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## Ukraine's Push to Prosecute Aggression: Implications for Immunity Ratione Personae and the Crime of Aggression

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# UKRAINE'S PUSH TO PROSECUTE AGGRESSION IMPLICATIONS FOR IMMUNITY RATIONE PERSONAE AND THE CRIME OF AGGRESSION

*Rebecca Hamilton*

## ABSTRACT

Russia's aggression against Ukraine dates back to its 2014 annexation of Ukraine's southern peninsula, Crimea.<sup>1</sup> It was Russia's brazen full-scale invasion of Ukraine on February 24, 2022,<sup>2</sup> however, that captured global attention and put the crime of aggression – the resort to war in violation of the UN Charter<sup>3</sup> – in the spotlight.

In recent months, model indictments of Russian President Vladimir Putin,<sup>4</sup> as well as Foreign Minister Sergei Lavrov, Defence Minister Sergei Shoigu and others, have been widely publicized.<sup>5</sup> A 2010 amendment to the Rome Statute of the

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1. Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea and Bitterly Denounces the West*, N.Y. TIMES (Mar. 19, 2014), <https://www.nytimes.com/2014/03/19/world/europe/ukraine.html> [https://perma.cc/PY9T-446E].
  2. *See, e.g.*, David Leonhardt, *War in Ukraine*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/briefing/ukraine-russia-invasion-putin.html> [https://perma.cc/SS8S-DNGE].
  3. Press Release, Secretary-General, Statement attributable to the Spokesperson for the Secretary-General on Ukraine (Feb. 21, 2022).
  4. RYAN GOODMAN & REBECCA HAMILTON, MODEL INDICTMENT FOR CRIME OF AGGRESSION AGAINST UKRAINE: PROSECUTOR V. PRESIDENT VLADIMIR PUTIN 1 (2022), <https://www.justsecurity.org/wp-content/uploads/2022/03/Model-Indictment-for-Crime-of-Aggression-Against-Ukraine-Prosecutor-v-President-Vladimir-Putin.pdf> [https://perma.cc/HV59-SWHF].
  5. OPEN SOC'Y JUST. INITIATIVE, MODEL INDICTMENT FOR THE CRIME OF AGGRESSION COMMITTED AGAINST UKRAINE 14-15 (2022), <https://www.justsecurity.org/wp-content/uploads/2022/05/osji-model-indictment-for-crime-of-aggression-committed-against-ukraine-may-2022.pdf> [https://perma.cc/FQG7-RHVF].

International Criminal Court means that the ICC now has jurisdiction over the crime of aggression when there is state consent.<sup>6</sup> But Russia has not - and will not - provide such consent. If an aggression indictment is to be formally issued, it will need to come through a newly created tribunal.<sup>7</sup>

Just a week after Russia's February 24 invasion, Chatham House convened a high-profile declaration to support the establishment of a tribunal to prosecute aggression.<sup>8</sup> The following month, Ukrainian President Volodymyr Zelenskyy used his address to the UN Security Council to call for the creation of an aggression tribunal.<sup>9</sup> Since then, the Ukrainian government has been working with willing governments in Europe on plans to bring such a tribunal to life.<sup>10</sup>

Historically, powerful states have been reticent to let international criminal law encroach on decisions about the use of force.<sup>11</sup> So, the plans currently being developed may ultimately be blocked by the self-interest of states - the United States among the forefront - in fear of the precedent an aggression tribunal

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6. Rome Statute of the International Criminal Court, art. 15, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].
  7. *E.g.*, STATEMENT AND DECLARATION CALLING FOR THE CREATION OF A SPECIAL TRIBUNAL FOR THE PUNISHMENT OF THE CRIME OF AGGRESSION AGAINST UKRAINE (2022), <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf> [<https://perma.cc/B5G5-AY3K>].
  8. *A Criminal Tribunal for Aggression Against Ukraine*, CHATHAM HOUSE (Mar. 4, 2022), <https://www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine> [<https://perma.cc/B5G5-AY3K>].
  9. Amanda Macias, *Zelenskyy Calls for a Nuremberg-Style Tribunal to Investigate and Prosecute Russian War Crimes*, CNBC, <https://www.cnbc.com/2022/04/05/zelenskyy-calls-for-a-nuremberg-style-tribunal-to-prosecute-war-crimes.html> (Apr. 5, 2022, 12:35 PM) [<https://perma.cc/RNK2-ACDE>].
  10. *See* Press Release, European Parliament, Ukraine: MEPs Want a Special International Tribunal for Crimes of Aggression (May 19, 2022, 12:41 PM), <https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression> [<https://perma.cc/G2DL-HG8U>].
  11. For a useful summary of the difficulties in getting states to codify the crime of aggression, see Beth van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505, 511-520 (2010).

would set. Indeed, this is the most likely outcome. But, as yet, the U.S. at least has not publicly registered any such dissent.<sup>12</sup> Moreover, Russia's invasion seems to have pushed states out of business-as-usual positioning in all manner of ways.<sup>13</sup> Therefore, it remains at least a possibility that such a tribunal will be established.<sup>14</sup> If it is, and especially if it issues indictments, this will have significant implications for the development of international law, regardless of whether those accused are ever arrested and brought to trial.<sup>15</sup>

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12. *See Briefing With Ambassador-at-Large for Global Criminal Justice Beth Van Schaack On Justice and Accountability for Russia's Atrocities in Ukraine*, U.S. Dep't of State (Nov. 21, 2022), <https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine/> ("we're still reviewing the various proposals [regarding an aggression tribunal] and talking with friends and allies to gather everyone's perspectives on this.") [ <https://perma.cc/QK7W-T6D7> ].
  13. *See, e.g.*, G.A. Res. ES-11/1, Aggression Against Ukraine (Mar. 2, 2022) (deploring Russian aggression); S. Res. 531, 117th Cong. (2022) (supporting ICC in Ukraine context without usual anti-ICC positioning); David M. Herszenhorn et al., *Germany to Send Ukraine Weapons in Historic Shift on Military Aid*, POLITICO (Feb. 26, 2022, 2:21 PM), <https://www.politico.eu/article/ukraine-war-russia-germany-still-blocking-arms-supplies/> (discussing Germany's reversal of its historic policy of prohibiting from the sending of lethal weapons into conflict zones in the context of Ukraine) [<https://perma.cc/W5UG-RAS4>]; A. Wess Mitchell, *Putin's War Backfires as Finland, Sweden Seek to Join NATO*, U.S. INST. OF PEACE (May 26, 2022), <https://www.usip.org/publications/2022/05/putins-war-backfires-finland-sweden-seek-join-nato> (describing how Finland and Sweden reversed course from decades of neutrality following Russia's invasion of Ukraine and sought to join NATO) [<https://perma.cc/X3X9-E5DW>].
  14. *See supra* text accompanying notes 10-12; *see also The Elders Call for a Criminal Tribunal to Investigate Alleged Crime of Aggression in Ukraine*, THE ELDERS (Mar. 5, 2022), <https://theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine> [<https://perma.cc/S5SW-B64Z>]; Janet Anderson, *Ukraine: "The Momentum Is There for a Tribunal on Aggression,"* JUST. INFO (Apr. 12, 2022), <https://www.justiceinfo.net/en/90566-ukraine-momentum-tribunal-aggression.html> [<https://perma.cc/N265-YDEX>].
  15. It is a prospect that may seem remote, especially for some of the most senior Russian officials, but that history reminds us should not be discounted in the long-term. *See, e.g., Ratko Mladic Arrested: Bosnia War Crimes Suspect Held*, BBC NEWS (May 26,

The first implication, which forms the bulk of the following analysis, relates to the law on head of state immunity.<sup>16</sup> The establishment of an aggression tribunal that enables the indictment of Putin or Lavrov while they remain in their existing roles will constitute, in Rebecca Ingber's terminology, an "interpretation catalyst."<sup>17</sup> The tribunal's establishment will trigger legal interpretations by states on the topic of immunity *ratione personae*.<sup>18</sup> This will contribute to state practice and *opinio juris*, regardless of whether the tribunal pursues indictments or ever brings any accused into custody. If a case ever does proceed, the tribunal's decision on the immunity challenge that these defendants would inevitably bring, would further contribute to our understanding of this fraught area of international law.<sup>19</sup>

The second implication relates to our understanding of the scope of liability for the crime of aggression. Aggression is understood to be a leadership crime.<sup>20</sup> But the charging decisions made by the aggression tribunal will add granularity to this understanding.<sup>21</sup> There is a meaningful difference, for example,

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2011), <https://www.bbc.com/news/world-europe-13561407> (bringing indicted war crime suspect into custody 16 years after the arrest warrant issued) [<https://perma.cc/E3V9-CHWJ>].

16. See JOANNE FOAKES, *THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW* 81 (2014).
17. See Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 *YALE J. INT'L L.* 359, 366-368 (2013).
18. See RAMONA PEDRETTI, *IMMUNITY OF HEADS OF STATE AND STATE OFFICIALS FOR INTERNATIONAL CRIMES* 25-28 (2015).
19. See *infra* text accompanying notes 40-59.
20. See Rome Statute, *supra* note 6, art. 8(1) ("crime of aggression [can be committed] by a person in a position effectively to exercise control over or to direct the political or military action of a State"). This formulation by the ICC is narrower than prior definitions, including at Nuremberg. See Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 *EUR. J. INT'L L.* 477, 478 (2007). Nonetheless, all iterations of the definition of the crime of aggression have included some kind of leadership component. See, e.g., G.A. Res. 3314 (XXIX), arts. 1-5 (Dec. 14, 1974).
21. See GOODMAN & HAMILTON, *supra* note 4, at 2.

between charging Putin alone, or charging him together with 15 members of his national security or military leadership.<sup>22</sup>

Finally, the temporal jurisdiction laid out in any aggression tribunal's constitutive document will influence, albeit indirectly, our understanding of the scope of the crime of aggression.<sup>23</sup> A temporal jurisdiction clause that begins on February 24, 2022 will prevent a tribunal from considering acts short of full-scale invasion.<sup>24</sup> This does not mean, of course, that Russia's acts of aggression prior to February 24, 2022 do not constitute aggression,<sup>25</sup> however, it does set the bar very high for the future engagement of international criminal law with the crime of aggression. If a case on these grounds proceeds, the first jurisprudence on aggression since Nuremberg will be limited to this textbook example.<sup>26</sup>

#### TABLE OF CONTENTS

ABSTRACT.....	39
TABLE OF CONTENTS.....	43
I: IMMUNITY RATIONE PERSONAE.....	44
A. ICJ Arrest Warrant Case.....	45
B. Customary International Law .....	47
C. Models of an Aggression Tribunal.....	51
II: SCOPE OF LIABILITY FOR AGGRESSION.....	53
III: SCOPE OF THE CRIME OF AGGRESSION.....	56
CONCLUSION.....	58

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22. *See generally id.* (discussing limitation of model indictment in charging Putin alone).
23. *See* Iryna Marchuk & Aloka Wanigasuriya, *The ICC and the Russia-Ukraine War*, AM. SOC'Y OF INT'L L. INSIGHTS, July 5, 2022, at 1, 1.
24. *See generally id.* at 1-2.
25. *See, e.g.,* Veronika Bílková, *The Use of Force by the Russian Federation in Crimea*, 75 HEIDELBERG J. INT'L L. 27, 30 (2015).
26. *See* Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SEC. (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter> [<https://perma.cc/A7NW-5AJA>].

## I: IMMUNITY RATIONE PERSONAE

Courts seeking to prosecute foreign state officials need to be concerned with two broad types of immunities. The first, immunity *ratione materiae*,<sup>27</sup> or functional immunity, provides lasting immunity to state officials for official acts they performed in their position.<sup>28</sup> The second, immunity *ratione personae*,<sup>29</sup> provides immunity to certain high-level officials who represent the state, such as heads of state and foreign ministers, but only for the period in which they hold their official position.<sup>30</sup> Unlike functional immunity, immunity for certain high-level officials covers all acts, including private ones and ones committed prior to holding office.<sup>31</sup>

There is broad agreement that functional immunity is not a bar to the prosecution of serious international crimes, even in foreign domestic courts.<sup>32</sup> Yet, for as long as certain high-level officials remain in power, immunity *ratione personae* continues to protect them.<sup>33</sup> This long-standing aspect of immunities law flows from the sovereign equality of states, *par in parem non habet imperium*.<sup>34</sup> The immunity exists so that one state cannot sit in judgment of another.<sup>35</sup> As such, the immunity is not held by the head of state as an individual, but by the state itself.<sup>36</sup>

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27. See PEDRETTI, *supra* note 18, at 14.

30. See HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 19 (3d ed. 2015).

29. See PEDRETTI, *supra* note 18, at 25.

30. *Id.*

31. *Id.* at 28.

32. See FOAKES, *supra* note 16, at 205.

33. See generally Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 864-866 (2002).

34. In the words of the ICJ, this is one of the “fundamental principles of the international legal order.” Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3).

35. Roman Anatolevich Kolodkin (Special Rapporteur on the Immunity of State of Officials from Foreign Criminal Jurisdiction), *Third Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction*, U.N. Doc. A/CN.4/646 (May 24, 2011).

36. See FOX & WEBB, *supra* note 30.

Exactly which state officials immunity *ratione personae* applies to is subject to some debate.<sup>37</sup> The following analysis, however, proceeds on the generally accepted view that as President and Foreign Minister respectively, Putin and Lavrov would have robust claims to immunity *ratione personae* should a domestic court outside of Russia try to prosecute them.<sup>38</sup> The issue becomes more complex however, once one moves beyond foreign *domestic* courts.

#### A. ICJ Arrest Warrant Case

The foundational language on this issue comes from the International Court of Justice decision in the Arrest Warrant case of 11 April 2000.<sup>39</sup> The ICJ agreed with the Democratic Republic of Congo that its incumbent foreign minister had immunity from arrest for international crimes with respect to Belgian judicial proceedings.<sup>40</sup> It nonetheless offered assurance that such immunity did not equate to impunity.<sup>41</sup>

The ICJ noted, uncontroversially, that senior officials could be prosecuted in their home state, in foreign states if their home

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37. The International Law Commission uses the formulation of the troika (head of state, head of government and foreign minister). See Concepcion Escobar Hernandez (Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction), *Second Rep. on the Immunity of State Officials from Foreign Criminal Jurisdiction*, ¶ 60, U.N. Doc. A/CN.4/661 (Apr. 4, 2013). The ICJ *Arrest Warrant* case suggested the immunity extended on functional grounds to those required to travel internationally on behalf of the state, through this has been criticized. See, e.g., Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. OF INT'L L. 815, 825 (2015) (“extending such broad immunity *ratione personae* to other ministers, as the ICJ did in *Arrest Warrant*, is erroneous and unjustified.”).
38. See Press Release, U.S. Dep’t Treasury, U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov (Feb. 25, 2022), <https://home.treasury.gov/news/press-releases/jy0610> [<https://perma.cc/3PH3-4GER>].
39. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14).
40. This issue was decided with thirteen votes to three. *Id.* ¶78.
41. *Id.* ¶ 60.



state waives immunity, or once they leave office.<sup>42</sup> For as long as Putin retains power in Russia, all of these pathways to prosecution remain closed. The Court, however, also provided a fourth pathway that is potentially relevant to Russia's aggression against Ukraine.<sup>43</sup> It stated that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts, where they have jurisdiction.*"<sup>44</sup>

The Court offered three non-exclusive examples of such international courts: the two extant ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, established by the UN Security Council pursuant to Chapter VII of UN Charter, and the yet-to-be-operational International Criminal Court.<sup>45</sup> Each of these courts, with their statutory provisions denying immunity, hold a direct source of authority for a state waiver of immunity.<sup>46</sup> In the case of the ad hoc tribunals, this source was the binding force of the UN Security Council's Chapter VII authority;<sup>47</sup> for the ICC it is state consent by parties who join the court's treaty.<sup>48</sup>

For the reasons outlined above – Russia's veto-wielding seat on the UN Security Council,<sup>49</sup> and Russia's lack of consent to ICC jurisdiction<sup>50</sup> – these sources of authority will not be available to any aggression tribunal.<sup>51</sup> As a result, states considering the establishment of an aggression tribunal will have to wade into a legal evaluation of whether the ICJ's category of "certain

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42. *Id.* ¶ 61.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 7, ¶ 2 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 6, ¶ 2 (May 25, 1993); Rome Statute, *supra* note 6, art. 27.

47. S.C. Res. 955, ¶¶ 1-2 (Nov. 8, 1994); S.C. Res. 827, ¶¶ 1-2 (Feb. 22, 1993).

48. Rome Statute, *supra* note 6, art. 12.

49. U.N. Charter art. 27, ¶ 3.

50. Rome Statute, *supra* note 6, art. 11-13.

51. Rome Statute, *supra* note 6, arts. 11-12.

international criminal courts [with] jurisdiction”<sup>52</sup> includes a tribunal without a direct source of authority to waive immunity and, if so, what the required attributes of such a tribunal would be.

### *B. Customary International Law*

In the years since the ICJ Arrest Warrant decision, different international criminal judgements,<sup>53</sup> and much scholarship,<sup>54</sup> have grappled with the question of what characteristics an international criminal court must have in order to render immunity *ratione personae* inapplicable.<sup>55</sup> Space constraints preclude detailed description, but beyond the uncontroversial although here-inapplicable examples of state immunity being waived by consent or over-ridden by the UN Security Council under Chapter VII, it is possible to distill arguments about whether customary international law permits courts with international jurisdiction to prosecute a sitting head of state or foreign minister without violating immunity *ratione personae*.<sup>56</sup>

Returning to foundational principles, recall that immunity *ratione personae* exists to uphold the principle *par in parem non habet imperium*, that one sovereign state cannot exercise

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52. Case Concerning the Arrest Warrant, *supra* note 39.
53. See, e.g., Prosecutor v. Al-Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶¶ 64-70 (July 6, 2017) (discussing Omar Bashir’s lack of immunity in another state).
54. See, e.g., ALEXANDRE SKANDER GALAND, UN SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT 157-58 (2018); Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT’L L. 653, 663 (2004); see also Dapo Akande & Talita de Souza Dias, *Does the ICC Statute Remove Immunities of State Officials in National Proceedings? Some Observations from the Drafting History of Article 27(2) of the Rome Statute*, EJIL TALK! (Nov. 12, 2018), <https://www.ejiltalk.org/does-the-icc-statute-remove-immunities-of-state-officials-in-national-proceedings-some-observations-from-the-drafting-history-of-article-272-of-the-rome-statute/> [https://perma.cc/64JW-BQCF].
55. GALAND, *supra* note 54.
56. See generally Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 96, 96-127 (Margaret DeGuzman & Valerie Oosterveld eds., 2020).

jurisdiction over another sovereign state.<sup>57</sup> It follows then that any international court in which immunity *ratione personae* is inapplicable must be exercising something other than sovereign jurisdiction. This makes the presence of international jurisdiction essential. But if international jurisdiction circumvents the need for a direct source of authority to waive immunity, it becomes critical to determine what exactly gives a court international jurisdiction.

One answer comes from the Special Court for Sierra Leone, established in 2002 through an agreement between the government of Sierra Leone and the United Nations under the auspices of the UN Secretary General.<sup>58</sup> It followed a UN Security Council resolution that asked the UN Secretary General to negotiate the agreement.<sup>59</sup> Unlike the ad hoc tribunals, though, the SCSL was not established under the UN Security Council's Chapter VII powers.<sup>60</sup>

In 2003, the SCSL faced an immunity challenge to its issuance of an arrest warrant against Liberian President, Charles Taylor,<sup>61</sup> for crimes against humanity and war crimes during the war in Sierra Leone, brought against him while he was the incumbent head of state.<sup>62</sup> In denying the applicability of immunity *ratione personae*, the Appeals Chamber emphasized the UN Security Council's role under Chapter VI in initiating the establishment of the SCSL, stating that "the Security Council acts [pursuant to Art. 24(1) of the UN Charter] on behalf of the members of the United Nations."<sup>63</sup> The Chamber added:

The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations

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57. Kolodkin, *supra* note 35.

58. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Agreement].

59. S.C. Res. 1315, ¶ 1 (Aug. 14, 2000).

60. *See generally* SCSL Agreement, *supra* note 58.

61. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 1 (May 31, 2004), <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

62. *Id.* ¶ 4.

63. *Id.* ¶ 38.

and Sierra Leone. This fact makes the agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.<sup>64</sup>

As a result, the quantity and breadth of states that agree – directly or, as in the Taylor case, through their membership in the United Nations<sup>65</sup> – to the establishment of a court is, according to the SCSL, what provides it with international jurisdiction.<sup>66</sup>

Another answer, from the ICC, endorses the SCSL's emphasis on international jurisdiction as a necessary feature of a court before which immunity *ratione personae* is inapplicable.<sup>67</sup> Following the ICC's issuance of an arrest warrant against incumbent Sudanese President Omar al-Bashir,<sup>68</sup> the ICC faced multiple immunity challenges.<sup>69</sup> The question finally reached the

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64. *Id.*

65. *Id.*

66. *Id.* ¶ 39.

67. *See* GALAND, *supra* note 54, at 165.

68. *See* Press Release, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (Mar. 4, 2009), <https://www.icc-cpi.int/news/icc-issues-warrant-arrest-omar-al-bashir-president-sudan> [<https://perma.cc/5WQS-9Z8X>].

69. 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, ¶ 4 (Dec. 13, 2021), <http://www.legal-tools.org/doc/476812>; Prosecutor v. Al-Bashir, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, I CC-02/05-01/09, ¶¶ 18-19 (Apr. 9, 2014), <http://www.legal-tools.org/doc/89d30d/>; Prosecutor v. Al Bashir, Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ICC-02/05-01/09, ¶¶ 6-9 (June 13, 2015), <http://www.legal-tools.org/doc/c2dc80/>; Prosecutor v. Al-Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, ¶ 32 (July 6, 2017), <http://www.legaltools.org/doc/68ffc1/>; Prosecutor v. Al Bashir, Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, ICC-02/05-01/09, ¶ 14 (Dec. 11, 2017), <http://www.legal-tools.org/doc/5bdd7f/>. While the ICC denied al-Bashir immunity in each

Appeals Chamber in 2019, and its joint concurring opinion replicated the SCSL's position that "[t]he source of the jurisdiction that the court is meant to exercise is the ultimate element of its character as an international court."<sup>70</sup>

Differing from the SCSL, however, the Appeals Chamber, in *dicta*, described an international court as "an adjudicatory body that exercises jurisdiction at the behest of two or more states."<sup>71</sup> It went on to state that the source of international jurisdiction for such a court "is the collective sovereign will of the enabling States, expressed directly or through the legitimate exercise of mandate by an international body . . . or an international functionary . . ." <sup>72</sup>

The Chamber's reference to an indirect expression of will through an international body, such as the United Nations General Assembly,<sup>73</sup> or functionary, such as the UN Secretary General,<sup>74</sup> is presumably equivalent to the SCSL's pathway to international jurisdiction. Its reference, however, to a source of international jurisdiction arising from the direct expression of the sovereign will of states, against the backdrop of its prior definition of an international court exercising jurisdiction at the behest of as few as two states and contemplation that "[a]n international court may be regional . . . in orientation," suggests something quite different.<sup>75</sup> Rather than the SCSL's vision of international

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decision, it relied on a variety of justifications including, in the DRC and South Africa case, direct sources of authority for the waiver of immunity.

70. Prosecutor v. Al-Bashir, ICC-02/05-01/09-397-Anx1, Concurring Joint Opinion of Judges Eboe-Osuji, Morrison, Hofmanski, and Bossa, ¶ 58 (May 6, 2019), [https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019\\_02595.PDF](https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2019_02595.PDF) [<https://perma.cc/8668-JKSW>].
71. *Id.* ¶ 56.
72. *Id.* ¶ 58.
73. *See Workings of the General Assembly*, UNITED NATIONS, <https://www.un.org/en/ga/> [<https://perma.cc/JSZ3-NNFE>].
74. *The Role of the Secretary-General*, UNITED NATIONS, <https://www.un.org/sg/en/content/the-role-of-the-secretary-general> [<https://perma.cc/T7Q9-XCYP>].
75. Prosecutor v. Al-Bashir, ICC-02/05-01/09-397-Anx1, Concurring Joint Opinion of Judges Eboe-Osuji, Morrison, Hofmanski, and Bossa, ¶ 57 (May 6, 2019), <https://www.icc-cpi.int/sites/default/>

jurisdiction that flows from an all-inclusive international commitment, the ICC's language suggests that some subset of states may be able to constitute an international court, without approaching the universality of endorsement by the United Nations or its membership.<sup>76</sup>

Finally, there is an alternative basis, discernable from the literature, which posits an emerging principle of customary international law that denies immunity *ratione personae* for serious international crimes.<sup>77</sup> Sarah Nouwen,<sup>78</sup> for example, argues that immunity *ratione personae* should be “freed from the false distinction” between domestic and international courts.<sup>79</sup> Instead of demanding either a direct waiver of immunity<sup>80</sup> or for “international criminal courts [with] jurisdiction”<sup>81</sup> to overcome the waiver requirement, courts should focus on the possibility that immunity *ratione personae* is becoming inapplicable per se for international crimes.<sup>82</sup>

### *C. Models of an Aggression Tribunal*

Three main types of aggression tribunals are being discussed, and the establishment of any one of them will have implications for our future understanding of immunity *ratione personae*.<sup>83</sup> The

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files/RelatedRecords/CR2019\_02595.PDF [https://perma.cc/8668-JKSW].

76. *See id.* ¶ 373.

77. Sarah M. H. Nouwen, *The Special Court for Sierra Leone and the Immunity of Taylor: The Arrest Warrant Case Continued*, 18 LEIDEN J. INT'L L. 645, 658-68 (2005).

78. Sarah Nouwen is a professor of public international law at the European University Institute. *Sara Nouwen*, EUR. UNIV. INST., <https://www.eui.eu/people?id=sarah-maria-heiltjen-nouwen> [https://perma.cc/3GYG-N95H].

79. Nouwen, *supra* note 77, at 669.

80. *See id.* at 656.

81. *Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14).

82. Nouwen acknowledges that, at present, state practice does not reflect this, but nonetheless argues that by making its decision on this basis, the SCSL could have “contributed to the development of this emerging customary law.” Nouwen, *supra* note 77, at 664.

83. *See, e.g.*, Jennifer Trahan, *U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*, JUST SEC. (Mar. 7, 2022),

models under discussion involve a tribunal: (a) established by agreement between Ukraine and the UN General Assembly, the UNGA model;<sup>84</sup> (b) established by the Council of Europe, the CoE model;<sup>85</sup> or (c) established by agreement between Ukraine and a number of willing states, the Nuremberg model.<sup>86</sup>

If any state acts to support one of these models, let alone if a tribunal is actually established and issues indictments, states will be pressured to develop their views on whether an aggression tribunal can overcome an immunity *ratione personae* challenge. The publication of these legal views will put a significant thumb on the scale of competing visions of customary international law with respect to the prosecution of incumbent head of state officials by international courts.

The legal branches of foreign ministries whose governments oppose an aggression tribunal will likely produce legal interpretations concluding that absent state consent to the waiver of immunity or Chapter VII authority to override immunity, international courts cannot prosecute incumbent state officials.<sup>87</sup> If the effort to establish an aggression tribunal leads a significant number of states to produce legal interpretations along these lines, it will diminish the value of the existent and emerging customary international law on immunity *ratione personae* discussed above.<sup>88</sup>

Government lawyers in states that support the UNGA model will presumably draw on the SCSL jurisprudence to argue that customary international law does not preclude the prosecution of

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<https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/> [<https://perma.cc/947E-3HPW>].

84. *Id.*; Larry D. Johnson, *United Nations Response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SEC. (Mar. 1, 2022), <https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/> [<https://perma.cc/W2YH-4VFT>].
85. European Parliament, *supra* note 10.
86. STATEMENT AND DECLARATION CALLING FOR THE CREATION OF A SPECIAL TRIBUNAL FOR THE PUNISHMENT OF THE CRIME OF AGGRESSION AGAINST UKRAINE, *supra* note 7.
87. *See* CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 288 (updated ed., 2021).
88. *See supra* notes 71-87 and accompanying text.

incumbent state officials where an international court is exercising jurisdiction stemming from the will of the international community as a whole, as expressed through the UN General Assembly. For states supporting the CoE or Nuremberg models, their lawyers will downplay this language and instead highlight the joint concurrence in the ICC's 2019 decision, to counter concerns about the lack of international inclusivity in those models. And finally, legal branches in states seeking to endorse any one of the models could issue a statement identifying the emergence of a customary international law norm to deny immunity *ratione personae* for the crime of aggression per se.

Though gratifying for victims and survivors of aggression,<sup>89</sup> this latter approach could ultimately bring unwanted consequences for the development of international law. Here, the situation involves prosecuting President Putin for what is widely acknowledged as a brazen and egregious violation of international law.<sup>90</sup> But if the nature of the crime allegedly perpetrated is the only barrier to the inapplicability of immunity *ratione personae*, then there is nothing to stop politically motivated and frivolous charges of international crimes against any incumbent officials from moving forward in the future. Taken to its most cynical conclusion, this would undermine the sovereign equality of states, resulting in exactly the scenario that the development of immunity *ratione personae* first sought to avoid.

## II: SCOPE OF LIABILITY FOR AGGRESSION

The charging decisions made by an aggression tribunal will influence future understandings of how far the scope of liability for aggression extends. As noted, aggression is a leadership crime.<sup>91</sup> However, the question of which categories of actors fall inside that leadership circle has been subject to controversy.<sup>92</sup>

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89. Oona Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/> [<https://perma.cc/KV6T-TWR5>].

90. See GOODMAN & HAMILTON, *supra* note 4; OPEN SOC'Y JUST. INITIATIVE, *supra* note 5.

91. Heller, *supra* note 20.

92. See, e.g., *id.* at 497; MCDUGALL, *supra* note 87, at 389.



At Nuremberg, private industrialists in both the *Farben*<sup>93</sup> and *Krupp*<sup>94</sup> cases were charged with crimes against the peace, what we now call aggression.<sup>95</sup> Though acquitted, the tribunal emphasized that this was not because of their status as private actors.<sup>96</sup> In the decades between Nuremberg and the adoption of the aggression amendment to the Rome Statute,<sup>97</sup> the parameters around the definition tightened considerably.<sup>98</sup> While the judgments in several Nuremberg trials referred to the requirement that a perpetrator of aggression “shape or influence” policy, the Rome Statute requires that a perpetrator is in “a position to effectively assert control over or to direct the political or military action of a State.”<sup>99</sup> Assuming any aggression tribunal would follow the Rome Statute definition, this would seem to limit the range of actors to those who are state officials.<sup>100</sup> Even within that

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93. KEVIN J. HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 179 (2011).
94. *Id.*
95. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (defining crimes against peace).
96. *See Opinion and Judgment of the United States Military Tribunal VI, in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 1081, 1125-26 (1952); Order of the Tribunal Concerning Its Dismissal of the Charges of Crimes Against Peace, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No 10 390, 393 (1950).*
97. PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS ET AL., *RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS ON THE CRIME OF AGGRESSION TO THE ROME STATUTE OF THE ICC HANDBOOK 1* (3rd ed., 2019).
98. *See MacKennan Graziano & Lan Mei, The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability*, 58 HARV. INT’L L. J. ONLINE 55, 55 (2017), <https://harvardilj.org/2017/04/the-crime-of-aggression-under-the-rome-statute-and-implications-for-corporate-accountability/> [<https://perma.cc/JE3B-A2JF>].
99. For a list of citations to the “shape or influence” requirement within the Nuremberg jurisprudence, see Heller, *supra* note 20, at 486. The control or direct standard is enshrined in the Rome Statute, *supra* note 6, art. 8(1).
100. *See* Graziano & Mei, *supra* note 104.

circle, however, there is considerable scope for prosecutorial discretion to determine how far to cast the liability net.<sup>101</sup>

Decisions on who to charge will inevitably stem from some mix of principled and pragmatic considerations. It may make sense for an aggression tribunal to adopt the policy approach of the ICC Office of the Prosecutor and focus on those “most responsible.”<sup>102</sup> This would suggest that, in a world of limited resources, indictments are pursued against President Putin and one or two of his senior officials. Alternatively, adherents of deterrence theory<sup>103</sup> may argue in favor of charging as widely as possible.<sup>104</sup> Should the latter argument win the day, this could push against the Rome Statute’s narrow construction of those potentially liable for aggression.<sup>105</sup> And while decisions by an aggression tribunal would not create precedent for the ICC in the formal sense,<sup>106</sup> it is hard to imagine that the first effort to prosecute aggression since the end of World War II would not be carefully studied by those working at the ICC.

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101. For a thoughtful example of where these lines could be drawn, see OPEN SOC’Y JUST. INITIATIVE, *supra* note 5, ¶¶ 2-34. As readers will be aware, prosecutorial discretion in charging decisions is a perennial point of controversy for international criminal tribunals. *See, e.g.*, Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT’L CRIM. JUST. 124, 142 (2005); Philippa Webb, *The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice,”* 50 CRIM. L. Q. 305, 323-24 (2005).

102. *Office of the Prosecutor*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/otp> [perma.cc/P5GE-DN6S].

103. *See* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L. J. 473, 475 (1999).

104. On the other hand, Carrie McDougall argues that deterrence goals may be “best met by characterising aggression as something of a ‘special’ category of crime with a very narrow focus, in order to maximise the potential to give pause for thought to those who actually make decisions about the use of force.” MCDUGALL, *supra* note 87, at 232. The validity of deterrence theory in general, but in international criminal law particularly is its own topic of ongoing debate. *See, e.g.*, Wippman, *supra* note 103.

105. *See* McDougall, *supra* note 87, at 232.

106. *See* Christopher Greenwood, *What the ICC Can Learn from the Jurisprudence of Other Tribunals*, 58 HARV. INT’L L. J. ONLINE 72, 72 (2017).

Pragmatically, of course, Putin is the defendant who will be the hardest to secure custody of, at least in the short-medium term.<sup>107</sup> For some, this reality will point in favor of pursuing officials, perhaps high-level military commanders visiting Ukraine, over whom an aggression tribunal may have a chance to bring into custody.<sup>108</sup> For others, the expressive power of an indictment matters more than the question of whether or not custody can be secured.<sup>109</sup> Moreover, the optics would be galling if an aggression tribunal proceeded to trial against a comparatively lesser-ranked official while failing to indict Putin for a war that he launched.

Prosecutorial discretion has long been the subject of contention within international criminal law.<sup>110</sup> And reasonable minds will differ on what is the best approach to take. But whatever direction an aggression tribunal pursues, it will inform the very limited practice that now exists on the question of the scope of liability for aggression.<sup>111</sup>

### III: SCOPE OF THE CRIME OF AGGRESSION

Finally, future understandings of the scope of the crime of aggression itself will be affected simply by the temporal jurisdiction assigned to any aggression tribunal in its constitutive document. Should temporal jurisdiction begin on February 24,

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107. See Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> [<https://perma.cc/CEV4-VMNQ>].
108. Jacqueline Thomsen & Mike Scarcella, *Explainer: How Could Russia's Putin Be Prosecuted for War Crimes in Ukraine?*, REUTERS, <https://www.reuters.com/world/how-could-russias-putin-be-prosecuted-war-crimes-ukraine-2022-04-04/> (Apr. 4, 2022, 3:32 P M) [<https://perma.cc/57XN-WQ9Q?type=image>].
109. Public International Law & Policy Group, *Expert Roundtable: Putin: Pathways to Prosecution*, YOUTUBE (June 7, 2022), <https://www.youtube.com/watch?v=X0iYC5gX9jM>.
110. See *e.g.*, Webb, *supra* note 101, at 305.
111. Nikola Hajdin, *The Leadership Clause in the Crime of Aggression and Its Customary International Law Status*, JUST SEC. (Mar. 17, 2022), <https://www.justsecurity.org/80696/the-leadership-clause-in-the-crime-of-aggression-and-its-customary-international-law-status/> [<https://perma.cc/EE9R-KX9U>].

2022,<sup>112</sup> this would signal that international criminal law is focused on aggression that comes in the form of a full-scale invasion.<sup>113</sup> Of course, there is nothing even in the narrow ICC definition of aggression to suggest that has to be the case - many lesser acts of aggression are subject to criminal liability.<sup>114</sup> But by starting the clock on the day of the full-scale invasion, such temporal jurisdiction necessarily devalues the perceived significance of Russia's acts of aggression prior to February 24, 2022.

The implications of this seemingly discrete detail are, potentially, enormous. This decision could generate a scenario in which the February 24, 2022, invasion becomes the 'gold standard' by which not just lawyers, but also the broader public, assess future acts of aggression. Again, there is nothing in law per se that makes this inevitable, but it is reasonable to expect that the first effort to prosecute Russia's aggression will attract major media coverage.<sup>115</sup> This attention, even if no trial ever goes forward, is likely to anchor the February 24, 2022, invasion in the minds of many as the prototype for what aggression looks like.

A sobering analogy comes from the field of critical genocide studies. There, the Holocaust - despite never actually being prosecuted as a genocide at Nuremberg - has become the prototype against which other atrocities are evaluated.<sup>116</sup> Atrocities that "look like" the Holocaust are more readily acknowledged as genocide, while atrocities that fail to conform to the model of the Holocaust are discounted, even when the legal requirements are met.<sup>117</sup>

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112. *Timeline: The Events Leading up to Russia's Invasion of Ukraine*, REUTERS, <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/> (Mar. 1, 2022, 4:03 AM) [<https://perma.cc/X5RG-AYZL>].

113. *See generally* Trahan, *supra* note 83.

114. *See* Rome Statute, *supra* note 6, art. 8.

115. *See generally* Kirsten Eddy & Richard Fletcher, *Perceptions of Media Coverage of the War in Ukraine*, REUTERS INST. (June 15, 2022), <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2022/perceptions-media-coverage-war-Ukraine> [<https://perma.cc/6WNK-SSFD>].

116. Alexander Laban Hinton, *Critical Genocide Studies*, 7 GENOCIDE STUD. & PREV. INT'L J. 4, 6-7 (2012).

117. "The Holocaust will forever remain the archetypal frame of reference for taking the measure of human perversity. But . . .

If the temporal jurisdiction of an aggression tribunal began in 2014, enabling the tribunal to investigate acts from Russia's annexation of Crimea onwards, the tribunal would mitigate the risk of establishing a full-scale invasion as the standard against which future accountability efforts are initiated. This temporal jurisdiction determination would help future prosecutions avoid the prejudice non-Holocaust-like genocides receive. Should such a case ever proceed to trial, the judgment of the tribunal itself will influence future understandings of the scope of aggression for the purposes of prosecution.

### CONCLUSION

The preceding analysis began to flesh out the significant implications for international law that would flow from the establishment of an aggression tribunal. In the process, it brought into stark relief the embryonic stage that issues of head of state immunity for international crimes are at under customary international law.

Writing six months after Russia's full-scale invasion, however, and with the war showing no sign of ending in the months ahead, the reality is that the attention of rest of the world, so striking early on, is now starting to wane.<sup>118</sup> The Ukrainian government remains committed to seeing an aggression tribunal established, and given Ukraine's defiance of the odds throughout this crisis,<sup>119</sup> one should not underestimate the ability

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fixation on the Holocaust is likely to deflect our attention from the similarly horrendous crimes that preceded (and followed) the Jewish apocalypse." *Preface, in FORGOTTEN GENOCIDES: OBLIVION, DENIAL, AND MEMORY* vii, viii (René Lemarchand ed., 2011).

118. See Dan Sabbagh, *Ukraine Fears Western Support Will Fade as Media Loses Interest in the War*, THE GUARDIAN (June 12, 2022, 3:00 AM), <https://www.theguardian.com/world/2022/jun/12/ukraine-fears-western-support-will-fade-as-media-loses-interest-in-the-war> [<https://perma.cc/YXG7-MKT9>].
119. Jonathan Guyer, *What Comes Next in Ukraine's Fight against Russia*, VOX, <https://www.vox.com/policy-and-politics/2022/10/1/23380326/future-ukraine-russia-war> (Oct. 3, 2022, 10:45 AM) [<https://perma.cc/M9T4-UWZD>]; *In Brussels, Ukraine Seeks Backing for Special War Crimes Tribunal*, REUTERS, <https://www.reuters.com/world/europe/brussels-ukraine-seeks-backing-special-war-crimes-tribunal-2022-09-05/> (Sept. 5, 2022, 1:51 PM) [<https://perma.cc/8NTA-WP4S>].

to their leadership to bring such a tribunal into being.<sup>120</sup> Still, it is more likely than not that the accountability goals of the Ukrainian people with respect to aggression will ultimately be channeled through other means.

At a minimum, the ICC Prosecutor should highlight that any war crimes charges his office brings took place within the context of a war of aggression. While better than nothing, such a second-best option would reflect the reality that international law operates within the constraints of politics and power. That does not change the fact that Putin's aggression in Ukraine is criminal, whether or not he ever faces prosecution.

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120. See Anderson, *supra* note 14.

