Ukraine should result in more reasonable and reliable support for the ICC from member and non-member states, which includes state cooperation and the sharing of resources and intelligence to enable the Prosecutor to be effective.<sup>127</sup>

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<sup>122</sup> Belquis Ahmadi, Kate Bateman and Scott Worden, *Intolerance of Atrocity Crimes in Ukraine Should Apply to Afghanistan*, UNITED STATES INSTITUTE OF PEACE, (Apr. 28, 2022) <https://www.usip.org/publications/2022/04/intolerance-atrocity-crimes-ukraine-should-apply-afghanistan>

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Christopher “Kip” Hale and Leila Nadya Sadat, *How International Justice Can Succeed In Ukraine And Beyond*. JUST SECURITY (Apr. 14, 2022) <https://www.justsecurity.org/81086/how-international-justice-can-succeed-in-ukraine-and-beyond/>

Near the end of 2022, in a surprising turn of events, the United States Congress passed legislation that facilitates United States cooperation with the ICC in relation to the situation in Ukraine.<sup>128</sup> Among other things, the amendments allow the ICC to “conduct in the United States investigative activities focused on foreign persons related to the situation in Ukraine that are undertaken in concurrence with the Attorney General,” and “enable the prosecution of individuals who stand accused of committing war crimes so long as they are present in the United States.”<sup>129</sup> The passing of this legislation suggests that the steps of superpower nations recognizing and supporting the legitimacy of the ICC are not far away at all. The legislation was passed after a “unanimous senate resolution describing the ICC as ‘an international tribunal that seeks to uphold the rule of law, especially in areas where no rule of law exists.’”<sup>130</sup> The United States’ current description is a far cry from the sanctions of the Trump presidency, and may facilitate a vehicle for the International Criminal Court to cement its authority. However, the opinions of the United States government change with each new administration and the opinions and policies of foreign affairs are no different. Although the Biden administration has been benevolent and lending support to the International Criminal Court for the situation in Ukraine, the United States has not declared ICC jurisdiction for the nation, has not ratified the Rome Statute, and has not expressed a desire to become a member state of the ICC.

### **Conclusion**

The principles of selectivity from the Nuremberg and Tokyo trials have visibly impeded the International Criminal Court’s pursuit for justice against world superpowers, such as the United

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<sup>128</sup> Beth Van Schaack, *Ambassador Van Schaack’s remarks on the US Proposal to Prosecute Russian Crimes of Aggression*, UNITED STATES DEPARTMENT OF STATE, (Mar. 27, 2023) <https://www.state.gov/ambassador-van-schaacks-remarks/>

<sup>129</sup> id

<sup>130</sup> id

States in connection with Afghanistan. However, the same influence of selectivity on the Court that often works to undermine investigations against world superpowers, powered by political and financial support, has recently allowed the Court to pursue charges against Russia in connection with the situation in Ukraine. To accomplish global justice, the international community and International Criminal Court must turn away from Nuremberg and Tokyo's selectivity and treat all international criminal situations with the same vigor as the situation in Ukraine. The United States looks to be taking a step in the right direction, but only time will tell if the situation in Ukraine reinforces selectivity or enables the International Criminal Court to turn to Afghanistan and other situations with the same vigor.