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Kevin Jon Heller

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FORUM: RUSSIA'S WAR ON UKRAINE

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Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis

Kevin Jon Heller[a,b]

[a]Centre for Military Studies, Department of Political Science, University of Copenhagen, Copenhagen, Denmark; [b]School of Law, Australian National University, Canberra, Australia

Introduction

In the wake of Russia's unprovoked invasion of Ukraine, there is broad consensus – at least in the Global North[1] – that Russian leaders must be prosecuted for the crime of aggression. That consensus, however, does not extend to *how* Russian aggression should be prosecuted. Some commentators argue that the International Criminal Court (ICC) is the most appropriate forum, even if enlivening the Court's jurisdiction requires amending the Rome Statute. Others call either for an ad hoc international tribunal similar to the ICTY and ICTR or for a hybrid tribunal based in the Ukrainian judicial system and supported by the Council of Europe. And still others advocate for national prosecutions conducted by Ukraine itself or by third states that have universal jurisdiction over aggression.

This article provides a critical assessment of the various options for prosecuting Russian leaders for their role in the invasion of Ukraine. The article is divided into three sections. Section 1 explains why Russia's invasion of Ukraine violates the prohibition of the use of force in Art. 2(4) of the UN Charter and amounts to a criminal act of aggression under either customary international law or the Rome Statute. It also briefly addresses whether Belarus's support for Russia's invasion was itself a criminal act. Section 2, the heart of the article, assesses three potential international options for prosecuting the individuals responsible for Russian aggression, paying particular attention to issues of immunity and selectivity. Finally, Section 3 examines proposals for domestic prosecutions in Ukraine or elsewhere.

The Criminality of Russia's Invasion

Whether Russia's invasion of Ukraine qualifies as a criminal act of aggression depends on two issues: whether it involves a use of force that violates Art. 2(4) of the UN Charter, and whether that use of force gives rise to individual criminal responsibility.

CONTACT Kevin Jon Heller kevinheller@ifs.ku.dk Centre for Military Studies, Department of Political Science, University of Copenhagen, Øster Farimagsgade 5, staircase E, building 8, 1st floor, DK – 1353, Copenhagen K, Denmark

[1] Although numerous states in the Global South voted in favour of Res. ES-11/A, the resolution did not specifically deem the invasion a criminal act. It is thus not possible to determine which of those states view the invasion as both unlawful and criminal. Not all violations of Art. 2(4) are criminal under either custom or the Rome Statute.

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Use of Force

Art. 2(4) of the UN Charter provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." By any measure, Russia's attack on Ukraine is a prima facie breach of Art. 2(4). As Green et al. note, "when tested against the non-exhaustive list of 'acts of aggression' in the UN General Assembly's Definition of Aggression, the operation pretty much ticks every box" – invasion, occupation, bombardment, blockade, etc.[2] That conclusion is independent of Russia's insistence that its use of force is a "special military operation," not an invasion. The legal qualification of a use of force is determined by the facts on the ground, not by the subjective preferences of the states involved in an armed conflict.

As the first mover, Russia bears the legal burden of providing a justification for its use of force against Ukraine.[3] It has offered three potential justifications, each implausible. The first is individual self-defense. On 24 February 2022, Russia sent a letter to the UN Security reporting that it had supposedly exercised its right of self-defense, as required by Art. 51 of the UN Charter. The letter consisted of nothing more than the text of Putin's notorious speech to the Russian people earlier that day, in which he had claimed that "our actions are self-defense against the threats posed to us."[4]

This argument fails for an obvious reason: Ukraine had not launched an armed attack against Russia prior to the invasion, nor was such an armed attack imminent. Indeed, Putin did not claim otherwise in his speech. Instead, he spun an elaborate conspiracy theory in which Ukraine had been plotting with the US and NATO to become strong enough militarily to attack Russia.[5]

Putin's claim had no factual basis. But even if such a conspiracy did exist, Russia's invasion of Ukraine would still have violated Art. 2(4). Self-defense against imminent attacks – where tanks are about to roll across the border or ICBMs are warming up in their silos – is almost certainly permissible.[6] By contrast, support among states for a right of self-defense against non-imminent attacks, what is often referred to as preventive self-defense, is "virtually non-existent."[7] Even the US, which notoriously affirmed the legality of preventive self-defense in its 2002 National Security Strategy,[8] has since made statements that indicate it believes self-defense is limited to situations in which an armed attack is imminent.[9]

Russia's second justification for invading Ukraine was collective self-defense of the Donetsk People's Republic (DPR) and the Lugansk People's Republic (LPR). As Putin put it in his speech: because "[t]he People's Republics of Donbass appealed to Russia for help … I have decided to conduct a special military operation with the approval of the

[2] James A. Green et al., "Russia's attack on Ukraine and the *jus ad bellum*," *Journal on the Use of Force and International Law* 9, no. 1 (2022): 6.
[3] Case Concerning Oil Platforms (Islamic Republic of Iran/U.S.), Judgment, 2003 ICJ Rep. 191 (6 November), ¶ 51.
[4] Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, https://article51un.blogspot.com/2022/03/letter-dated-24-february-2022-from_5.html.
[5] Ibid.
[6] Green et al., "Russia's Attack on Ukraine," 10.
[7] Tom Ruys, "*Armed Attack" and Art. 51 of the UN Charter* (Cambridge: Cambridge University Press, 2010), 336.
[8] The National Security Strategy of the United States of America, September 22, Covering Letter, § 5, https://2009-2017.state.gov/documents/organization/63562.pdf.
[9] Ruys, *Armed Attack*, 338.

Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with" the DPR and LPR.

Collective self-defense is permitted by Art. 51 if a state is exercising its individual right of self-defense and specifically asks other states to help it exercise that right.[10] There are, however, two fatal flaws with Russia's argument. The first and most important is that only *states* have a right of self-defense, individual or collective, and neither the DPR nor LPR satisfy the legal requirements for statehood established by the Montevideo Convention – particularly the requirement that the government claiming statehood be independent of other states.[11] Indeed, Russia's premature recognition of the DPR and LPR as states was itself a violation of international law,[12] as noted by the General Assembly in Resolution ES-11/1.[13]

The second flaw in Russia's argument is that even if the DPR and LPR were states, they had neither been attacked by Ukraine nor were facing an imminent armed attack prior to the Russian invasion. In the absence of such an actual or imminent armed attack, the DPR and LPR had no right of individual self-defense against Ukraine – and thus could not ask Russia to help it exercise that right.

Russia's final justification for its invasion was that it had to use force to stop Ukraine's ongoing genocide of ethnic Russians living in eastern Ukraine. Putin thus insisted that "[w]e had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us … The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime." Put more simply, Russia was claiming a right of unilateral humanitarian intervention (UHI) – the right to use force against another state without Security Council approval in order to protect that state's civilians from harm.[14]

As with the previous two, this justification for the invasion had no factual basis. Even if it did, though, UHI is not a legitimate exception of the prohibition of the use of force. Only three states have ever defended the legality of UHI: the UK, Belgium, and Denmark.[15] By contrast, more than 130 states have repeatedly insisted that it is unlawful, including the entire Non-Aligned Movement, the G-77, and the Islamic Conference.[16] Indeed, Russia itself has consistently condemned UHI in the context of NATO's intervention in Kosovo – calling it a "flagrant violation" of the UN Charter – as well as in response to various Western interventions in Syria.[17]

Crime of Aggression

The next question is whether Russia's unlawful invasion of Ukraine qualifies as a criminal act of aggression. It is important to note here that the crime of aggression in the Rome

[10] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8), ¶ 199.
[11] Julia Miklasova, "Russia's Recognition of the DPR and LPR as Illegal Acts Under International Law," *Völkerrechtsblog*, 24 February 2022, https://voelkerrechtsblog.org/russias-recognition-of-the-dpr-and-lpr-as-illegal-acts-under-international-law/.
[12] Ibid.
[13] UNGA Res ES-11/1, UN Doc A/RES/ES-11/1, 2 March 2022, ¶¶ 5, 6.
[14] Kevin Jon Heller, "The Illegality of 'Genuine' Unilateral Humanitarian Intervention," *European Journal of International Law* 32, no. 2 (2021): 614.
[15] Ibid., 625–6.
[16] Ibid.
[17] Ibid., 626–7.

Statute is broader than the crime of aggression under customary international law,[18] because at least some of the courts discussed below might apply custom instead of the Rome Statute. The Rome Statute's definition is straightforward: a criminal act of aggression is "an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations,"[19] with "act of aggression" defined as any act that violates Art. 2(4) of the UN Charter.[20] The customary definition is narrower, although its precise contours are debated. As catalogued by Kress, possible definitions include an act intended to annex territory or subjugate the victim state; an act intended to acquire territory, appropriate assets, or bring about change in the government or foreign policy of the victim state; an act intended to alter the victim state's status quo by attacking its military, governmental, or economic institutions; or an act intended to establish a military occupation in the victim state.[21] Under customary international law, therefore, only what have been traditionally referred to as "wars of aggression" qualify as criminal acts.[22]

Russia's invasion of Ukraine would qualify as a criminal act of aggression under either definition. In terms of custom, the invasion would satisfy all of the definitions mentioned above. In terms of the Rome Statute, given that any violation of Art. 2(4) qualifies as an aggressive act, the only question would be whether the invasion constituted a "manifest" violation of Art. 2(4) in terms of its character, gravity, and scale. Although the manifest-violation test is notoriously vague – the expression "you know it when you see it" was often invoked during the 2010 Review Conference in Kampala – the invasion clearly satisfies all three factors: it was unambiguously illegal under the UN Charter (character); it was a particularly grave breach of the UN Charter because it was intended to acquire territory and bring about regime change (gravity); and it involved the massive use of force both in terms of number of soldiers and the kinds of weapons employed (scale).

Belarus

Although Russia's aggressive actions have understandably received the most attention, Belarus's support of the Russian invasion could also amount to the crime of aggression.[23] Belarus has not only allowed Russia to launch airplanes bound for Ukraine from its airports, it has also permitted Russia to use Belorussian territory to send soldiers and fire missiles into Ukraine.[24] There is no question that these are aggressive acts. Art. 3(f) of General Assembly Resolution 3314 specifically deems aggression "[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that

[18] Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2013), 154.
[19] Rome Statute, Art. 8bis(1).
[20] Ibid., Art. 8bis(2).
[21] Claus Kress, "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus," *European Journal of International Law* 20, no. 4 (2010): 1139.
[22] McDougall, *Crime of Aggression*, 139.
[23] See, e.g. Aleksander Pociej, "The Russian Federation's Aggression Against Ukraine: Ensuring Accountability for Serious Violations of International Humanitarian Law and Other International Crimes," Report of the Parliamentary Assembly of the Council of Europe, 26 April 2022, 14.
[24] See, e.g. Becky Sullivan, "Why Belarus is so Involved in Russia's Invasion of Ukraine," *NPR*, 11 March 2022, https://www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin.

other State for perpetrating an act of aggression against a third State."[25] That is precisely what Belarus has done.

Whether Belarus is responsible for a criminal act of aggression is more complicated. There is no evidence that Belarus itself used armed force against Ukraine, which means that its actions do not satisfy any of the customary definitions discussed above. The customary crime of aggression, however, is not limited to the direct use of force by one state against another. On the contrary, Carrie McDougall has persuasively argued that customary international law also deems criminal "war declared in support of a third party's war of aggression."[26] As she notes, although "the IMT's discussion of Germany's conduct vis-à-vis the United States lacks a definitive conclusion that Germany's actions amounted to a war of aggression," it nevertheless concluded that some of the defendants were criminally responsible for planning and waging aggressive war against it. That conclusion, McDougall points out, makes sense only if the defendants' guilt was based on Germany encouraging Japan to attack the United States and promising to support Japan if it did so.[27] If McDougall is correct that "war declared in support of a third party's war of aggression" is criminal under customary international law, Belarus's support of Russia's invasion of Ukraine is criminal.

Because the Rome Statute considers any violation of Resolution 3314 to be an act of aggression – including a violation of Art. 3(f) – Belarus's responsibility for a criminal act of aggression depends on whether its support for Russia constituted a "manifest violation" of Art. 2(4) of the UN Charter. It seems highly likely that any court applying the Rome Statute would conclude that it did; after all, Belarus knowingly supported an "unambiguously illegal" invasion (character) intended to bring about consequences – acquisition of territory and regime change – repeatedly condemned by the international community as particularly serious (gravity). The only issue is whether Belarus's actions were of a sufficient scale to qualify as a manifest violation of Art. 2(4). Given that the "scale" factor is designed to exclude "de minimis" uses of force from the crime of aggression, such as border skirmishes and individual missile strikes,[28] they probably were – and in any case, two of the three factors might be enough to find a manifest violation.[29]

International Prosecution

This section examines three potential international options for prosecuting the individuals responsible for Russia's criminal act of aggression against Ukraine: the ICC; a Special Tribunal created by a group of states or through agreement between the UN and Ukraine; and a hybrid tribunal based in Ukraine's judicial system and supported by the Council of Europe.

[25] UNGA Res 3314 (XXIX), UN Doc A/RES/3314, 14 December 1974, Art. 3(f).
[26] Carrie McDougall, "The Crimes Against Peace Precedent," in *The Crime of Aggression: A Commentary*, 2 Vols., eds. Claus Kress and Stefan Barriga (Cambridge: Cambridge University Press, 2016), 1: 69.
[27] Ibid., 68.
[28] See Claus Kress, "The State Conduct Element," in Kress and Barriga, *The Crime of Aggression*, 2: 513–14.
[29] McDougall, *Crime of Aggression*, 129.

International Criminal Court

Prosecuting Russian aggression at the ICC would make the most practical sense. The Office of the Prosecutor (OTP) has already committed significant resources – the most in its history – to investigating other international crimes committed in Ukraine, so extending the investigation to include aggression would offer economy of scale and would spare the international community the time and effort required to create a new court. The most important benefit of ICC prosecution, however, would be symbolic: avoiding the appearance of selective justice. As discussed in more detail below, a court created for the sole purpose of prosecuting Russian aggression would likely be viewed as illegitimate by a significant number of states, particularly those in the Global South that are routinely subjected to unlawful use of force by powerful Northern states. An ICC prosecution would not completely solve the selectivity problem – the Court's claims to universality are more aspirational than real – but at least there would be the *de jure* possibility of future aggression prosecutions. That possibility alone would help ensure that prosecuting Russian aggression would be perceived as legitimate.

The problem is that, in the absence of a Security Council referral that Russia would inevitably veto,[30] the ICC does not have jurisdiction over Russia's aggression against Ukraine. Largely as a result of the efforts of the US and the UK,[31] the crime of aggression is subject to a different jurisdictional regime than the other international crimes: whereas the Court has jurisdiction over war crimes, crimes against humanity, and genocide when committed by a non-state party on the territory of a state party (or on the territory of a state that has accepted the Court's jurisdiction on an ad hoc basis, like Ukraine), non-state parties are completely excluded from the crime of aggression.[32] Russia has not ratified the Rome Statute, so the aggression amendments simply do not apply to it.[33]

In theory, states could give the ICC jurisdiction over Russia's aggression by removing the provision that excludes non-state parties, Art. 15bis(5), from the Rome Statute. The practical likelihood of such an amendment, however, is virtually nil. Amendments of the Rome Statute that do not involve Articles 5–8 are governed by Art. 121(4), which provides that "an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them." It defies belief to think that 107 state parties would accept such a fundamental revision of the Court's jurisdiction over aggression. After all, only 41 – barely 1/3 – have ratified the aggression amendments themselves in the 12 years since their adoption.

[30] The Council of Europe's Parliamentary Assembly recently called on the General Assembly to "request an Advisory Opinion from the ICJ on possible limits to the veto rights of permanent members of the United Nations Security Council." Res. 2436 (2022) (Provisional Version), ¶ 12.5.2, https://pace.coe.int/pdf/0417ea5a365f41824709ff552526cafc71864ae0fc169d8a890d751b53efdec1/resolution%202436.pdf. Nevertheless, because any such Advisory Opinion would not be binding, even a robust ICJ affirmation of limits would not affect Russia's ability to veto any attempt to refer its aggression against Ukraine to the ICC.

[31] Oona A. Hathaway, "A Crime in Search of a Court: How to Hold Russia Accountable," *Foreign Affairs*, 19 May 2022, https://www.foreignaffairs.com/articles/ukraine/2022-05-19/crime-search-court.

[32] See Rome Statute, Art. 15bis(5).

[33] Carrie McDougall, "Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics," *Opinio Juris*, 15 March 2022, https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/.

The same problem afflicts the idea, which dates back to ILC discussions in the 1990s,[34] that "the Rome Statute could be amended to allow the General Assembly, acting under the 'Uniting for peace' resolution, to make referrals to the ICC in order to provide accountability for the crime of aggression in the context of Ukraine."[35] Because such an amendment would require amending Art. 13 and likely Art. 15ter,[36] it would also be governed by Art. 121(4) and require ratification by 7/8 of state parties. Such support seems exceptionally unlikely, given that permitting General Assembly referrals would expand the Court's jurisdiction over aggression even more than eliminating the exclusion of non-state parties. The former change would make it possible for the Court to prosecute any act of aggression committed anywhere in the world, whereas including non-state parties in the Court's jurisdiction would still exclude aggressive acts committed by a non-state party against another non-state party.

It is also worth noting that even if state parties were willing to amend the Rome Statute to permit General Assembly referrals, the legality of such referrals is questionable. Because the ICC is a treaty-based court, its jurisdiction cannot exceed the jurisdiction delegated to it by its member states.[37] States could have given the Court jurisdiction over criminal acts of aggression committed by non-state parties on the territory of state parties or states that have accepted the Court's jurisdiction on an ad hoc basis, but they chose not to. As a result, the Court cannot exercise aggression jurisdiction over a non-state party without that state's consent – *pacta tertiis nec nocent nec prosunt*. That limitation does not affect Security Council referrals, because states constructively consent to the Security Council's coercive Chapter VII authority – which includes the power to refer states to the Court – when they ratify the UN Charter.[38] But it does prohibit General Assembly referrals, because such referrals are coercive acts[39] and the General Assembly has no coercive power.[40] States thus cannot be said to have constructively consented to General Assembly referrals when they ratified the Charter.

Special Tribunal

Calls for an international mechanism able to prosecute Russian leaders have generally focused on a third possibility: the creation of a new tribunal whose jurisdiction would be limited to Russia's invasion of Ukraine – a "Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine," in the words of the Combined Statement and Declaration (CSD) issued in March 2022 and signed by more than 40 legal and political and legal luminaries.[41] Such a Special Tribunal could be created in two different ways:

[34] Shane Darcy, "Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly," *Just Security*, 16 March 2022, https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/ (noting more than a dozen states supported giving the General Assembly the power to refer situations to the ICC). Not surprisingly, nearly all of those states are in the Global South.
[35] Ibid.
[36] Ibid.
[37] See, e.g. Hans Peter Kaul and Claus Kress, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises," *Yearbook of International Humanitarian Law* 2 (1999): 145 (noting that the Rome Statute is based on "the very simple idea that states must be entitled to do collectively what they have the power to do individually").
[38] Cf. Alexandre Skaland Galand, *UN Security Council Referrals to the International Criminal Court* (Leiden: Brill Open Access, 2019), 162.
[39] See McDougall, "Why."
[40] See UN Charter, Arts. 10–14.

(1) a treaty concluded by a group of interested states; or (2) an agreement between the UN and Ukraine endorsed by the General Assembly.

Group of States

The Combined Statement and Declaration went the first route, resolving to establish "a dedicated international criminal tribunal … to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine."[42] That call has been echoed by the Rapporteur of the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights, who argues that "given the scale of the current aggression and the international dimension of the conflict … the best option would be for a group of States to create a special international tribunal for the punishment of the crime of aggression against … on the basis of a multilateral treaty."[43]

The Combined Statement and Declaration is unclear concerning the jurisdictional basis of a Special Tribunal, stating only that "[c]ountries should agree to grant [it] jurisdiction arising under national criminal codes and general international law."[44] No such delegation would be necessary, however, because Ukraine has already expressed its willingness to participate.[45] The Special Tribunal's jurisdiction would thus be based on Ukraine's own territorial jurisdiction over Russia's aggressive acts.

Although jurisdictionally unproblematic, a Special Tribunal created by a group of states does raise two important concerns – one legal and one practical.

Immunity. The legal concern is whether such a treaty-based tribunal would be entitled to set aside the personal and functional immunity of Russian officials.

Personal Immunity. The ICJ specifically held in the *Arrest Warrant* case that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government, and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[46] If a treaty-based Special Tribunal had to recognize personal immunity, it would be unable to prosecute either Putin, the President of Russia, or Sergey Lavrov, the Foreign Minister.

The Combined Statement and Declaration is strangely silent concerning whether a Special Tribunal would be able to set aside personal immunity. The Council of Europe (CoE) Rapporteur, by contrast, specifically claims that "Heads of State and other government officials (from non-parties to the treaty) could not rely on immunities *vis-à-vis* such an international tribunal."[47] In defence of his position, the Rapporteur cites the ICJ's statement in the *Arrest Warrant* case that "an incumbent or former Minister for Foreign Affairs

[41] "Combined Statement and Declaration Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine," *Website of Gordon & Sarah Brown*, March 2002, https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf.
[42] Ibid.
[43] Pociej, CoE Report, 15.
[44] Combined Statement and Declaration, 2.
[45] Stéphanie Maupas, "Ukraine calls for the creation of a special tribunal on the crime of aggression," *Le Monde*, 22 May 2022, https://www.lemonde.fr/en/international/article/2022/05/22/ukraine-calls-for-the-creation-of-a-special-tribunal-on-the-crime-of-aggression_5984275_4.html.
[46] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) [2002] ICJ Rep 3, 21–2, ¶ 58.
[47] Pociej, CoE Report, 15.

may be subject to criminal proceedings *before certain international criminal courts*, where they have jurisdiction."[48]

Unfortunately, this notoriously cryptic statement fails to explain *why* international courts but not national ones can set aside personal immunity. Without a convincing explanation, it is impossible to determine whether a treaty-based Special Tribunal would be the kind of international court capable of prosecuting Russian officials like Putin and Lavrov.

One possible answer is that customary international law provides an exception to personal immunity that applies exclusively to international courts. This was the position taken by the ICTY Trial Chamber in the *Milošević* case[49] and the ICC Pre-Trial Chamber in its decision concerning Malawi's failure to arrest Omar Al-Bashir.[50] It is also endorsed by some scholars, most notably Claus Kress.[51]

There is, however, very little state practice that supports this position. The IMT and the IMTFE prosecuted only former heads of state and foreign ministers.[52] The same is true of the ICTR[53] – and although the ICTY issued an arrest warrant for Miloševic while he was still President, he was no longer President when he was actually prosecuted. That is why the ICTY addressed its supposed lack of jurisdiction "by reason of his status as a former President" – a question of functional immunity, not personal immunity.[54] Indeed, there only two actual examples of ostensibly international tribunals prosecuting individuals who, at the time of their prosecution, would have been entitled to personal immunity before national courts: Charles Taylor at the SCSL[55] and Uhuru Kenyatta at the ICC.[56]

Because of the lack of relevant practice, Kress's defense of a customary exception focuses on "modern custom," which privileges opinio juris over state practice. Modern custom, Kress believes, permits new rules of customary international law to "come into existence at a relatively high speed and without a voluminous body of hard practice confirming the respective rule."[57] He thus argues that, in light of statements by international tribunals denying the applicability of personal immunity, "a weighty case can be made for the crystallization of a customary international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international community."[58]

Yudan Tan's careful study of the Rome Statute's relationship to customary international law,[59] however, makes clear that the case for a customary exception is much less weighty than Kress assumes. In terms of statutory provisions, for example, she shows that the

[48] *Arrest Warrant*, 26, ¶ 61 (emphasis added).
[49] Prosecutor v. Miloševic, Decision on Preliminary Motions, ICTY-IT-02-54, 8 November 2001, ¶ 28.
[50] Prosecutor v. Al-Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139-Corr, 15 December 2011, ¶ 36.
[51] Claus Kress, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute," in *State Sovereignty and International Criminal Law*, eds. Morten Bergsmo and Ling Yan (Beijing: Torkel Opsahl Academic EPublisher, 2012), 251.
[52] Galand, *UNSC Referrals*, 172–3.
[53] Ibid., 173.
[54] Kress, "Immunities," 253.
[55] Ibid.
[56] Galand, *UNSC Referrals*, 158.
[57] Kress, "Immunities," 251.
[58] Ibid., 254.
[59] See Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (Leiden: Brill Nijhoff, 2021).

relevant provisions in the IMT and IMTFE statutes were intended to prevent government officials from claiming "act of state" as a substantive defense and – like the judgments themselves – said nothing about the availability of personal immunity as a procedural bar to jurisdiction.[60] The relevant provisions in the statutes of the ICTY, ICTR, and SCSL have a similar function, in that they are addressed not to personal immunity as a jurisdictional bar but to the guilt of the accused officials.[61] Opinio juris in favour of a customary exception is thus limited to Art. 27(2) of the Rome Statute, which explicitly disavows personal immunity, and the SCSL's insistence that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court."[62]

That is thin, to say the least – especially when we consider the limits of Art. 27(2) as opinio juris. States necessarily accept that Art. 27(2) provides a conventional exception to personal immunity *inter partes* when they ratify the Rome Statute. But that does not mean ratification indicates support for Art. 27(2) applying to non-state parties – much less that the principle underlying Art. 27(2) applies as a matter of customary international law. On the contrary, the African Union, which represents almost 30% of the world's states, insists that personal immunity applies before international courts no less than before national ones.[63]

State practice and opinio juris, in short, "do not suffice to establish a rule of customary international law that precludes the application of head of state immunity in all international prosecutions."[64] Indeed, it is revealing that, when given the opportunity to weigh in on the issue, the ICC Appeals Chamber did not follow the *Malawi* decision by finding a customary exception to personal immunity. Instead, it simply inverted the customary baseline, claiming that it was Jordan's burden to show that customary international law applied personal immunity to international courts. Having framed the issue in that way, it was inevitable that the Appeals Chamber would hold – as it did – that "there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court."[65]

The Appeals Chamber's position, however, necessarily assumes that international courts are inherently different than national ones. Only that assumption allows the Appeals Chamber to insist that the undisputed customary rule concerning personal immunity before national courts does not apply to international ones, thus requiring proof of a customary rule extending the former to the latter. But the Appeals Chamber's assumption is flawed. As Dapo Akande has pointed out, "it makes little difference whether the foreign states seek to exercise [their] judicial jurisdiction unilaterally or through some collective body that the state concerned has not consented to."[66] Either way, the court's

[60] Ibid., 339.
[61] ICTY Statute, Art. 7(2); ICTR Statute, Art. 6(2); SCSL Statute, Art. 6(2).
[62] Prosecutor v. Charles Taylor, Decision on Immunity from Jurisdiction, SCSL-2003-01-1, 31 May 2004, ¶ 52.
[63] See Extraordinary Session of Assembly of the African Union, "Decision on Africa's Relationship with the International Criminal Court," Ext/Assembly/au/Dec.1, October 2013, §§ 9–10.
[64] Phillip Wardle, "The Survival of Head of State Immunity at the International Criminal Court," *Australian International Law Journal* 18 (2011): 190; see also Galand, *UNSC Referrals,* 175; Tan, *Rome Statute*, 377.
[65] Prosecutor v. Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, 6 May 2019, ¶ 113.
[66] Dapo Akande, "International Law Immunities and the International Criminal Court," *American Journal of International Law* 98, no. 3 (2004): 417.

jurisdiction derives from – and cannot exceed – the jurisdiction of the state or states in question. So if national courts cannot set aside personal immunities (and it is undisputed that they cannot), the international courts they create cannot either.

To be sure, this analysis does not mean international courts must always respect personal immunity. It simply means that the availability of such immunity depends on whether an international court's enabling statute is binding on the government official in question. If the official is bound by the statute and the statute does not recognize personal immunity, the court can prosecute him or her. But if the official is not bound by the statute, the court cannot prosecute no matter what the statute says.[67]

Not all international courts, in other words, are alike. In particular:

> [T]here is a distinction between those tribunals established by United Nations Security Council resolution and those established by treaty. Because of the universal membership of the United Nations and because decisions of the Council are binding on all UN members, the provisions of the ICTY and ICTR Statutes are capable of removing immunity with respect to practically all states. But this is only because those states are bound by and have indirectly consented (via the UN Charter) to the decision to remove immunity. On the other hand, since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty.[68]

This distinction between international courts created by the Security Council and international courts created by treaty – which is widely supported by scholars[69] – indicates that a Special Tribunal created by a group of states would not have the power to set aside the personal immunity of Russian officials like Putin and Lavrov. Such a court would be international in the literal sense, but it would not be the kind of "international" court that could transcend the jurisdictional limits of the states that created it.[70] Even Kress acknowledges as much[71] – as did Philippe Sands, the key proponent of a treaty-based Special Tribunal, when the SCSL was considering Charles Taylor's personal immunity. In an amicus brief to the tribunal, Sands argued that "two States may not establish an international criminal court for the purpose, or with the effect, of circumventing the jurisdictional limitations incumbent on national courts."[72]

Sands' amicus addressed a court created by two states, but the number of states participating in an "international" court is irrelevant. The issue is not how many states delegate their jurisdiction, but whether a court's enabling statute is binding on a government official otherwise entitled to personal immunity. So not even the ICC, created by 120 states, is entitled to set aside the personal immunity of an official whose state has not ratified the Rome Statute and whose alleged crimes do not fall within a situation referred to the Court by the Security Council.[73]

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[67] See, e.g. Galand, *UNSC Referrals*, 161.
[68] Akande, "ICC," 417.
[69] See, e.g. Galand, *UNSC Referrals*, 164; Sarah M. H. Nouwen, "The Special Court for Sierra Leone and the Immunity of Taylor: The *Arrest Warrant* Case Continued," *Leiden Journal of International Law* 18 (2005): 649.
[70] Nouwen, "Taylor Immunity," 656.
[71] Kress, "Immunities," 236.
[72] Prosecutor v. Charles Taylor, Submissions of the Amicus Curiae on Head of State Immunity, SCSL-2003-01-I, 2004, ¶ 43.
[73] Akande, "ICC," 421.

Functional Immunity. Although personal immunity applies to only a small number of particularly important government officials, all government officials are entitled to functional immunity for their official acts. A lower-level Russian official charged with aggression would thus no doubt attempt to claim functional immunity before a treaty-based Special Tribunal.

It is generally accepted – though not without controversy[74] – that functional immunity does not apply to international crimes such as genocide, crimes against humanity, war crimes, and torture.[75] Whether functional immunity applies to aggression, however, is less clear. Most scholars insist that it does not, arguing that there is no functional immunity for any crime that can genuinely be considered international – a category that obviously includes aggression.[76] Germany's Federal Court of Justice also suggested last year that aggression is not covered by functional immunity.[77] By contrast, the ILC's recently adopted Draft Article 7 concerning the immunity of state officials from foreign jurisdiction does not include aggression in its list of international crimes that exclude functional immunity.[78]

Given the dearth of state practice and opinio juris, no definitive conclusion concerning the availability of functional immunity for the crime of aggression is possible. It is nevertheless clear, as the German Federal Court decision indicates, that international and national courts are increasingly unwilling to recognize functional immunity for any international crime – not only those that can plausibly (if rather fictitiously) be described as unofficial acts, but also ones that, like the standalone crime of torture, are necessarily governmental.[79] It would thus be very surprising if a treaty-based Special Tribunal (or any court) concluded that functional immunity applied to aggression even though participation in the crime is an inherently official act.[80]

Selectivity. The second concern with a Special Tribunal created by a group of states is the message it would send about the selectivity of international criminal justice. There are two interrelated problems here. The first is inter-conflict selectivity: namely, creating a new international tribunal for one act of aggression when other aggressive acts are also deserving of prosecution.[81] There is no question that Russia's invasion of Ukraine is serious enough to justify a Special Tribunal. But the invasion of Iraq in March 2003 was equally serious, given that the "coalition of the willing" led by the US and UK sent more than 150,000 soldiers into Iraq, overthrew its government, and established a military occupation that lasted for more than 15 months. The results of the invasion were predictably

[74] See, e.g. Roger O'Keefe, "An 'International Crime' Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely," *American Journal of International Law Unbound* 109 (2015): 167–72.
[75] See, e.g. Dapo Akande and Sageeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts," *European Journal of International Law* 21, no. 4 (2011): 851.
[76] See, e.g. Helmut Kreicker, "Immunities," in Kress and Barriga, *Crime of Aggression*, 2: 683.
[77] See Aziz Epik, "No Functional Immunity for Crimes under International Law before Foreign Domestic Courts: An Unequivocal Message from Germany's Federal Court of Justice," *Journal of International Criminal Justice* 19 (2021): 1271 (noting that the court held that functional immunity does not apply to war crimes, crimes against humanity, genocide, and "certain other crimes of concern to the international community as a whole."). Epik believes that "other crimes of concern" refers to aggression. Ibid., 1276.
[78] See International Law Commission, "Immunity of State officials from foreign criminal jurisdiction," A/CN.4/L.893, 10 July 2017, Draft Article 7.
[79] See, e.g. Douglas Guilfoyle, *International Criminal Law* (Oxford: Oxford University Press, 2016), 396.
[80] Dannenbaum, "Mechanisms."
[81] Ibid.

catastrophic: approximately 200,000 Iraqi civilians killed and more than 2,000,000 refugees created. There was no plausible legal justification for the invasion[82]: it was not authorized by the Security Council, it was not an act of self-defense (as Iraq had not launched an armed attack against the US), and Iraq had not consented to the use of force. Indeed, Elizabeth Wilmshurst, the Deputy Legal Adviser in the UK Foreign Office, memorably resigned her position because she believed the invasion was a criminal act of aggression.[83] Yet no state ever called for the creation of a new international tribunal empowered to investigate and prosecute American or British leaders for their role in invading Iraq.

Given this glaring selectivity, creating a Special Tribunal for Russia's invasion of Ukraine would not – contrary to the Combined Statement and Declaration – "uphold the rule of law and the principles of the United Nations Charter, including the prohibition on the use of force."[84] It would instead send a message that the "international community" cares about some crimes of aggression more than others.[85] Indeed, as Sâ Benjamin Traoré has explained, the significant number of African abstentions on Res. ES-11/A is almost certainly due to selectivity concerns:

> There is a vast feeling– especially in public opinions and ordinary citizens – around the duplicity of western states when it comes to respecting international law. The perception is that the western zealotry over Ukraine – and not for other situations of blatant violation of international law – is troubling, shocking and nothing short of hypocrisy and double standards in international politics.[86]

To be sure, not everyone agrees with this selectivity critique. McDougall, for example, attempts to distinguish Iraq from Ukraine by arguing that the latter "is the first clear-cut case of a crime of aggression since the adoption of an internationally agreed definition of the crime."[87] That is literally true – but as McDougall herself acknowledges, the crime of aggression was firmly entrenched in customary international law long before the Rome Statute. And it is difficult to argue that the invasion of Iraq did not violate the customary definition of aggression, given that the definition includes invasions that are intended to bring about regime change or establish military occupation.

The second selectivity problem concerns the identity of the states that would create a Special Tribunal and then oversee its operation. The ICC does not have jurisdiction over acts of aggression committed by non-state parties primarily because of the US's fervent opposition, while other powerful states – most notably the UK, France, Canada, Australia, and New Zealand – managed to exclude from jurisdiction aggressive acts committed by state parties unless they "opt-in" by ratifying the aggression amendments.[88] Without the efforts of those states, it is likely that the OTP's current investigation in Ukraine would include aggression as well as war crimes and crimes against humanity.

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[82] See, e.g. Anne-Marie Slaughter, "The Use of Force in Iraq: Illegal and Illegitimate," *Proceedings of the Annual Meeting (American Society of International Law)* 98 (March-April 2004): 262.

[83] "Wilmshurst Letter," *BBC News*, 24 March 2005, http://news.bbc.co.uk/1/hi/uk_politics/4377605.stm ("[A]n unlawful use of force on such a scale amounts to the crime of aggression.")

[84] Combined Statement and Declaration, 3.

[85] See, e.g. Hathaway, "In Search."

[86] Sâ Benjamin Traoré, "Making sense of Africa's massive abstentions during the adoption of the UNGA resolution on the Aggression Against Ukraine," *AfricLAW*, 21 April 2022, https://africlaw.com/2022/04/21/making-sense-of-africas-massive-abstentions-during-the-adoption-of-the-unga-resolution-on-the-aggression-against-ukraine/.

[87] McDougall, "Why."

[88] Noah Weisbord, *The Crime of Aggression* (Princeton: Princeton University Press, 2019), 107.

Little is known about which states support a treaty-based Special Tribunal. It would be deeply problematic, though, if the same ones that made a Russia-specific tribunal necessary by neutering the crime of aggression now took a leading role in creating and operating that tribunal. And it would be even worse if that group of states included the two – the US and UK – most responsible for the invasion of Iraq. As Dannenbaum says, such selectivity "would call into question the tribunal's moral standing to issue the kind of condemnation that is supposed to inhere in international criminal punishment."[89]

In my view, the two selectivity concerns discussed above are sufficient to establish the undesirability of a treaty-based Special Tribunal. Other commentators, however, disagree – even those that acknowledge the selectivity problem. The CoE Rapporteur, for example, argues that "we should seize this moment of unprecedented political response by the international community in order to reinforce (not weaken) international criminal justice, including by creating novel and ad hoc mechanisms that could fill the gaps of the existing and somehow imperfect ones."[90] Similarly, Dannenbaum claims that because "the revival of the crime of aggression has to begin somewhere … [t]he invasion of Ukraine, as one of the most blatantly aggressive wars in the past 80 years, offers an opportunity to begin that revival,"[91] while McDougall insists that we should "advocate for better outcomes in the future, while pursuing what justice is within our grasp."[92]

There is, however, a critical problem with the argument that a Special Tribunal for Russian aggression will make it more likely similar tribunals will be created for future acts of aggression committed by other powerful states: namely, there is no evidence powerful states agree with that argument. As the late Rob Cryer repeatedly reminded us, nearly all states – and especially the powerful ones – have proven far more willing to create "safe" international tribunals whose rules apply only to others than "unsafe" ones whose rules also apply to them.[93] His argument is particularly relevant to the crime of aggression, where powerful states have gone to great lengths to ensure that the ICC can never prosecute their own leaders for committing aggression. Given that history, it is unlikely a successful Special Tribunal for Russia's invasion of Ukraine would set a precedent for creating similar tribunals down the road. On the contrary, if states like the US and UK do end up supporting a Special Tribunal, it will almost certainly be because they know such a tribunal will never be created for their own criminal acts of aggression.

General Assembly Endorsement

A Special Tribunal could also be created with the endorsement of the General Assembly. This option takes two forms. The most common suggestion is that the UN and Ukraine could agree to create a tribunal for Russia's invasion of Ukraine with the General Assembly's approval.[94] This option would be modelled on the creation of the Extraordinary

[89] Dannenbaum, "Mechanisms."
[90] Pociej, CoE Report, 16.
[91] Dannenbaum, "Mechanisms."
[92] McDougall, "Why."
[93] Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), 232–3.
[94] See, e.g. McDougall, "Why"; Alexander Komarov and Oona S. Hathaway, "The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law," *Just Security*, 11 April 2022, https://www.justsecurity.

Chambers in the Courts of Cambodia.[95] Alternatively, the General Assembly could provide its imprimatur for a treaty concluded by a group of states that included Ukraine – the model discussed above. This option has been endorsed by the Parliamentary Assembly of the Council of Europe: Resolution 2436, adopted in April 2022, calls for the creation of an "ad hoc international criminal tribunal … to be set up notably by a group of like-minded States in the form of a multilateral treaty endorsed by the United Nations General Assembly and with support to be provided by the Council of Europe, the European Union and other international organisations."[96]

A Special Tribunal created with the endorsement of the General Assembly would still represent selective inter-conflict justice, given that no such tribunal was ever suggested for the invasion of Iraq (or for any other act of aggression). Moreover, given that expanded ICC jurisdiction would still be a better option, General Assembly endorsement would not eliminate the possibility of the Special Tribunal being dominated by states with unclean hands – particularly in the "group of states" model endorsed by the CoE. It is undeniable, however, that both selectivity concerns would be significantly minimized if a tribunal enjoyed the support of the General Assembly. As Komarov and Hathaway note, "[a] tribunal created by a few states would not have the legitimacy of one created by an organization that represents the international community."[97]

Whether General Assembly endorsement could solve the personal immunity problem is a more complicated issue. As discussed above, because it has no coercive power, the General Assembly could not refer non-state parties to the ICC even if the Rome Statute was amended to permit such referrals. It is unlikely a Special Tribunal endorsed by the General Assembly would be able to set aside personal immunity for the same reason: even if the tribunal's enabling statute purported not to recognize personal immunity – along the lines of Art. 27(2) of the Rome Statute – the General Assembly would have no power to make that statute binding on Russian government officials. The Special Tribunal would thus have to recognize the personal immunity of a Putin or Lavrov unless Russia waived their immunity.

That said, if any tribunal not created by the Security Council could plausibly claim to be an "international court" within the meaning of *Arrest Warrant*, it would be a Special Tribunal overwhelmingly endorsed by the General Assembly.[98] A number of scholars have invoked the SCSL in this context,[99] which makes intuitive sense given that the judges set aside Taylor's personal immunity despite acknowledging the tribunal was not created by the Security Council acting under its Chapter VII authority.[100] The *Taylor Immunity Decision* should be relied upon with caution, however, because the judges emphasized that the resolution which authorized the UN and Sierra Leone to create the SCSL, Resolution 1315, was itself based on Chapter VII – Articles 39 and 41 in particular. As

org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/#:~:text=The%20most%20promising%20way%20forward,the%20crime%20of%20aggression.

[95] Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, dated 17 March 2003. Approved by UNGA Res 57/228B, 13 May 2003.

[96] Res. 2436, ¶ 11.6.4.

[97] Komarov and Hathaway, "Best Path."

[98] Cf. Dannenbaum, "Mechanisms" ("If it is correct to say that status immunities do not apply before international courts *qua* international courts, a court created by the General Assembly would have the strongest claim to that status.").

[99] See, e.g. Kress, "Immunities," 247.

[100] *Taylor Immunity Decision*, ¶ 38.

they said, "these powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone."[101] Read literally, therefore, the *Taylor Immunity Decision* does not suggest that the General Assembly, whose resolutions are not binding on states, could create an "international court" with the power to set aside personal immunity.

The general idea motivating invocations of the SCSL is nevertheless sound. As discussed above, Kress's invocation of modern custom in defense of a customary exception to personal immunity fails because of the lack of supporting opinio juris. His argument would be much stronger if a Special Tribunal was established pursuant to a widely supported General Assembly resolution that explicitly affirmed the non-applicability of personal immunity.[102] As Kress says, "[o]n an abstract level," a court should be considered "international" as long as it "can make a convincing claim to directly embody the 'collective will'."[103]

This argument, however, raises two important questions. The first is obvious: how many states would need to support a General Assembly resolution authorizing the creation of a Special Tribunal for it to have the power to set aside personal immunity? Given that personal immunity has long been fundamental to the international legal order, it seems reasonable to borrow the test ILC applies to the identification of *jus cogens* norms. According to the Special Rapporteur's most recent report, members of the Commission generally support requiring "[a]cceptance and recognition by a very large and representative majority of States."[104] That test has the benefit of emphasizing that the mark of a *jus cogens* norm is not simply how many states accept it, but also whether the norm is – to quote the Singaporean member of the ILC – accepted by states "across regions, legal system and cultures."[105]

The second question is more practical: would "a very large and representative majority of states" actually vote for a General Assembly resolution that explicitly empowered a Special Tribunal to set aside the personal immunity of Russian government officials? Many scholars are sceptical,[106] and for good reason. As noted earlier, the African Union, which represents more than 50 states, categorically rejects the idea that personal immunity is inapplicable before international courts. It is thus almost inconceivable that more than a small number of African states would vote for such a resolution – even one that was limited to Russian aggression. The AU's opposition alone would make it impossible to find the necessary "very large and representative majority of states."

Moreover, opposition to a Special Tribunal with the power to set aside personal immunity would likely extend far beyond Africa. A significant number of states in the Middle East and Southeast Asia either voted against or abstained on Res. ES-11/1,[107] which said nothing about a Special Tribunal or personal immunity but simply deemed

[101] Ibid., ¶ 37.
[102] It would also be useful for such a resolution to explicitly state that functional immunity does not apply to aggression. See Dannenbaum, "Mechanisms."
[103] Kress, "Immunities," 247.
[104] ILC, "Fifth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur," A/CN.4/747, 24 January 2022, ¶ 96.
[105] Ibid., ¶ 86.
[106] See Hathaway, "In Search."
[107] See Wikipedia Voting Map, https://en.m.wikipedia.org/wiki/File:United_Nations_General_Assembly_resolution_ES-11_L.1_vote.svg.

Russia's invasion of Ukraine an act of aggression. And an even greater number voted against or abstained on Res. ES-11/L.4, removing Russia from the Human Rights Council, including a significant group of states in South America.[108] There is no reason to believe those states would be any more likely to support a General Assembly resolution creating a court whose very existence would set a precedent for someday prosecuting their own heads of state and foreign ministers.

These considerations, it is important to note, do not simply threaten the ability of a Special Tribunal to set aside the personal immunity of high-ranking Russian officials like Putin and Lavrov. They also undermine the very idea of a Special Tribunal based on the General Assembly endorsing an agreement between the UN and Ukraine. The rationale for such a tribunal is that General Assembly endorsement would increase the tribunal's legitimacy by minimizing perceptions of selectivity. That effect, however, is predicated on the resolution being adopted by a significant cross-section of UN member states. It is difficult to see the Special Tribunal being perceived as legitimate if the General Assembly resolution endorsing it failed to pass, passed with a minority of states (like the Human Rights Council resolution, which garnered 93 votes), or passed with a small majority of states despite having little support in the Global South. On the contrary, the tribunal would almost certainly – and rightly – be viewed as selective justice.

Hybrid Tribunal

The third potential international option for prosecuting the Russian leaders responsible for the invasion of Ukraine would be a hybrid tribunal. Although there is no single definition of such tribunals, they are commonly understood as "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred."[109] An example is the Extraordinary Chambers in the Courts of Cambodia, which was based in Cambodia's judicial system, prosecuted international crimes, and had international judges and prosecutors.[110]

In the context of Russian aggression, the suggestion offered by me and by others[111] is for Ukraine to enter into an agreement with the Council of Europe to create a High Ukrainian Chamber for Aggression (HUCA): a specialized Chamber in the Ukrainian judicial system with jurisdiction over aggression. Ukraine would have primary responsibility for HUCA's operation, but the Chamber itself would consist of both Ukrainian and non-Ukrainian judges and prosecutors and would be supported – financially, through capacity-building projects, etc. – by the CoE. Procedurally, Ukraine would ask the Council of Ministers to recommend, pursuant to Art. 15(a) of the Statute of the Council of Europe, that members adopt a "common policy" to support a HUCA. That would enable the CoE to conclude the necessary agreement with Ukraine because – as the CoE Rapporteur points out – Russia's "ongoing aggression amounts to a serious breach of the Statute

[108] See Wikipedia Voting Map, https://commons.wikimedia.org/wiki/File:United_Nations_General_Assembly_resolution_ES-11_L.4_vote.svg.

[109] Office of the High Commissioner for Human Rights, *Maximising the Legacy of Hybrid Courts*, 2008, 1, https://www.ohchr.org/sites/default/files/Documents/Publications/HybridCourts.pdf.

[110] Kirsten Ainley and Mark Kersten, *Dakar Guidelines on the Establishment of Hybrid Courts* (2019), 102, http://eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf.

[111] See, e.g. Carl Bildt, "The EU Must Help Prosecute Putin for Crimes of Aggression – Here's How," *Politico*, 23 May 2022, https://www.politico.eu/article/the-eu-must-help-prosecute-putin-for-crimes-of-aggression-heres-how/.

of the Council of Europe" and the tribunal would be a "response to large-scale human rights violations committed on the territory of one of its members."[112]

Komarov and Hathaway have suggested that a High Ukrainian Chamber for Aggression would run afoul of Art. 125 of the Ukrainian Constitution,[113] which provides that "[t]he establishment of extraordinary and special courts shall not be permitted." There is, however, precedent for a HUCA: the High Anti-Corruption Court of Ukraine (HACC), which was established as a specialized court in Ukraine's judicial system in 2019. In May 2022, Ukraine's parliament passed legislation expanding HACC's jurisdiction to include issuing orders "to seize the property of particular individuals and legal entities associated with the ongoing military aggression by the Russian Federation against Ukraine, without compensation."[114] Although HACC does not make use of international judges or prosecutors, a Public Council of International Experts has the power to block judicial appointments,[115] and the Court generally is supported by the EU.[116]

A High Ukrainian Chamber for Aggression would have significant practical advantages over a Special Tribunal, because it would build on Ukraine's functioning judicial system, avoiding the need to create a new tribunal *ex nihilo*, while taking advantage of CoE member-states' expertise regarding the investigation and prosecution of international crimes. Equally important, though, a HUCA would minimize perceptions of inter-conflict selectivity, despite being limited to Russia's invasion of Ukraine. After all, Ukraine could hardly be blamed for prioritizing Russian aggression over other aggressive acts, no matter how similar. Nor could the Council of Europe be accused of selectivity for supporting a HUCA but not other hybrid tribunals: although the conflict in Ukraine obviously has global implications, Russia's invasion poses a direct and immediate threat to the many of the CoE's members, particularly states in Eastern and Central Europe.

A Council of Europe-backed High Ukrainian Chamber for Aggression would also minimize the problem of unclean hands. Although the UK and France are members of the CoE, most of the other states responsible for limiting the ICC's jurisdiction over aggression and/or for the invasion of Iraq – the US, Canada, Australia, New Zealand – are not. Moreover, the CoE's membership has proven far more committed to accountability for aggression than the membership of any other international organization. Only 43 states have ratified the ICC's aggression amendments, and 28 of them (65%) are members of the CoE. Similarly, of the 39 states that have criminalized aggression domestically, 26 are CoE members (67%). Overall, of the CoE's 46 members, 37 (80%) have either ratified the aggression amendments or domestically criminalized aggression.

A High Ukrainian Chamber for Aggression would, however, have one very significant drawback: personal immunity. As noted above, any court established to prosecute the individuals responsible for the invasion of Ukraine, international or national, is likely to conclude that Russian officials are not entitled to functional immunity for aggression. By contrast, it is difficult to see how a hybrid tribunal like a HUCA could set aside personal

[112] Pociej, CoE Report, 15.
[113] Komarov and Hathaway, "Best Path."
[114] Cameron McKenna and Nabarro Olswang, "Ukraine Expands Sanctions against Russia and its Supporters," *Lexology*, 20 May 2022, https://www.lexology.com/library/detail.aspx?g=7d1f4c76-3219-4caa-8678-196368912a4f.
[115] U4 Practice Insight, "Launching an Effective Anti-Corruption Court: Lessons from Ukraine," 15 June 2021, https://www.u4.no/publications/launching-an-effective-anti-corruption-court#2-establishing-the-high-anti-corruption-court.
[116] Ibid.

immunity, given that its enabling statute would not be binding on suspects like Putin and Lavrov. The SCSL was also formally a hybrid tribunal, but the UN/Sierra Leone agreement that created the tribunal was at least authorized by the Security Council acting pursuant to Arts. 39 and 41 of the UN Charter. The Security Council would obviously not endorse a HUCA, given Russia's permanent veto. A HUCA would thus have to be sufficiently endorsed by the General Assembly to even plausibly claim the right to set aside personal immunity. Such endorsement would be very unlikely, for all the reasons discussed above.

The Leadership Requirement

With the exception of the ICC, all of the international options – a Special Tribunal created by a group of states or by an agreement between the UN and Ukraine; a hybrid tribunal based in Ukraine's judicial system – raise an important substantive question concerning the definition of aggression: namely, what leadership requirement the court would apply. Aggression has always been understood as a crime that can be committed only by high-ranking political and military leaders.[117] The leadership requirement in the customary definition of aggression, however, is different than the leadership requirement in the Rome Statute's definition of aggression. The customary standard, which was adopted both by the Nuremberg Military Tribunals and by the IMTFE,[118] was articulated most precisely in the *High Command* case: "[i]t is not a person's rank or status, but his power to *shape or influence* the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace."[119] The Rome Statute standard is articulated in Art. 8bis(3) of the Rome Statute: "[i]n respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively *to exercise control over or to direct* the political or military action of a State."[120]

The ICC is obviously required to apply the Rome Statute leadership requirement. The other tribunals, however, could apply either the Rome Statute or the customary standard. McDougall believes "it is imperative that the constitutive instrument of any ad hoc mechanism established to prosecute crimes of aggression committed against Ukraine replicate the definition of the crime of aggression found in the Rome Statute."[121] The Combined Statement and Declaration, by contrast, provides that a Special Tribunal should "investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine, including those who have materially influenced or shaped the commission of that crime"[122] – the customary leadership requirement. And the Council of Europe offers a recommendation that can only be described as muddled, calling for the creation of an ad hoc international criminal tribunal that will "apply the definition of the crime of aggression as established in customary international law, which has also inspired the definition of the crime of aggression in Article 8 *bis* of the ICC Statute."

[117] See Kevin Jon Heller, "Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression," *European Journal of International Law* 18, no. 3 (2007): 479.
[118] Ibid., 483–8.
[119] *United States v. von Leeb et al.*, Military Tribunal XII, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950), 489. Emphasis added.
[120] Emphasis added.
[121] McDougall, "Why."
[122] Combined Statement and Declaration, 3.

I have argued elsewhere that the primary difference between custom and the Rome Statute is that the "control or direct" standard excludes two categories of potentially deserving perpetrators that the "shape or influence" standard does not: private economic actors, such as industrialists and financiers, and government officials who are complicit in another state's criminal act of aggression.[123] Neither appears relevant to either Russia or Belarus. In terms of the first category, despite the imposition of Western sanctions on private economic actors in both states, there is no evidence that any industrialist or financier shaped or influenced, much less controlled or directed, either Russia's decision to invade Ukraine or Belarus's decision to support the Russian invasion. In terms of the second category, although Belorussian officials could not have "controlled or directed" Russia's invasion of Ukraine,[124] we saw earlier that Belarus committed its own criminal act of aggression under both custom and the Rome Statute – a "war declared in support of a third party's war of aggression," and a manifest violation of the UN Charter in the form of "allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State." A tribunal applying either the customary standard or the Rome Statute standard would thus be able to convict Belorussian officials responsible for Belarus's decision to make its territory and airports available to the Russian army.

That said, it would still matter which leadership requirement an ad hoc tribunal applied. It is uncontroversial that the "control or direct" standard encompasses fewer political and military leaders than the "shape or influence" standard.[125] An ad hoc tribunal that wanted to maximize prosecutorial flexibility regarding the choice of aggression defendants, therefore, would be better off adopting the customary leadership requirement instead of the Rome Statute one. Such flexibility seems particularly desirable in the context of Russia's invasion of Ukraine, given that the primary obstacle any ad hoc tribunal will face is likely to be practical rather than legal: namely, obtaining defendants to put on trial. The broader the range of perpetrators a tribunal can prosecute, the more likely it will be to eventually have an actual case.

Domestic Prosecution

It would also be possible to prosecute at least some Russian leaders in national courts, whether in Ukraine or elsewhere.

Ukraine

The most obvious location for domestic trials would be Ukraine itself. Art. 437 of the Criminal Code of Ukraine, which is loosely based on the customary definition of aggression, provides that "[p]lanning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of

[123] Heller, "Retreat," 488–96.

[124] The "control or direct" standard applies to all modes of participation in aggression, even those that are forms of complicity. Rome Statute, Art. 25(3)bis. And although the text of Art. 8bis(3) says the perpetrator must be a leader of "a state," the Elements of Crimes make clear that he or she must be a leader of the state that commits the act of aggression. See Elements of Crimes, Art. 8bis, Element 3 ("The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.").

[125] See, e.g. McDougall, *Crime of Aggression*, 183.

seven to twelve years"[126] and that "[c]onducting an aggressive war or aggressive military operations … shall be punishable by imprisonment for a term of ten to fifteen years."[127]

Although Ukraine has both the moral and legal right to prosecute Russian aggression, there are reasons to question the wisdom of such prosecutions. Ukraine has applied Art. 437 at least twice since 2014. In the earlier trial, two low-ranking Russian soldiers were convicted of violating Art. 437(2) by entering Ukraine and participating in hostilities in the Luhansk region.[128] From the standpoint of international law, there are two significant problems with their convictions. First, the act for which the soldiers were convicted, "conducting an aggressive war," is idiosyncratic and unprecedented, as every international definition of aggression limits participation in the crime to planning, preparing, initiating, or waging an act of aggression. Neither Art. 437 itself nor the court's judgment explains how "conducting" is different than "waging." Second, the convictions are impossible to reconcile with the idea, unquestioned since Nuremberg, that aggression is a leadership crime.[129] Low-ranking soldiers who participate in a criminal act of aggression do not satisfy the leadership requirement in either customary international law or the Rome Statute.

The leadership problem is particularly acute, because Ukraine's Office of the Prosecutor General (OPG) has stated that it has identified 623 Russians who are responsible for the crime of aggression.[130] The suspects, according to the OPG, include "ministers," "deputies," "military command," "officials," "heads of law enforcement agencies," and "instigators of war and propagandists of the Kremlin."[131] It is unlikely that more than a small number of those suspects qualify as leaders under international law. Few if any Russian law-enforcement officials and propagandists would have been in a position to "shape or influence" Russia's invasion of Ukraine, much less "control or direct" it. The same is probably true of government "officials" who are neither ministers nor deputies. Particularly important deputies might satisfy the "shape or influence" standard, but they would not satisfy – almost by definition – the "control or direct" one. That leaves "ministers" and members of Russia's "military command" as the only suspects who might satisfy both the customary and the Rome Statute leadership requirement.

In the later aggression trial, the former President of Ukraine, Viktor Yanukovych, was convicted of complicity in conducting an aggressive war – Art. 437(2) again – for asking Putin to send Russian troops into Ukraine after he was removed from office.[132] Yanukovych's conviction is no less problematic than the conviction of the low-ranking Russian soldiers. To begin with, it reinforces concerns raised by the first trial about Ukraine's failure to apply a leadership requirement to the crime of aggression: although Yanukovych would have qualified as a leader while he was President of Ukraine, his

[126] Criminal Code of Ukraine, Art. 437(1).
[127] Ibid., Art. 437(2).
[128] Sergey Sayapin, "A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case," *Journal of International Criminal Justice* 16 (2018): 1094.
[129] Ibid., 1095.
[130] Sergey Vasiliev, "The Reckoning for War Crimes in Ukraine Has Begun," *Foreign Policy*, 17 June 2022, https://foreignpolicy.com/2022/06/17/war-crimes-trials-ukraine-russian-soldiers-shishimarin/.
[131] See Prosecutor General's Office, "Crimes Committed During the Full-Scale Invasion of RF," *Twitter*, 3 June 2022, https://twitter.com/GP_Ukraine/status/1532607993338011649/photo/1.
[132] Sergey Sayapin, "The Yanukovych Trial in Ukraine: A Revival of the Crime of Aggression?" *Israel Yearbook on Human Rights* 50 (2020): 65.

request to Russia came after he had been replaced. More troubling, though, is the fact that Yanukovych was convicted in absentia. Although trials in absentia are not prohibited by international law, they are strongly disfavoured because they inevitably compromise a defendant's ability to exercise his or her rights under the ICCPR.[133] They are also subject to strict procedural requirements that are not adequately respected by the Ukrainian Criminal Procedure Code.[134] Ukraine nevertheless went ahead with Yanukovych's trial – and has made clear that it intends to to prosecute Russian suspects in absentia as well, including those being investigated for aggression.[135] If it does so, the international community will likely see any convictions it obtains as illegitimate.

To be clear, none of these problems are insuperable. Ukraine could commit to not prosecuting Russian suspects in absentia, and parliament could harmonize the Criminal Code with the international definition of aggression by adopting two changes to Art. 437: eliminating the "conducting" paragraph, Art. 437(2), and explicitly incorporating a leadership requirement into Art. 437(1). In terms of the latter change, Ukraine would be free to choose between the customary "shape or influence" standard and the Rome Statute's "control or direct" standard, with the former being the better choice in terms of maximizing prosecutorial flexibility.

No matter how Art. 437 is worded, however, domestic prosecutions in Ukraine face a more intractable obstacle: personal immunity. Although there is uncertainty concerning whether such immunity applies before international courts, there is no question that it applies before national ones. As noted above, the ICJ explicitly held in the *Arrest Warrant* case that "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."[136] Despite Ukraine's right to prosecute less important Russian officials, therefore, under no circumstances could it prosecute Putin or Lavrov.

Other States

Lithuania and Poland have each announced that they are currently investigating Russia's criminal act of aggression against Ukraine.[137] Lithuania's investigation is based on universal jurisdiction, while Poland's appears to be based on protective jurisdiction.[138]

Lithuania and Poland face the same personal immunity problem as Ukraine. Moreover, Lithuania faces an important legal issue that Ukraine does not: namely, whether universal jurisdiction actually exists for aggression. A small number of states – approximately 18[139] – claim the right to exercise such jurisdiction in their domestic legislation,[140] and some

[133] Human Rights Watch, Letter to the Secretariat of the Rules and Procedure Committee Extraordinary Chambers of the Courts of Cambodia," 17 November 2006, https://www.hrw.org/legacy/backgrounder/ij/cambodia1106/cambodialetter1106web.pdf.
[134] See Global Rights Compliance, "Trials in Absentia," 11–13, https://www.asser.nl/media/795064/grc-trials-in-absentia-english.pdf.
[135] See "Ukraine Files Eight More War Crimes Cases to Court – Prosecutor," *Reuters*, 8 June 2002, https://www.reuters.com/world/europe/ukraine-has-filed-more-eight-war-crimes-cases-court-prosecutor-2022-06-08/.
[136] *Arrest Warrant*, 21–2, ¶ 58.
[137] Pociej, CoE Report, 17.
[138] McDougall, "Why."
[139] Ibid.
[140] See, e.g. McDougall, *Crime of Aggression*, 318.

scholars support their position.[141] The Princeton Principles of Universal Jurisdiction also include crimes against peace.[142] Nevertheless, "'[i]t is very doubtful that under current customary law it can be asserted unequivocally that aggression is subject to universal jurisdiction."[143] Only 40 or so states criminalize aggression at all,[144] and the majority of them do not provide for universal jurisdiction over the crime. Moreover, as McDougall has pointed out, "none of the separate judgments in the ICJ *Arrest Warrant* case that attempt to identify the crimes to which universal jurisdiction attaches include the crime of aggression, or crimes against peace, as such a crime."[145] Even the Princeton Principles (which do not represent either state practice or opinio juris) are equivocal about the status of crimes against peace, given that the Commentary notes that they were included in Principle 2 "despite some disagreement" – and largely "in order to recall the wording of Article 6(a) of the Nuremberg Charter."[146] It is anything but clear, though, that the IMT actually exercised universal jurisdiction.[147]

Poland's reliance on protective jurisdiction is similarly open to question. McDougall is skeptical that a state like Poland, which has been only indirectly affected by Russia's aggression,[148] is entitled to invoke protective jurisdiction. In her view "it is not obvious … that the crime of aggression committed against Ukraine is 'an offence against the internal or external security of the Republic of Poland' (or even 'an offence against essential economic interests of Poland')."[149] As a general rule concerning protective jurisdiction over the crime of aggression, McDougall's distinction between direct and indirect effect is persuasive. An act of aggression, however, indirectly affects some states more than others: although Russia's invasion of Ukraine is of global concern, it poses a more significant threat to Poland and other states that border Russia, Ukraine, and Belarus than to (say) New Zealand in terms of security, refugees, etc. It thus seems at least plausible for a state like Poland to invoke protective jurisdiction despite not being directly targeted by Russian aggression.

What Next?

Any discussion of accountability for Russia's aggression against Ukraine must acknowledge that there is little prospect a Russian political or military leader will face prosecution anytime soon. Although scholars are right to point out that it is easier to prove aggression than any of the other international crimes,[150] a Russian leader who satisfies aggression's leadership requirement is unlikely to fall into hostile hands barring the replacement of the current government by one with very different international priorities.

[141] See, e.g. Michael P. Scharf, "Universal Jurisdiction and the Crime of Aggression," *Harvard International Law Journal* 33, no. 2 (2012): 388.
[142] *Princeton Principles on Universal Jurisdiction* (Princeton: Program in Law and Public Affairs, 2001), 29.
[143] Roger S. Clark, "Complementarity and the Crime of Aggression," in *The International Criminal Court and Complementarity: From Theory to Practice, Vol. II*, eds. Carsten Stahn and Mohamed El Zeidy (Cambridge: Cambridge University Press, 2011), 731.
[144] Sergey Sayapin, *The Crime of Aggression in International Law* (The Hague: TMC Asser Press, 2014), xx.
[145] McDougall, *Crime of Aggression*, 319–20.
[146] Princeton Principles, 47.
[147] See, e.g. McDougall, *Crime of Aggression*, 318.
[148] McDougall does not contest the right of a state targeted by aggression to invoke protective jurisdiction – though, as she points out, that state would almost certainly invoke territorial jurisdiction instead. Ibid.
[149] Ibid.
[150] See, e.g. Katarina Sipulova, "International Law After the War in Ukraine," *Oxford Global Society*, 19 May 2002, https://oxgs.org/2022/05/19/international-law-after-the-war-of-ukraine-towards-the-post-bellum-accountability/.

Unlikely things, however, sometimes happen. And because they do, this article has endeavoured to provide a relatively comprehensive analysis of what justice for Russian aggression might look like. As we have seen, options for accountability differ in terms of their legitimacy, efficacy, and plausibility.

The best option overall is the most international one: expanding the ICC's jurisdiction to include Russia's aggression against Ukraine. That option is the most cost-effective and the most legitimate: cost-effective because the Court already exists and is already investigating international crimes in Ukraine; legitimate because a Court with broader jurisdiction over aggression would minimize (though certainly not eliminate) inter-conflict selectivity. Unfortunately, though, the ICC option is also the least plausible: the likelihood of state parties amending the Rome Statute to eliminate the exclusion of non-state parties from the crime of aggression is virtually nil.

The domestic options are a mixed bag. Ukrainian prosecutions would be cost-effective given that the state has a functioning justice system, and they would almost certainly be seen as legitimate as long as parliament brought Ukraine's definition of aggression in line with international standards and disclaimed the use of in absentia trials. But Ukrainian trials would be limited to Russians leaders not entitled to personal immunity; Putin and Lavrov would have to be prosecuted elsewhere. The same would be true of trials in third states – and such trials are in any case likely to be few and far between, given that universal jurisdiction probably does not apply to aggression and that protective jurisdiction can at best be exercised by a small number of states most affected by Russia's invasion of Ukraine.

Insofar, then, as the international community wants to be able to prosecute Putin and Lavrov, its only feasible option is some kind of ad hoc tribunal. The most legitimate choices would be a Special Tribunal created by agreement between Ukraine and the UN with the General Assembly's endorsement or a hybrid tribunal based in Ukraine and supported by the Council of Europe, because both would be much less susceptible to allegations of selective justice than a Special Tribunal created by a group of states. Either tribunal would need General Assembly endorsement, however, to have even a colourable argument for setting aside personal immunity.

Unfortunately, such endorsement is unlikely. It is thus possible that *none* of the options discussed in this article would be capable of setting aside personal immunity. If that is the case – if the best the international community can do is prosecute Russian leaders less senior than Putin and Lavrov – a High Ukrainian Chamber for Aggression supported by the CoE would be the best option, because it offers the most promising combination of efficiency, legitimacy, and expertise.

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Notes on Contributor

Kevin Jon Heller is Professor of International Law and Security at the University of Copenhagen's Centre for Military Studies and Professor of Law at the Australian National University. He currently serves as Special Adviser to the ICC Prosecutor on International Criminal Law Discourse. All opinions contained herein are made in his academic capacity.