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## Prosecuting Russian Leaders for War Crimes (Oct. 24, 2021 Broadcast)

Talking Foreign Policy

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## TALKING FOREIGN POLICY: “PROSECUTING RUSSIAN LEADERS FOR WAR CRIMES”

OCTOBER 24, 2021 BROADCAST

Launched in 2012, “Talking Foreign Policy” is a one-hour radio program, hosted by CWRU School of Law Co-Dean Michael Scharf, in which experts discuss the salient foreign policy issues of the day. It airs quarterly on WKSU 89.7 FM in Cleveland and is webcast live for world-wide listening at Ideastream. Archived broadcasts can be accessed anytime through the School of Law YouTube page.<sup>1</sup> Starting in September 2021, Talking Foreign Policy is also available as a podcast. This transcript was created and footnotes added by Senior Cox Center Fellows William Baker and Elise Manchester, and Grotian Scholars Elizaveta Julian, Gregory Nitz, and Brianna Schmidt.

**Michael Scharf:** Russia’s invasion of Ukraine has shocked the conscience of humanity. Daily reports of Russian atrocities appear in the news. We have seen videos of bombed out apartment buildings, schools, hospitals, theaters, and churches.<sup>2</sup> We have heard accounts of torture chambers, mass graves, and bodies bound and shot execution style.<sup>3</sup> Evidence is mounting

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1. See Case W. Rsrv. Univ. Sch. L., Talking Foreign Policy Playlist, YOUTUBE, [www.youtube.com/playlist?list=PLOWPmlciK6gkZl-Xfuk0oBc9a3aRX2WMd](http://www.youtube.com/playlist?list=PLOWPmlciK6gkZl-Xfuk0oBc9a3aRX2WMd) (Oct. 25, 2022).
  2. See, e.g., Katie Polglase et al., *Anatomy of the Mariupol Hospital Attack*, CNN (Mar. 17, 2022), [www.cnn.com/interactive/2022/03/europe/mariupol-maternity-hospital-attack/index.html](http://www.cnn.com/interactive/2022/03/europe/mariupol-maternity-hospital-attack/index.html) [<https://perma.cc/Q3RC-4BPB>]; Jason Dearen et al., *War Crimes Watch: Targeting Ukraine Schools, Russia Bombs the Future*, PBS (May 17, 2022), [www.pbs.org/wgbh/frontline/article/war-crimes-watch-ukraine-russia-targets-schools-bombs-future/](http://www.pbs.org/wgbh/frontline/article/war-crimes-watch-ukraine-russia-targets-schools-bombs-future/) [<https://perma.cc/BUN3-MCAY>]; Andrew Carey et al., *300 People Were Killed in Russian Airstrike on Mariupol Theater, Ukrainian Authorities Say*, CNN, [www.cnn.com/2022/03/25/europe/ukraine-mariupol-theater-dead-intl/index.html](http://www.cnn.com/2022/03/25/europe/ukraine-mariupol-theater-dead-intl/index.html) (Mar. 25, 2022, 2:24 PM) [<https://perma.cc/PTR7-RCU6>].
  3. See, e.g., Adam Schreck et al., *Police: More than 900 Civilian Bodies Found in Kyiv Region*, AP NEWS (Apr. 15, 2022), <https://apnews.com/article/russia-ukraine-zelensky-kyiv-business-black-sea-22d7279f32c15d4a7037a2195113fb57> [<https://perma.cc>

that this is part of a plan to ethnically cleanse eastern Ukraine and intimidate [the] Ukrainian population into submission.<sup>4</sup> Worldwide cries for accountability are deafening. But are Vladimir Putin and other Russian leaders beyond the reach of International Criminal law? I'm Michael Scharf, Dean of Case Western Reserve University School of Law.<sup>5</sup> In this broadcast of *Talking Foreign Policy*,<sup>6</sup> I've assembled a panel of leading experts to discuss the options and obstacles to bringing Russian leaders to justice, right after the news.

[STATION BREAK]

**Michael Scharf:** Welcome to *Talking Foreign Policy*. I am your host Michael Scharf, Dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will be discussing the options and obstacles to bringing Russian leaders to justice for the crime of aggression and war crimes in the Ukraine. In our first segment, we will discuss the international crimes that have been committed and the possibilities of prosecuting [them] in national courts. In the second segment, we will examine the prospects of prosecuting war crimes, crimes against humanity, and even genocide in the International Criminal Court. And, in the final segment, we will explore proposals to create a special international tribunal to

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/UMD6-6LNG]; *Ukraine War: Ukraine Investigates Alleged Execution of Civilians by Russians*, BBC (Apr. 4, 2022), [www.bbc.com/news/world-europe-60981228](https://www.bbc.com/news/world-europe-60981228) [https://perma.cc/K6K3-8XL5]; *Ukraine: Executions, Torture During Russian Occupation*, HUM. RTS. WATCH (May 18, 2022, 8:00 AM), [www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation](https://www.hrw.org/news/2022/05/18/ukraine-executions-torture-during-russian-occupation) [https://perma.cc/5XKS-VTS6].

4. See KAROLINA HIRD ET AL., INST. FOR THE STUDY OF WAR, RUSSIAN OFFENSIVE CAMPAIGN ASSESSMENT, OCTOBER 15 (2022), <https://understandingwar.org/sites/default/files/Russian%20Offensive%20Campaign%20Assessment%2C%20October%202015.pdf> [https://perma.cc/ZJ73-CMV4].
5. Michael Scharf is a co-dean of Case Western Reserve University School of Law and the Joseph C. Hostetler—Baker Hostetler Professor Law. He has written and published extensively in the area of international law.
6. See generally *Talking Foreign Policy*, CASE W. RSRV. UNIV. SCH. OF LAW, <https://case.edu/law/centers-institutes/cox-international-law-center/talking-foreign-policy> [https://perma.cc/H3VZ-E2KD].

prosecute the crime of aggression. For the program today, I have assembled a panel of individuals intimately involved in various efforts to prosecute Russian atrocities. Joining us once again from the nation's capital is Doctor Paul Williams,<sup>7</sup> the President of the Public International Law & Policy Group, a Nobel Peace Prize nominated non-governmental organization.<sup>8</sup> Paul's NGO has interviewed hundreds of Ukrainian refugees in Poland to document war crimes.<sup>9</sup> And we are so glad to have you back here today, Paul.

**Paul Williams:** Great, thanks Mike! I am excited to be back.

**Michael Scharf:** And from Asheville, North Carolina, we have a special guest, David Crane,<sup>10</sup> the former Chief Prosecutor of the Special Court for Sierra Leone. David has produced a draft indictment of Russian leaders<sup>11</sup> and a statute for a tribunal to prosecute Russia's crime of aggression.<sup>12</sup> Dave, it has been a

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7. Paul Williams is a Professor at American University Washington College of Law. He is also the president of PILPG, a Nobel-Peace-Prize-nominated NGO that has provided legal counsel in a dozen peace negotiations over the past twenty-two years.
  8. PILPG is a global pro bono law firm that provides free legal services for peace negotiations and post-conflict, war-crimes prosecution, and transitional justice issues. *See generally Public International Law & Policy Group*, PUB. INT'L L. & POL'Y GRP., [www.publicinternationalallawandpolicygroup.org/](http://www.publicinternationalallawandpolicygroup.org/) [<https://perma.cc/JXF9-UY7H>].
  9. *See The Ukraine Accountability Initiative*, UKR. TRANSITIONAL JUST. & DOCUMENTATION, <https://www.ukrainetjdoc.org/ukraine-accountability-initiative-information-page-en> [<https://perma.cc/P5AJ-G4HT>].
  10. David Crane is a world-renowned jurist and international prosecutor with vast experience in the fields of international criminal law, national security law, and international law. Before his retirement in 2018, Crane was a professor of international law at Syracuse University College of Law from 2006. He is the former Chief Prosecutor of the Special Court for Sierra Leone.
  11. *See KELLY ADAMS ET AL., THE GLOB. ACCOUNTABILITY NETWORK, RUSSIAN WAR CRIMES AGAINST UKRAINE: THE BREACH OF INTERNATIONAL HUMANITARIAN LAW BY THE RUSSIAN FEDERATION* app. A, (Kelly Adams et al. eds., 2022) [hereinafter *Draft Indictment of Russian Leaders*], <https://syrianaccountabilityproject.syr.edu/docs/russian-war-crimes-against-ukraine-the-global-accountability-network.pdf> [<https://perma.cc/Y9DN-R7NC>].

few years since you've appeared on Talking Foreign Policy. It is so good to have you back.

**David Crane:** It's great to be back and greetings from the Smoky Mountains.

**Michael Scharf:** And joining us for the first time from New York City is Jennifer Trahan.<sup>13</sup> She's a Professor of Global Affairs at NYU and Head of the Global Institute for the Prevention of Aggression. Jennifer has been assisting the ambassador of Liechtenstein in drafting a proposal for a tribunal to prosecute the crime of aggression.<sup>14</sup> Welcome to Talking Foreign Policy, Jen.

**Jennifer Trahan:** Thanks Michael. It's great to be here.

**Michael Scharf:** And then, with me in the Ideastream Studio here in Cleveland, is Professor Milena Sterio, a chaired international law Professor at Cleveland State University College of Law.<sup>15</sup> And Milena joined me in February in making an amicus argument before the Appeals Chamber of the International Criminal Court in the Hague,<sup>16</sup> so she's a super expert at the ICC. It is good to have you back on the program, Milena.

**Milena Sterio:** It's a pleasure to be back here, Michael.

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12. HANS CORELL ET AL., UKR. TASK FORCE OF THE GLOB. NETWORK, PROPOSAL FOR A RESOLUTION BY THE UNITED NATIONS GENERAL ASSEMBLY & ACCOMPANYING PROPOSAL FOR A SPECIAL TRIBUNAL FOR UKRAINE ON THE CRIME OF AGGRESSION 7 (Rohan Bhattacharjee et al. eds., 2022) [hereinafter Draft Statute for Ukraine Tribunal], [www.globalaccountabilitynetwork.org/\\_files/ugd/a982f0\\_c9fb874d8cf14270b3c5fd0a1bfb4971.pdf](http://www.globalaccountabilitynetwork.org/_files/ugd/a982f0_c9fb874d8cf14270b3c5fd0a1bfb4971.pdf) [<https://perma.cc/MFF2-5KP4>].
  13. Jennifer Trahan is a Professor at NYU's Center for Global Affairs and Director of their Concentration in International Law and Human Rights. She is an internationally renowned expert on international law and international justice.
  14. See Permanent Reps. of Latvia, Lichtenstein, and Ukraine to the U.N., Letter dated Aug. 12, 2022 from Representatives of Latvia, Liechtenstein and Ukraine to the United Nations Addressed to the Secretary-General, at 6, U.N. Doc. A/ES-11/7 (Aug. 17, 2022).
  15. Milena Sterio is a chaired professor at Cleveland-Marshall College of Law and an expert in international law.
  16. See Prosecutor v. Ongwen, ICC-02/04-01/15 A, *Amicus Curiae* Observations by Public International Law & Policy Group, ¶ 1 (Dec. 23, 2021), [www.icc-cpi.int/sites/default/files/CourtRecords/CR2021\\_11922.PDF](http://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_11922.PDF) [<https://perma.cc/KV25-QTQS>].

**Michael Scharf:** So, let's kick things off. I'm going to ask Paul Williams to start by summarizing the Russian invasion and the state of the war in Ukraine.

**Paul Williams:** Well, Michael, this has been a phenomenal eight years of angst and aggression by the Russians against the independent state of Ukraine. Back in February of 2014 the Russians invaded and then annexed Ukrainian territory of Crimea,<sup>17</sup> followed shortly thereafter, in April of 2014, where they sought to occupy substantial parts of the Donbas region.<sup>18</sup> And then, most recently, as we've all been aware of, on February 24th of this year they launched an all-out attack essentially trying to occupy the whole of Ukraine.<sup>19</sup> The Ukrainians pushed back. They effectively defended Kiev and defended other territories,<sup>20</sup> and then began to roll back the advances of the Russians.<sup>21</sup> We saw just recently the Ukrainians made an attack, a strategically militarily important attack, on the supply bridge from Russian mainland territory to the annexed Crimea.<sup>22</sup> And then, recently, the Russians have been responding with indiscriminate attacks on train stations and

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17. Steven Pifer, *Crimea: Six Years After Illegal Annexation*, BROOKINGS INST. (Mar. 17, 2020), [www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/](http://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/) [<https://perma.cc/UG4C-Y9WN>].
  18. Mark Fisher, *Everything You Need to Know About the 2014 Ukraine Crisis*, VOX (Sept. 3, 2014, 11:01 AM), <https://www.vox.com/2014/9/3/18088560/ukraine-everything-you-need-to-know> [<https://perma.cc/H36B-QSYQ>].
  19. Holly Ellyatt, *Russian Forces Invade Ukraine*, CNBC, [www.cnn.com/2022/02/24/russian-forces-invade-ukraine.html](http://www.cnn.com/2022/02/24/russian-forces-invade-ukraine.html) (Feb. 24, 2022, 11:38 AM) [<https://perma.cc/MCB4-464K>].
  20. See Paul Sonne et al., *Battle for Kyiv: Ukrainian Valor, Russian Blunders Combined to Save the Capital*, WASH. POST (Aug. 24, 2022, 2:00 AM), [www.washingtonpost.com/national-security/interactive/2022/kyiv-battle-ukraine-survival/](http://www.washingtonpost.com/national-security/interactive/2022/kyiv-battle-ukraine-survival/) [<https://perma.cc/GG38-FW6V>].
  21. See *Maps: Tracking the Russian Invasion of Ukraine*, N.Y. TIMES, [www.nytimes.com/interactive/2022/world/europe/ukraine-maps.html](http://www.nytimes.com/interactive/2022/world/europe/ukraine-maps.html) (Jan. 25, 2023) [<https://perma.cc/RKH5-V2VS>].
  22. See *Factbox: Crimeas Bridge Blast – Why Is Bridge Important and What Happened to It*, REUTERS, [www.reuters.com/world/europe/bridge-linking-russia-crimean-peninsula-2022-10-08/](http://www.reuters.com/world/europe/bridge-linking-russia-crimean-peninsula-2022-10-08/) (Oct. 10, 2022, 10:34 AM) [<https://perma.cc/QC36-FMPZ>].

other areas throughout Ukraine,<sup>23</sup> essentially amounting to atrocity crimes.

**Michael Scharf:** Well, Paul, all wars are messy and there are always some war crimes, but this one seems to be showing the Russians' particular brand of cruelty. Let me turn to Professor Milena Sterio. Can you tell us what international crimes appear to have been committed by Russian nationals in this conflict and how are these crimes being documented?

**Milena Sterio:** Several grave international crimes seem to have been committed. First of all, aggression. Under international law, aggression is defined as use of armed force by a state against the sovereignty territorial integrity or political independence of another state.<sup>24</sup> It is crystal clear in this instance that Russia has used armed forces against the sovereignty, territorial integrity, or political independence of Ukraine. It also appears that Russian troops have committed war crimes such as, for example, crimes of sexual violence, torture, other mistreatment of civilians as well as prisoners of war, and they have also conducted indiscriminate shellings of civilian objectives.<sup>25</sup> Russian troops probably also committed crimes against humanity, which are crimes committed on a widespread and systematic basis against Ukrainian civilians.<sup>26</sup> And finally, there have been allegations of genocide.<sup>27</sup> Now, these crimes are being documented by various domestic and international civil society organizations as well as non-

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23. *See Putin Unleashes Barrage of Missiles on Ukrainian Civilian Areas*, N.Y. TIMES, [www.nytimes.com/live/2022/10/10/world/russia-ukraine-war-news](http://www.nytimes.com/live/2022/10/10/world/russia-ukraine-war-news) (Oct. 11, 2022) [<https://perma.cc/MB36-AL54>].

24. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

25. Amanda Macias, *UN Report Details Horrifying Ukrainian Accounts of Rape, Torture and Executions by Russian Troops*, C NBC, [www.cnbc.com/2022/10/28/russia-ukraine-war-un-report-details-accounts-of-rape-torture-and-executions.html](http://www.cnbc.com/2022/10/28/russia-ukraine-war-un-report-details-accounts-of-rape-torture-and-executions.html) (Oct. 29, 2022, 12:39 PM) [<https://perma.cc/C4RG-FQMD>].

26. Rome Statute, *supra* note 24, art. 7, ¶ 1.

27. *See* Ashish Kumar Sen, *Is Russia Committing Genocide in Ukraine?*, U.S. INST. OF PEACE (Sept. 21, 2022), [www.usip.org/publications/2022/09/russia-committing-genocide-ukraine](http://www.usip.org/publications/2022/09/russia-committing-genocide-ukraine) [<https://perma.cc/88Q4-SPB7>].

governmental organizations.<sup>28</sup> One such non-governmental organizations conducting documentation is the Public International Law & Policy Group and both Professor Paul Williams and I are involved in those efforts.

**Michael Scharf:** Oh, I want to follow up on this crime of genocide. It's sometimes called "the crime of all crimes."<sup>29</sup> I think it's pretty clear just from the videos we're seeing that war crimes and crimes against humanity are being committed. But Milena, what is the definition of genocide and why do you think that there might be a case for that crime being committed?

**Milena Sterio:** Genocide is a particularly difficult crime to prove and to prosecute because it requires that the perpetrator have specific intent to kill or harm members of a national, ethnic, racial, or religious group on account of their membership in this group.<sup>30</sup> And so, as a prosecutor, you really have to prove that there is such a specific intent to commit these crimes against members of one of these protected groups. Here, we have recently seen footage on Russian television of Russian officials publicly saying how Ukrainians need to be exterminated essentially and so that would be the evidence, if I were the Prosecutor.<sup>31</sup> You know, you could use that evidence as evidence of this genocidal intent or at least as evidence of incitement to commit genocide. If I draw a parallel to another situation, I would compare this to Rwanda, where in the context of the Rwandan genocide, we had public broadcasting messages calling for one of the ethnic groups to kill members of the other.<sup>32</sup>

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28. Anya Neistat, *Victims of War Crimes in Ukraine Have an Unprecedented Chance to Seek Justice*, THE GUARDIAN (July 24, 2022, 4:00 AM), [www.theguardian.com/commentisfree/2022/jul/24/war-crimes-ukraine-investigations-justice](http://www.theguardian.com/commentisfree/2022/jul/24/war-crimes-ukraine-investigations-justice) [<https://perma.cc/K3LV-N5B6>].
  29. *E.g.*, NICOLE RAFTER, THE CRIME OF ALL CRIMES: TOWARD A CRIMINOLOGY OF GENOCIDE (2016).
  30. *See* Rome Statute, *supra* note 24, art. 6.
  31. *See* Ishaan Tharoor, *The Russian Rhetoric that Adds Weight to Charges of 'Genocide'*, WASH. POST (Apr. 6, 2022, 12:01 AM), [www.washingtonpost.com/world/2022/04/06/genocide-claims-ukraine-russia-zelensky/](http://www.washingtonpost.com/world/2022/04/06/genocide-claims-ukraine-russia-zelensky/) [<https://perma.cc/TJ3A-ASSH>].
  32. *See* *Rwanda Radio Transcripts*, CONCORDIA UNIV.: MONTREAL INST. FOR GENOCIDE & HUM. RTS. STUD., [www.concordia.ca/content/concordia/en/research/migs/resources/rwanda-radio-transcripts.html](http://www.concordia.ca/content/concordia/en/research/migs/resources/rwanda-radio-transcripts.html) [<https://perma.cc/3MWQ-JJ7A>].



**Michael Scharf:** And now let's go to the Smoky Mountains and turn to our Chief Prosecutor David Crane. David, you've prepared draft indictments for several Russian leaders.<sup>33</sup> Can you summarize a few of those for us and tell us about the theories of liability for those?

**David Crane:** I'm glad to, Michael. And, again, it's just great to be talking to all of you. We haven't seen these kinds of tactics since World War II. The old Soviet army, now the Russian army, uses tactics that [are] almost barbaric. That's the way they do things. They're clearly violating many international norms and statutes. But clearly, in the laws of armed conflict, the Russian army has totally ignored it. And as we were putting together our sample indictments for the world to consider, it was very easy to show that Vladimir Putin, as the head of state and also the commander of all the armed forces, all the way down to commanders in the field, who are committing war crimes and totally ignoring the rule of law. Of course, their soldiers are following this terrible example. And so, we're seeing widespread attacks on civilians, civilian targets, and protected places, in violation of the laws of armed conflict. So, there are the gravamen that you'll find in the sample indictments.<sup>34</sup> And they're ignoring all of those cautions.<sup>35</sup>

**Michael Scharf:** So, Dave, I can understand indicting the military leaders and even Vladimir Putin who is commander in chief like our president. But I remember that one of your indictments was about the foreign minister Sergey Lavrov.<sup>36</sup> What's your theory of liability for him?

**David Crane:** Well, again Lavrov gets sucked into—at a minimum—aiding and abetting aggression.<sup>37</sup> And I think that a

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33. See Draft Indictment of Russian Leaders, *supra* note 11.

34. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

35. *The Geneva Conventions: How Russia Breaches Them and Blames Ukraine for It. VoxCheck Explains*, VOX UKR. (Mar. 14, 2022), <https://voxukraine.org/en/the-geneva-conventions-how-russia-breaches-them-and-blames-ukraine-for-it-voxcheck-explains/> (explaining how Russia has violated the Geneva convention) [<https://perma.cc/J4KU-HQ9M>].

36. Draft Indictment of Russian Leaders, *supra* note 11, at 145.

37. See generally Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593 (2019).

kind of a cutting-edge theory of liability that we put into the sample indictments regarding aggression was that this brings in not only the military aspect of this aggression, but also the political leadership that surrounds Putin.<sup>38</sup> So, you know, Vladimir Putin as President and Commander in Chief of the armed forces clearly is committing international crimes and aggression. But those around him—the National Security Advisor, the Minister of Defense, the Foreign Minister Lavrov—they're all along with the senior commanders in the field, aiding and abetting aggression, which is really the core international offense of the invasion.

**Michael Scharf:** And everything flows from that. Let me go to Paul Williams and ask you, I know that Ukraine has prosecuted some low-level people that just fell into its custody,<sup>39</sup> but can leaders of Russia be prosecuted in domestic courts in Ukraine and other countries throughout Europe?

**Paul Williams:** Michael, there's a legal and a practical dimension to your question. Legally, yes; the Ukrainians have the legal authority to prosecute any individual who has committed atrocity crimes including Putin, Lavrov, [and] senior generals of the Russian military.<sup>40</sup> As you've noted, they've already had ten successful war crimes prosecutions.<sup>41</sup> There're two difficulties, though, with this. The first of which is the perception of legitimacy, which I would not overstate, but it's oftentimes important to have an international tribunal to establish that legitimacy or reflect that legitimacy. And the second is expertise. The Ukrainians have highly skilled phenomenal prosecutors, but no one except for these last ten, have ever prosecuted someone for war crimes before.<sup>42</sup> You and I have talked about this on other programs. It's not something that people specialize in domestically because it's so rare.

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38. Draft Indictment of Russian Leaders, *supra* note 11.

39. Gaiane Nuridzhanian, *Prosecuting War Crimes: Are Ukrainian Courts Fit to Do It?*, EJIL: TALK! (Aug. 11, 2022), [www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/](http://www.ejiltalk.org/prosecuting-war-crimes-are-ukrainian-courts-fit-to-do-it/) [<https://perma.cc/7MFY-935M>].

40. *See id.*

41. *See Ukraine Probing Almost 26,000 Suspected War Crimes Cases*, REUTERS, [www.reuters.com/world/europe/ukraine-probing-almost-26000-suspected-war-crimes-cases-prosecutor-2022-08-07/](http://www.reuters.com/world/europe/ukraine-probing-almost-26000-suspected-war-crimes-cases-prosecutor-2022-08-07/) (Aug. 7, 2022, 10:41 AM) [<https://perma.cc/2ZD6-RU99>].

42. *See* Nuridzhanian, *supra* note 39.

Unfortunately, it's a little less rare than we would like it to be. So yes, the Ukrainians have the legal authority to do it but it's a fairly substantial ask.

**Michael Scharf:** And let me turn to Jennifer. Can the Russian President and the foreign minister be prosecuted by a domestic court outside of Russia or is that blocked by something called head of state immunity?

**Jennifer Trahan:** Thanks for that question, Michael. Yes, you hit the nail on the head. We say that aggression is a leadership crime. So, you're looking for those who planned, prepared, initiated, or executed the crime.<sup>43</sup> Those are going to be high level political or military leaders. That's at least under the international definition. And we do hit this issue of potential head of state immunity at least before national courts.<sup>44</sup> So, this could be an issue both in Ukraine and in other countries, such as if courts in some of the European countries have opened investigations and these could be precluded. There was this case called *Yerodia* from the International Court of Justice suggesting that result.<sup>45</sup>

**Michael Scharf:** All right. Well, we've talked about domestic prosecutions. It's time for a short break. When we return, we're going to be looking at the investigation and prosecution of Russian leaders by the International Criminal Court. Stay with us.

[STATION BREAK]

**Michael Scharf:** Welcome back to Talking Foreign Policy, brought to you by Case Western Reserve University and Ideastream Public Media. I'm your host, Michael Scharf, Dean of Case Western Reserve University School of Law. I'm joined today by the President of the Public International Law & Policy Group, Paul Williams. I'm also with the former Chief Prosecutor of the Special Court for Sierra Leone, David Crane. And we have the head of the Global Institute for the Prevention of Aggression Jennifer Trahan with us. And finally, we have an

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43. Michael Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L. J. 357, 363 (2012).

44. *Id.* at 383.

45. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 53-55 (Feb. 14) (involving arrest of Mr. Abdoulaye Yerodia Ndombasi).

expert in international criminal law from Cleveland State University College of Law, Milena Sterio here in studio. We're talking about the challenges and obstacles of prosecuting Russian nationals for war crimes in the Ukraine. And in the last segment we were just hearing from Jennifer Trahan about why the top leaders cannot be prosecuted in domestic courts because of something called 'head of state immunity.' In this segment of our show, I'd like to focus the discussion on prosecution before the International Criminal Court in The Hague. It's also called the ICC. Milena, can you tell us a little bit about the ICC?

**Milena Sterio:** Sure. The ICC is the only permanent International Criminal Court. It has been around for about 20 years. It is located at the Hague in the Netherlands, and it has jurisdiction over genocide, crimes against humanity, war crimes, and aggression.<sup>46</sup> There are currently 123 member states of the ICC. And it is important to note the United States is not a member, nor are Ukraine or Russia.<sup>47</sup> The court has jurisdiction in situations where either the United Nations Security Council refers the case to the court, or where the crime is committed on the territory of a member state or by a national of member states.<sup>48</sup>

**Michael Scharf:** So, let me turn to Jennifer. If, as Milena says, Russia is not a party to the treaty and the Security Council has not referred this case, how does the ICC have jurisdiction over Russian war crimes in Ukraine?

**Jennifer Trahan:** Ukraine has done something which is called executing an article 12(3) declaration.<sup>49</sup> I know that sounds very technical, but it's kind of like becoming a state party, but not quite. But it has created jurisdiction over genocide war crimes and crimes against humanity committed in the territory of Ukraine.<sup>50</sup> The problem is what it's not done is

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46. See *International Criminal Court Fast Facts*, CNN, [www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html](http://www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html) (Apr. 5, 2022, 11:14 AM) [<https://perma.cc/PL47-XYW9>].

47. See *id.*; *Ukraine: Situation in Ukraine*, INT'L CRIM. CT., [www.icc-cpi.int/ukraine](http://www.icc-cpi.int/ukraine) [<https://perma.cc/FX3Y-HPRR>].

48. *How the Court Works*, INT'L CRIM. CT., [www.icc-cpi.int/about/how-the-court-works](http://www.icc-cpi.int/about/how-the-court-works) [<https://perma.cc/F8R4-W3ZK>].

49. Rome Statute, *supra* note 24, art. 12, ¶ 3.

50. Press Release, Int'l Crim. Ct., *Ukraine Accepts ICC Jurisdiction Over Alleged Crimes Committed Since 20 February 2014* (Sept. 8,

created any jurisdiction over the crime of aggression.<sup>51</sup> Ukraine alone can't do that because, under the International Criminal Court Statute, we're in this position, which I think is pretty unfortunate, that there's a lot less jurisdiction for the ICC over the crime of aggression and it can't prosecute the nationals of non-states parties.<sup>52</sup> So, Russia is not a state party and, for instance Belarus, which allowed its territory to be used as a staging ground for the invasion, [is] also not a state party.<sup>53</sup> So, we're in the position where nationals of Russia or Belarus could not be prosecuted for the crime of aggression and that's why I think, in the third part, we'll discuss other alternatives.

**Michael Scharf:** But the ICC still can prosecute these horrible crimes: the war crimes, the crimes against humanity, and even genocide.<sup>54</sup> Now let me turn to our Chief Prosecutor David Crane. David, the ICC has announced that it has initiated an investigation into Russian war crimes in Ukraine. What does that mean?

**David Crane:** Well, it's really, in fact, executing its mandate and moving forward into the Ukraine with a large body of investigators, an excellent team, headed by an American, Brenda Hollis.<sup>55</sup> And they're starting to collect

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2015), [www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014](http://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014) [<https://perma.cc/JAE3-SUTB>].

51. See Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SEC. (Mar. 10, 2022), [www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/](http://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/) [<https://perma.cc/U2L6-NUHC>].
52. See *id.*
53. See Becky Sullivan, *Why Belarus Is So Involved in Russia's Invasion of Ukraine*, NPR: SPECIAL SERIES (Mar. 11, 2022, 5:01 A.M.), [www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin](http://www.npr.org/2022/03/11/1085548867/belarus-ukraine-russia-invasion-lukashenko-putin) [<https://perma.cc/F7VS-K77A>]; Kateryna Busol, *Can the International Criminal Court Help Belarus?*, CHATHAM HOUSE (Aug. 26, 2020), [www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus](http://www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus) [<https://perma.cc/LX3Q-4CJV>].
54. Michael P. Scharf, *Power Shift: The Return of the Uniting for Peace Resolution*, 55 CASE W. RES. J. INT'L L. 165 (2023).
55. See *Legal and Institutional Aspects of Responsibility for War Crimes Prevalent During the Second Day of XI Judicial Forum*, PRAVO-JUST. (Dec. 9, 2022), [www.pravojustice.eu/post/pravovita-organizacijni-aspekti-vidpovidalnosti-za-voyenni-zlochiny](http://www.pravojustice.eu/post/pravovita-organizacijni-aspekti-vidpovidalnosti-za-voyenni-zlochiny)

evidence in and around Ukraine related to war crimes, crimes against humanity, and, of course, genocide. [I] agree that it's difficult to prove but can be proven. So that's what they're doing right now. They're doing it carefully and slowly to ensure that they have a proper case because the stakes are very high here. When you move in and are considering indicting a Head of State—which I did back in March of 2003, President Charles Taylor of Liberia<sup>56</sup>—you have to have your act together and do it slowly and carefully. And when it's time, to go ahead and sign an indictment against a sitting Head of State and his henchmen, which would be the commanders around him and in the field, who are violating the laws of armed conflict and perpetrating all of these international crimes.

**Michael Scharf:** You know, David, it seems to me that this is a case where getting enough evidence is not going to be difficult. The difficulty is going to be that the ICC will be overwhelmed by a mountain of evidence. How should they sift through all of that?

**David Crane:** You know, it's a real challenge and I've been talking about this with, among yourselves, as well as other colleagues, and to include the Ukrainian Bar Association<sup>57</sup> and the Ministry of Foreign Affairs<sup>58</sup> and the Ministry of Justice.<sup>59</sup> We know this. The challenge is we have too many people stepping all over the crime scene. Everybody has a good heart, but in reality, there's no central point of contact. Everybody is gathering evidence, some of it professionally. We all are head of

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golovna-tema-drugogo-dnya-hi-sudovogo-forumu  
[<https://perma.cc/QD4U-GH5Y>].

56. See Douglas Farah, *Tribunal Indicts Liberia's Leader*, WASH. POST (June 5, 2003), [www.washingtonpost.com/archive/politics/2003/06/05/tribunal-indicts-liberias-leader/62cdcb8-86d2-42ae-a9de-9b07161e3511/](http://www.washingtonpost.com/archive/politics/2003/06/05/tribunal-indicts-liberias-leader/62cdcb8-86d2-42ae-a9de-9b07161e3511/) [<https://perma.cc/Y4C5-R6VS>].
57. The Ukrainian Bar Association is the largest non-governmental, non-profit organization of legal professionals in Ukraine. *About Us*, UKRAINIAN BAR ASS'N, <https://2022.uba.ua/en/about-us/?lang=en&section=about> [<https://perma.cc/9SAF-66XF>].
58. See generally *Mission and Strategy*, MINISTRY OF FOREIGN AFFS. OF UKR. (June 16, 2020, 11:45 AM), <https://mfa.gov.ua/en/misiya-ta-strategiya> [<https://perma.cc/Z526-HFZV>].
59. БЧЕННЯ, МІСЯ, ЦІННОСТІ [*Vision, Mission, Values, Ministry*], МІНІСТЕРСТВО ЮСТИЦІЇ [JUST. UKR.], [https://minjust.gov.ua.translate.google/en/pages/mission?\\_x\\_tr\\_sl=en&\\_x\\_tr\\_tl=ru&\\_x\\_tr\\_hl=en&\\_x\\_tr\\_pto=wapp](https://minjust.gov.ua.translate.google/en/pages/mission?_x_tr_sl=en&_x_tr_tl=ru&_x_tr_hl=en&_x_tr_pto=wapp) [<https://perma.cc/FG8U-AEMH>].

various organizations—like ours, the Global Accountability Network<sup>60</sup>—doing it professionally, carefully, chain of custody, et cetera. But there are a lot of individuals who want to do well, go in, bring people in, but are actually messing up these crime scenes.<sup>61</sup> It's a real challenge in that regard, but also just in this day and age, where we have the ability to just accumulate data, which is really what it is. You know, at this point in time, in my opinion, 95 percent of the data that's being gathered cannot be used in a domestic or an international court of law. The challenges are the rules of procedure and evidence.<sup>62</sup> So, there's a real practical problem here for the ICC and that is, we need to centralize our ability to take this data, turn it into criminal information, and then, eventually, evidence where we can prove beyond a reasonable doubt each and every element of the international crimes that are committed. But it's a great question, Michael, because it's truly a problem right now, everybody is doing so much, but actually getting in each other's way.

**Michael Scharf:** So, let me turn to Milena and ask, what are the next steps from the investigation to the indictment to eventual prosecution, and how long is this likely to take?

**Milena Sterio:** Sure. Actually, in this case, the ICC had already opened a so-called preliminary examination several years ago in the wake of the Donbas and Crimea crises when Russia had already used force against Ukraine, and that was under the leadership of the previous prosecutor --

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60. The Global Accountability Network is a consortium of universities and other organizations that works to build international criminal cases. See David Crane, *The Second Chautauqua Principles from the Global Accountability Network*, JURIST (Sept. 23, 2022, 9:00 AM), [www.jurist.org/commentary/2022/09/the-second-chautauqua-principles-from-the-global-accountability-network/](http://www.jurist.org/commentary/2022/09/the-second-chautauqua-principles-from-the-global-accountability-network/) [<https://perma.cc/P6JY-UTDJ>]
61. See Ian Lovett & Natalia Ojewska, *Ukraine Struggles to Preserve Evidence of Alleged Russian War Crimes*, WALL ST. J. (May 28, 2022, 5:30 AM), [www.wsj.com/articles/ukraine-struggles-to-preserve-evidence-of-alleged-russian-war-crimes-11653730202](http://www.wsj.com/articles/ukraine-struggles-to-preserve-evidence-of-alleged-russian-war-crimes-11653730202) [<https://perma.cc/M6VT-QHWD>].
62. See e.g., Chelsea Quilling, *The Future of Digital Evidence Authentication at the International Criminal Court*, J. PUB. & INT'L AFFS., May 20, 2022, <https://jpia.princeton.edu/news/future-digital-evidence-authentication-international-criminal-court> [<https://perma.cc/9MVE-EDGB>].

**Michael Scharf:** [Interjecting] Back in 2014.<sup>63</sup>

**Milena Sterio:** Correct. And so, that preliminary examination took place. And then, fast forward to February of 2022 in the wake of the current aggression by Russia. The current prosecutor of the ICC then opened an investigation and as David Crane just explained to us, the issue here is really gathering all the evidence, and gathering the evidence that's actually usable in a court of law. Once the ICC prosecutor determines that there is enough evidence to proceed, then the court can issue indictments against specific individuals, such as, for example, Putin or other Russian leaders. The ICC is a criminal court, which prosecutes individuals. It is not prosecuting the State of Russia, it is going to be prosecuting specific individuals. And then the court can issue arrest warrants against those individuals. Now, the problem with putting on the actual trial is that the ICC under the ICC statute, trials in absentia where the defendant is not actually present, physically, are not allowed.<sup>64</sup> And so the real challenge is going to be being able to arrest the individuals whom the ICC actually wants to prosecute.

**Michael Scharf:** So, let's focus on that issue. The ICC has had a mixed record at best of getting custody over the people it has indicted. Let me turn to David. David, Sudanese President al-Bashir was indicted by the ICC for genocide 15 years ago,<sup>65</sup> but he's never been surrendered to the Court.<sup>66</sup> Saif Gaddafi,

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63. Press Release, Int'l Crim. Ct., ICC Prosecutor Extends Preliminary Examination of the Situation in Ukraine Following Second Article 12(3) Declaration (Sept. 29, 2015), [www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123](http://www.icc-cpi.int/news/icc-prosecutor-extends-preliminary-examination-situation-ukraine-following-second-article-123) [<https://perma.cc/C3XV-KACD>].

64. See Rome Statute, *supra* note 24, art. 63, ¶ 1.

65. The chief prosecutor of the ICC presented an application for a warrant of arrest against Omar Hassan al-Bashir on July 14, 2008. *Chronology of Events: Sudan*, SEC. COUNCIL REP. (June 8, 2022), [www.securitycouncilreport.org/chronology/sudan.php](http://www.securitycouncilreport.org/chronology/sudan.php) [<https://perma.cc/2H9N-6J5E>].

66. Former Sudanese president Omar al-Bashir faces five counts of crimes against humanity, two counts of war crimes, and three counts of genocide. He is currently in Sudanese custody and is a fugitive of the ICC. See *First ICC Trial on Darfur Crimes: Ali Mohammed Ali, Known as Ali Kosheib or Kushayb, Janjaweed Leader*, HUM. RTS. WATCH (Mar. 29, 2022, 4:00 AM), [www.hrw.org](http://www.hrw.org)



the son of the former Libyan President, was indicted for crimes against humanity a dozen years ago, but he's never been surrendered to the Court.<sup>67</sup> Joseph Kony, the notorious leader of the Lord's Resistance Army, was indicted for crimes against humanity by the ICC more than a decade ago, and is still at large in Africa after a dozen years.<sup>68</sup> How likely, Dave, is it that indicted Russian leaders are actually going to be brought to trial at the Hague?

**David Crane:** Well, there's a couple points we need to kind of flesh out here. The world and international community has to come together in support of Ukraine and also to prosecute the international crimes being perpetrated by the Russian Federation. So, the fact that the world comes together, along with the International Criminal Court, and indicts the leadership of the Russian Federation for international crimes – or crimes against humanity, genocide – and the ICC, and perhaps another justice mechanism, to prosecute them for aggression, sends a tremendous signal for those who choose to step away from the rule of law. The indictment is the cornerstone which is the stake in the ground of letting leaders around the world know that they cannot get away with perpetrating atrocity against human beings. I think it's really critical that we tend to think, "well, we can't get them, therefore we shouldn't be doing anything." The answer is no, we should move forward and properly, under rules of procedure and evidence, indict these individuals and stick the stake in the ground saying, "No more. You cannot do this." Your listeners need to understand that there's no statute of limitations on international crimes.<sup>69</sup> So we may not get them before a court, maybe ever, but we could. There may become a political circumstance within Russia, sooner or later, that will allow

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[rg/news/2022/03/29/first-icc-trial-darfur-crimes-ali-mohammed-ali-known-ali-kosheib-or-kushayb](https://www.westernreservejournal.com/news/2022/03/29/first-icc-trial-darfur-crimes-ali-mohammed-ali-known-ali-kosheib-or-kushayb) [<https://perma.cc/4UYH-53J2>].

67. A warrant for the arrest of Saif Al-Islam Gaddafi was issued on June 27, 2011, but he is not in the ICC's custody. The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11, Case Information Sheet, [www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf](http://www.icc-cpi.int/sites/default/files/2022-08/GaddafiEng.pdf) [<https://perma.cc/SK4X-V342>].
68. See Anthony G. Craine, *Joseph Kony: Ugandan Rebel*, ENCYC. BRITANNICA, [www.britannica.com/biography/Joseph-Kony](http://www.britannica.com/biography/Joseph-Kony) (Mar. 1, 2023) [<https://perma.cc/4HFV-WA7G>].
69. See Rome Statute, *supra* note 24, art. 29.

Russia to hand over those individuals who have been indicted for fair and open trial. So that's really important, and, you know, when I indicted Charles Taylor, they didn't hand him over to us for another two years. But he was handed over, he got a fair and open trial, he was found guilty of aiding and abetting war crimes and crimes against humanity, and he's going to spend the rest of his life now in His Majesty's Maximum Security Prison in England.<sup>70</sup>

**Michael Scharf:** Yeah, I see the symbolic value of an indictment. Let me turn to Paul and ask, are there any practical benefits of indicting Russian leaders, even if they're never brought to trial?

**Paul Williams:** Well, Michael, I think there's two practical elements. And the first one isn't really your question, but I'll just answer it anyways, which is, never underestimate the long arm of the law. As David mentioned, Taylor, former president of Liberia, was eventually captured. Milošević,<sup>71</sup> Karacic,<sup>72</sup> Mladić<sup>73</sup>—you know, the list goes on of individuals that were never going to appear before a tribunal if they were indicted. They were indicted, they appeared before a tribunal, they're serving time. But, secondly, truth matters. If an international criminal court or some type of hybrid mechanism indicts a senior leader, or president, or foreign minister for atrocity crimes, that matters when it comes to sanctions, and

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70. See *Former Liberian Leader Taylor to Serve Time in a British Jail*, REUTERS, [www.reuters.com/article/uk-warcrimes-taylor-britain/former-liberian-leader-taylor-to-serve-time-in-a-british-jail-idUKBRE9990AA20131010](http://www.reuters.com/article/uk-warcrimes-taylor-britain/former-liberian-leader-taylor-to-serve-time-in-a-british-jail-idUKBRE9990AA20131010) (Oct. 10, 2013, 6:22 AM) [<https://perma.cc/R58N-DKF9>].

71. Slobodan Milošević was a politician and administrator who served as Serbia's president from 1989 to 1997 and president of the Federal Republic of Yugoslavia from 1997 to 2000. John B. Allcock, *Slobodan Milošević*, ENCYC. BRITANNICA, [www.britannica.com/biography/Slobodan-Milosevic](http://www.britannica.com/biography/Slobodan-Milosevic) (Nov. 25, 2022) [<https://perma.cc/FD8T-WQH9>].

72. See generally Robert Rauch, *Radovan Karadžić*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Radovan-Karadzic> (June 15, 2022) [<https://perma.cc/J72V-37S7>].

73. Ratko Mladić is a former Bosnian Serb military leader who commanded the Bosnian Serb army during the Bosnian conflict from 1992 to 1995. Jeff Wallenfeldt, *Ratko Mladić*, ENCYC. BRITANNICA, [www.britannica.com/biography/Ratko-Mladic](http://www.britannica.com/biography/Ratko-Mladic) (Mar. 8, 2022) [<https://perma.cc/PLT7-E3MQ>].

maintaining the political will to provide military assistance to the Ukrainians. You know, getting through what is going to be a very cold winter in Europe, the fact that you're doing it because you're pushing back on an agenda of a war criminal—"Well, how do we know they're a war criminal?" Well look, they've been indicted by the international criminal court—that's very important for this magical political will, which we all, you know, strive to have, you know, come into being in order to stop these types of atrocities. So, yes, definitely an indictment, regardless of whether –

**Michael Scharf:** If Putin is indicted, won't that make it harder to make a peace deal with him at the end of the conflict?

**Paul Williams:** Peace deal? You think Putin's serious about a peace deal? I think we kid ourselves sometimes by thinking that we need to get to "yes" with war criminals, so to speak. A war criminal is a war criminal. And if you have an international court identify someone, through a legitimate and a fair process, as a war criminal, that's important to know when you're trying to deal with that individual, as opposed to closing your eyes and saying, "Oh, we just have to get to 'yes.' We have to 'save lives.'" We've learned with what happened in Crimea in 2014 and Donbas, that closing your eyes to these atrocities and trying to get to "yes" with someone who's a war criminal just leads to more war crimes and more deaths.

**Michael Scharf:** All right, well, let's assume, hypothetically, that you and David are right that, eventually, Putin and the other leaders fall from power or just wind up somewhere that surrenders them to the Hague. Milena, if they are eventually prosecuted, what defenses would these leaders likely assert at their trial? Do they have any defenses?

**Milena Sterio:** Well, I'm not sure that they would be, you know, successful, but there are defenses that are allowed under the statute of the International Criminal Court.<sup>74</sup> Some defenses or grounds for excluding criminal responsibility include things like duress, which is, essentially, "I didn't have free will someone else made me do it." Putin couldn't really claim this, but another Russian leader could presumably say, "Putin made me do it." There are also things, like, for example, mental illness, or incapacity, or intoxication. I also think that it's likely that some of these leaders might be prosecuted under this mode of liability

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74. See Rome Statute, *supra* note 24, art. 31 (establishing grounds for excluding criminal responsibility).

called “command responsibility,” which is when acts of subordinates are imputed to their superiors, and it is possible that some of these defendants would say some of the elements of command responsibility are simply not met. For example, “I didn’t actually order the troops to do something,” “I didn’t know that they were about to do something bad,” “they did it, but it’s really not my fault.” Not likely that any of these defenses would be successful, but there are defenses that are allowed and possible under the Rome Statute of the International Criminal Court.

**Michael Scharf:** And I can see how we would all assume, if Putin was brought to the Hague, that it’d be an open and shut case. But the ICC really doesn’t have that great a track record of successful prosecutions. So, Lawrence Gbagbo, the former president of the Ivory Coast,<sup>75</sup> Jean-Pierre Bemba, the former vice-president of the Central African Republic,<sup>76</sup> Matthieu Chui, a Congolese military leader<sup>77</sup>—they were all acquitted or had their convictions overturned on appeal in just the last couple of years. And the case against the former vice-president of Kenya, William Ruto, that was dismissed for insufficient evidence.<sup>78</sup> So, Paul, what does that say about the ICC’s ability to successfully prosecute Russian leaders for war crimes?

**Paul Williams:** Well, Michael I think it tells us that justice actually works. Not everyone indicted for a war crime is actually guilty of that war crime. I think the individuals we’re talking about here—Foreign Minister Lavrov, President Putin, some of the most high-ranking generals — we’re watching it unfold right before us on television and on the internet, so we

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75. Amy McKenna, *Laurent Gbagbo*, ENCYC. BRITANNICA, [www.britannica.com/biography/Laurent-Gbagbo](http://www.britannica.com/biography/Laurent-Gbagbo) (Aug. 19, 2022) [<https://perma.cc/R3EF-XJ97>].
76. *See Jean-Pierre Bemba (Bemba I)*, COALITION FOR THE INT’L CRIM. CT., [www.coalitionfortheicc.org/cases/jeanpierre-bemba-bemba-i](http://www.coalitionfortheicc.org/cases/jeanpierre-bemba-bemba-i) [<https://perma.cc/6W6D-S2PQ>].
77. *See Matthieu Ngudjolo Chui*, COALITION FOR THE INT’L CRIM. CT., [www.coalitionfortheicc.org/cases/mathieu-ngudjolo-chui](http://www.coalitionfortheicc.org/cases/mathieu-ngudjolo-chui) [<https://perma.cc/QS3B-M3RZ>].
78. *ICC: Kenya Deputy President’s Case Ends*, HUM. RTS. WATCH (Apr. 5, 2016, 3:02 PM), [www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends](http://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends) [<https://perma.cc/H9XF-RMHX>].

know what's happening. But I think, you know, the International Criminal Court has some high standards for both the indictment and then the eventual prosecution and proof that someone is a war criminal. We should embrace the fact that, as these processes move forward, we know that there's a high level of legitimacy given these cases that you've just mentioned.

**Michael Scharf:** I think that's a great point, but often when you have a leader on trial, their goal is to try to make the court look illegitimate. So, David, let me ask you this: Trials of leaders for war crimes, they tend to be extremely messy. I'm thinking of the experience with the Saddam Hussein trial,<sup>79</sup> and the Milošević trial,<sup>80</sup> and even the Charles Taylor<sup>81</sup> trial had its moments. Is that what a trial of Russian leaders at the ICC would likely resemble?

**David Crane:** Well, historically these kinds of individuals, these heads of state or senior leaders—we saw this with Göring at Nuremberg<sup>82</sup>—tried to turn it into a political event so that they can speak directly to the citizens of the country of which they were a Head of State once. And so, they do intentionally try to do that. It's not a defense and it can be incredibly disruptive, so that you have to just understand that and stick to the rules of procedure and evidence. This is where leadership at the bench, strong judges, control what's going on in the courtroom, can rein that in fairly well, and we've seen that happen both from Nuremberg<sup>83</sup> all the way up to the Charles

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79. *See Saddam Hussein Fast Facts*, CNN, [www.cnn.com/2013/10/17/world/meast/saddam-hussein-fast-facts/index.html](http://www.cnn.com/2013/10/17/world/meast/saddam-hussein-fast-facts/index.html) (Apr. 27, 2017, 3:42 PM) [<https://perma.cc/KT8V-F4EF>].
80. *See Slobodan Milošević Trial-The Prosecution's Case*, UN: INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, [www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case](http://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case) [<https://perma.cc/9RPY-CWK6>].
81. *Charles Taylor*, HUM. RTS. WATCH, [www.hrw.org/topic/international-justice/charles-taylor](http://www.hrw.org/topic/international-justice/charles-taylor) [<https://perma.cc/3LTP-K3UH>].
82. *See Herman Göring*, U.S. HOLOCAUST MEM'L MUSEUM: HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/hermann-goering> [<https://perma.cc/WYD2-ARDU>].
83. *See generally The Nuremberg Trials*, U.S. HOLOCAUST MEM'L MUSEUM: HOLOCAUST ENCYC., [www.ushmm.org/collections/bibliography/the-nuremberg-trials](http://www.ushmm.org/collections/bibliography/the-nuremberg-trials) [<https://perma.cc/B7PQ-8XWK>].

Taylor trial itself. So, it's really, really important—but just let me add just something, very quickly, to what Paul was saying in the previous question. You know, when I was drafting the indictments of a sitting Head of State, President Charles Taylor, my standard was that I wouldn't sign the indictment until I knew we could prove each and every element of each and every crime that I charged him with, beyond a reasonable doubt. Because you have to make sure, if you're going to go after Heads of State, you can't make a mistake because you don't want to have a retrial of a sitting Head of State or his very senior leaders. From a practical point of view, and for someone who actually has done it, my standard was I don't sign that indictment until we've already got [an iron clad case against] him. And then when we issue the indictment, it's just a matter of going through the procedure in court to make that happen. You've got to be careful on that because you can't make these mistakes at the international level, because it just cheapens, frankly, the opinion of others as to “why did we even try these international crimes?”

**Michael Scharf:** Dave, those seem like very wise words. It's time for us to take another short break. When we return, we'll be talking about the proposal to establish a tribunal to prosecute the crime of aggression related to Ukraine. We'll be back in a moment.

[STATION BREAK]

**Michael Scharf:** This is Michael Scharf and we're back with “Talking Foreign Policy.” I'm joined today by experts in international criminal law and the crisis in Ukraine. In this final segment, we're going to be discussing the proposal to prosecute Russian leaders for the crime of aggression. Jennifer Trahan let's begin with you. You're the head of the Global Institute for the Prevention of Aggression. Can you tell us about how the crime of aggression came about? I know that Milena Sterio has already given us a definition, but what's the background on this?

**Jennifer Trahan:** Sure, Michael. So, it has an early lineage. Starting in 1917, there were Americans who were thinking: “how do we prevent aggressive war” and “how do we

outlaw war?”<sup>84</sup> In 1928, we can see a turning point with the enactment of the Kellogg-Briand Pact, wherein the US, France, and other states jointly agreed that war should be illegal.<sup>85</sup> That’s attempted, of course, again in the UN Charter and that’s the core provision against aggression that we have in the UN Charter.<sup>86</sup> We have a really important turning point in terms of individual criminal responsibility, that is, that individuals are responsible for the crime, that it’s not enough to just say “okay, Russia is responsible.” Individual leaders and those prosecutions regarding the crime and individual responsibility first happened at Nuremberg.<sup>87</sup> This is a little-known fact, that the key focus of Nuremberg was actually not on the Holocaust, but on the crime of aggression.<sup>88</sup> That kind of sets up the situation where we are today that where we have this crime defined, it’s been a very clear violation of the UN Charter, a manifest one.<sup>89</sup> So, we clearly have had the crime occur, but as I mentioned in the first segment, we have a gap in the International Criminal Court’s Jurisdiction—and we have this problem of immunities at the domestic level. That leads us to the idea that there needs to be some kind of “gap-filler.”

**Michael Scharf:** I’m reminded of the fact that ultimately Al Capone was brought down and prosecuted for tax evasion,<sup>90</sup> and that was a great success because you took a major Chicago gangster off the streets, and you put him in jail for the rest of his life. We know that the International Criminal Court can prosecute Putin for war crimes, crimes against humanity and

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84. See generally Jennifer D. Keene, *United States of America and the First World War*, THE WORLD REMEMBERS, <https://theworldremembers.org/countries/united-states-of-america/united-states-of-america-and-the-first-world-war> [https://perma.cc/U8JE-SUZX].

85. See generally *The Kellog-Briand Pact*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/kellogg> [https://perma.cc/U2C9-5P7K].

86. U.N. Charter art. 1, ¶ 1.

87. See Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L. J. 161, 164 (2008).

88. See *id.* at 163.

89. See G.A. Res. 3314 (XXIX), at 142 (Dec.14, 1974).

90. See *Al Capone*, FBI: HISTORY, [www.fbi.gov/history/famous-cases/al-capone](http://www.fbi.gov/history/famous-cases/al-capone) [https://perma.cc/6Y6C-V7TR].

even genocide.<sup>91</sup> Why is it so important, Jennifer, that they also prosecute Putin somewhere for the crime of aggression?

**Jennifer Trahan:** Great question, Michael. Well, first I don't know if the ICC will prosecute Putin. For war crimes, you have your first-hand perpetrator who most directly commits it. Then you might look to a mid-level commander, but does the proof actually go all the way up to Putin? Milena mentioned command responsibility—potentially. We just really don't know if the International Criminal Court will be going to that level. The crime of aggression is different. It is the leaders who initiate the war and for that one—it's very obvious that you would be looking to high-level political or military leaders,<sup>92</sup> but in the Nuremberg Judgement they also refer to the crime as “the supreme crime,” and what they mean by that is it contains all the other crimes within it.<sup>93</sup> If we didn't have the aggression, we wouldn't be seeing the war crimes—we wouldn't be seeing the crimes against humanity—and it's even broader than that—because there's also all these civilians who are dying who are not necessarily being killed as a result of a “war crime” because the Laws of War do tolerate—horrible term—“collateral damage.”<sup>94</sup> Some individuals are dying as a result of that and there won't necessarily be war crimes charges, but the crime of aggression encompasses that.<sup>95</sup> It even encompasses all the killing of the military on both sides.<sup>96</sup> Including Ukrainians, who never should have been forced to fight in an illegal war, and Russian soldiers. Now, on the Russian side, we're seeing

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91. See Rome Statute, *supra* note 24, art. 27 (applying statute “equally to all persons without any distinction based on official capacity.”).

92. See *id.* art. 8 *bis*, ¶ 1.

93. Weisbord, *supra* note 87, at 165.

94. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000) (discussing the limited permissibility of “collateral damage” in warfare).

95. See Rome Statute, *supra* note 24, art. 8 *bis*; see also Rachel E. VanLandingham, *Criminally Disproportionate Warfare: Aggression as a Contextual War Crime*, 48 CASE W. RES. J. INT'L L. 215, 259 (2016) (discussing how national leaders can be held accountable for collateral damage to civilians).

96. See Rome Statute, *supra* note 24, art. 8 *bis*, ¶ 2 (classifying attacks on armed forces by another state's armed forces as a crime of aggression).



widespread reluctance to fight in this illegal war.<sup>97</sup> So that's why it's the Supreme Crime and that's why it really matters.

**Michael Scharf:** Well, you know, I hadn't really thought of it all that way. That is extremely helpful. Let me ask a follow-up for Milena. So, the Security Council is paralyzed because Russia has a veto as one of the five permanent members—so it's not going to create a tribunal for aggression, and it's not going to refer Russian aggression to the International Criminal Court.<sup>98</sup> What options are there for creating a tribunal to prosecute Russian leaders for the crime of aggression without Security Council involvement?

**Milena Sterio:** Well, let me just mention that even without creating a special tribunal—one, at least theoretical option would be to amend the statute of the International Criminal Court to broaden the jurisdictional regime over the crime of aggression. There have been groups, such as Parliamentarians For Global Action<sup>99</sup>—which have advocated for this option. It's unlikely, but in theory, it's possible. Now, another option—if you're going down the path of creating a special ad-hoc tribunal—if you say the ICC cannot prosecute aggression—one way to do it would be to have an agreement signed between the United Nations General Assembly and

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97. According to Ukrainian military officials, there are signs that Russian military discipline and morale have diminished. Signs of low morale include soldiers looting and writing presumably desperate messages on city walls. Andrew E. Kramer, *In Southern Ukraine, Signs of Low Russian Morale Amid Retreat*, N.Y. TIMES, [www.nytimes.com/2022/10/10/world/europe/ukraine-war-south.html](http://www.nytimes.com/2022/10/10/world/europe/ukraine-war-south.html) (Oct. 11, 2022) [<https://perma.cc/FWQ8-YVWQ>].

98. Russia recently used its U.N. Security Council powers to veto a U.N. draft resolution condemning its actions in Ukraine. Russia was the only nation in the United Nations to vote against the resolution. See *Russia Vetoes UN Resolution on Ukraine Annexation, China Abstains*, AL JAZEERA (Oct. 1, 2022), [www.aljazeera.com/news/2022/10/1/russia-vetoes-un-resolution-on-ukraine-annexation-china-abstains](http://www.aljazeera.com/news/2022/10/1/russia-vetoes-un-resolution-on-ukraine-annexation-china-abstains) [<https://perma.cc/X8G9-J487>].

99. Parliamentarians For Global Action has worked to advance global ratification of the Rome Statute, thereby “fighting impunity for the commission of genocide, war crimes, crimes against humanity and the crime of aggression.” See *Campaign for the Universality and Effectiveness of the System of the Rome Statute of the International Criminal Court (ICC)*, PARLIAMENTARIANS FOR GLOBAL ACTION, [www.pgaction.org/ilhr/rome-statute/](http://www.pgaction.org/ilhr/rome-statute/) [<https://perma.cc/E2G9-RCLE>].

Ukraine. We already have precedent for such agreements creating hybrid tribunals such as the Special Court for Sierra Leone,<sup>100</sup> or the Cambodia tribunal.<sup>101</sup> Finally, another option that I would mention—to prosecute the crime of aggression—would be in the national courts of Ukraine, but as we mentioned previously, the problem with this is that you really could only prosecute mid or lower-level offenders. The problem with this is that as Jennifer just laid out, aggression is a leadership crime, and you couldn't prosecute people like Putin in the national courts because of immunity.<sup>102</sup>

**Michael Scharf:** Now this is what makes this show really cool, because David and Jennifer, you both are part of groups of experts with different proposals for the UN to create a tribunal to prosecute Russian leaders for the crime of aggression—you're in the middle of the mix of all this.<sup>103</sup> Can you tell us how your proposals differ? Let's start with David.

**David Michael Crane:** Well, actually, our proposals really don't differ at all. They both focus on the fact that we have to prosecute the crime of aggression, which is an international affront to the United Nations that has to be prosecuted. It has to be done by the United Nations. There is talk about having Europe create some type of justice mechanism

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100. See generally Lansana Gberie, *The Special Court for Sierra Leone Rests For Good*, U.N.: AFR. RENEWAL, [www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good](http://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good) [https://perma.cc/R9LF-U9FU].

101. See generally Benny Widyono, *The Spectre of the Khmer Rouge over Cambodia*, U.N. CHRONICLE, [www.un.org/en/chronicle/article/spectre-khmer-rouge-over-cambodia](http://www.un.org/en/chronicle/article/spectre-khmer-rouge-over-cambodia) [https://perma.cc/9DPM-J2J2].

102. U.N. Convention on Special Missions art. 21, Dec. 8, 1969, 1400 U.N.T.S. 231 (affording Heads of States "privileges and immunities accorded by international law").

103. See generally Jaimee Francis, *A Guide to Prosecuting Russian Atrocities in Ukraine*, JURIST (July 12, 2022, 8:48 PM), [www.jurist.org/features/2022/07/12/a-guide-to-prosecuting-russian-atrocities-in-ukraine/](http://www.jurist.org/features/2022/07/12/a-guide-to-prosecuting-russian-atrocities-in-ukraine/) [https://perma.cc/5SZR-9MMW]; Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part III)*, JUST SEC. (Sept. 26, 2022), [www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/](http://www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/) (discussing intricacies and considerations required in order to establish a tribunal for Ukraine) [https://perma.cc/TYJ2-N9ZK].

to prosecute the crime of aggression,<sup>104</sup> but this invasion is not a European problem, it's an international problem. The United Nations as a body has to prosecute this. So again, I don't think we differ. I think we're both pilgrims heading to Jerusalem and we'll eventually get there. There's not a lot of difference between the two in setting up the special tribunal for Ukraine.

**Michael Scharf:** Jennifer, are there any nuances—any minor differences you can point to?

**Jennifer Trahan:** I have to agree with David. We're really arguing basically the same thing. I think we differed on the working languages of the tribunal. We might have different ideas of where to put it—but these are in the little details, and I think ultimately both of us are setting out what could be negotiated. The details ultimately have to be negotiated between the UN and Ukraine so we can set out what we think should happen. I actually think it's a really strong statement that working independently, we came out with pretty much the same answer—that the best way this could be done would be with an international tribunal and going through the UN. Because even if they could get in Ukrainian courts and even if we had the most skilled judges, they're not going to look neutral. As David said, this also isn't a European issue. Global order is at issue. Do we care about Article 2, paragraph 4 of the UN Charter, the basic prohibition against aggression?<sup>105</sup> We will never know if there was too tepid a response in Crimea that got us to where we are today.<sup>106</sup> If we don't do something now, are

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104. *See generally* Carl Bildt, Opinion, *The EU Must Help Prosecute Putin for Crimes of Aggression - Here's How*, POLITICO (May 23, 2022, 4:36 AM), [www.politico.eu/article/the-eu-must-help-prosecute-putin-for-crimes-of-aggression-heres-how/](http://www.politico.eu/article/the-eu-must-help-prosecute-putin-for-crimes-of-aggression-heres-how/) (discussing the possibility of applying the model of the Kosovo Specialist Chambers to create an EU justice mechanism within Ukraine) [<https://perma.cc/VT2S-64PH>].

105. U.N. Charter art. 2, ¶ 4 (“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[.]”).

106. *See generally* Wash. Post Live, *Latvia President Egils Levits Discusses the Growing Fears Among Baltic States*, YOUTUBE, at 08:17 (Mar. 25, 2022), [www.youtube.com/watch?v=0q12onBfpX4](http://www.youtube.com/watch?v=0q12onBfpX4) (discussing the possibility that a stronger international response to Russia's annexation of Crimea may have prevented the outbreak of war).

we going to be talking next about the invasion of Taiwan?<sup>107</sup> We just don't want to get there. It's for this reason that David and I think this needs to be taken up at the level of the UN and not solely by a couple of countries or by any kind of European tribunal. That is what we're both advocating for.

**Michael Scharf:** Alright so, David, you are in partnership with Hans Corell, the former legal advisor of the UN.<sup>108</sup> Jennifer, you're in partnership with the ambassador from Liechtenstein who used to be the president of the International Criminal Court's Assembly of State Parties.<sup>109</sup> You've got very heavy hitters involved in these proposals. Can you give us a status update? Where are we with each of these proposals?

**David Michael Crane:** Let me go ahead and start. Again, I agree with Jennifer entirely. This is an affront against the United Nations. If the United Nations doesn't do something about this aggression, then why have a United Nations? That's just a rhetorical question. Where we are right now is we're moving forward carefully. We have a draft UN General Assembly resolution put together with a sample statute which creates the special tribunal for Ukraine on the crime of aggression. That was handed to the President of Ukraine about two weeks ago, and shortly after that, he publicly announced that we should have a special tribunal for Ukraine on the crime of aggression.<sup>110</sup> One thing is that another person who helped wrap this UN General Assembly resolution and the sample indictment was Irwin Cotler, the former Attorney General and

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107. See generally Lily Kuo, *Xi's Looming Third Term in China Raises Threat of War Over Taiwan*, WASH. POST (Oct. 12, 2022, 3:00 AM), [www.washingtonpost.com/world/2022/10/12/china-taiwan-war-xi-jinping/](http://www.washingtonpost.com/world/2022/10/12/china-taiwan-war-xi-jinping/) [<https://perma.cc/QGD5-FSQJ>].

108. See Interview with Hans Corell in Waltham, Mass. (Mar. 11, 2015), [www.brandeis.edu/ethics/international-justice/oral-history/interviews/corell-hans.html](http://www.brandeis.edu/ethics/international-justice/oral-history/interviews/corell-hans.html) [<https://perma.cc/H6DF-D5NY>].

109. See *Ambassador Christian Wenaweser*, INT'L CTR. FOR TRANSITIONAL JUST., [www.ictj.org/about/ambassador-christian-wenaweser](http://www.ictj.org/about/ambassador-christian-wenaweser) [<https://perma.cc/3SWL-SR5Z>].

110. France 24 Videos, *Ukraine MP: 'We Are Working on a Possible International Tribunal for Putin's Crimes'*, YAHOO NEWS (Oct. 21, 2022), <https://uk.news.yahoo.com/ukrainian-mp-maria-mezentseva-working-205324249.html> [<https://perma.cc/3B5Y-DBH8>].

Minister of Justice for Canada.<sup>111</sup> The three of us were really instrumental in setting up, already, an earlier tribunal very similar to the special tribunal for Ukraine called the Special Court for Sierra Leone.<sup>112</sup> I think it's important for your listeners to understand—is we've already done this before. We've already created a tribunal which entered into a bilateral agreement with an injured state with a mandate to prosecute a head of state.<sup>113</sup> So, I think this should all give us some kind of a firm hope that we can do this again.

**Michael Scharf:** And Jennifer, how about your proposal? Where is that?

**Jennifer Trahan:** Well, first—I should say that my proposal is not just mine. I've been working with former U.S. War Crimes Ambassador, David Scheffer,<sup>114</sup> Oona Hathaway of Yale Law School,<sup>115</sup> Astrid Reisinger Coracini of the University of Vienna,<sup>116</sup> and Claus Kress of the University of Cologne.<sup>117</sup> We presented this in June to a number of states and we've had some enthusiastic endorsements. Again, it's not very much different from what David Crane's group has been doing. Michael, I'll just be honest—where I see the challenge is—getting the votes in the General Assembly. Putin likes to cast

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111. *The Honourable Irwin Cotler*, CANADA (Nov. 25, 2020), <https://pm.gc.ca/en/news/backgrounders/2020/11/25/honourable-irwin-cotler> [<https://perma.cc/378G-87ZA>].

112. *See generally* Gberie, *supra* note 100.

113. *See id.*

114. David Scheffer worked as the U.S. Ambassador at Large for War Crimes issues from 1997-2001 and currently serves as a senior fellow for the Council on Foreign Relations.

115. Oona A. Hathaway has served on the Advisory Committee on International Law for the Legal Adviser at the U.S. Department of State since 2005.

116. Astrid Reisinger Coracini is a researcher at the department of International Law and International Relations at the University of Vienna who focuses on international criminal and humanitarian law. She has also served as a delegate at the first Review Conference of the Rome Statute of the International Court in Kampala.

117. Claus Kress has served as a representative for Germany in the negotiations regarding the International Criminal Court since 1998. In addition, he teaches Criminal Law and Public International Law at the University of Cologne.

this as NATO's war with Russia.<sup>118</sup> Now, if he controls that narrative and says this is only NATO's issue—we'll never get the General Assembly votes. Now, that's just his narrative—but this is actually an issue for the entire international community. If Russia can invade its neighbor with impunity, then the sanctity of borders is no more.<sup>119</sup> No states are safe. The real challenge will be to make sure that countries from other regions are involved. We need African countries leading this as well. This can't just be Liechtenstein or Latvia, or even Ukraine. We need the Central and South American countries denouncing this. We need Asian countries denouncing this. All of those countries that in February, condemned the invasion—those countries that are now condemning the purported annexation—need to put their money where their mouth is and vote for a tribunal. So, this is really the challenge to get the vote in the General Assembly—and to really make this happen. Because David's right. The international community knows how to do the technical requirements. What we now need is the vote to make this happen.

**Michael Scharf:** Well, this is where politics makes strange bedfellows and can get really complicated. What are the world politics related to getting those votes that Jennifer is talking about? For example, why is the chief prosecutor of the International Criminal Court currently saying he does not favor this idea? Why is the country of France currently opposed? David or Jennifer?

**David Michael Crane:** Well, the bright red thread of international criminal law is politics with a small "p." It's a matter of political compromise. As the special court for Sierra Leone statute was being negotiated—that took about a year.<sup>120</sup>

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118. Putin claimed that the United States and NATO did not truly care for Ukraine, but rather were using the nation as a way to counter Russian interests. Isabelle Khurshudyan et al., *Putin Accuses West of Using Ukraine as a Pawn in Showdown with Russia*, WASH. POST, [www.washingtonpost.com/world/2022/02/01/ukraine-russia-putin-blinken-diplomacy-nato/](http://www.washingtonpost.com/world/2022/02/01/ukraine-russia-putin-blinken-diplomacy-nato/) (Feb. 1, 2022, 5:59 PM) [<https://perma.cc/2HPG-9VK6>].

119. Tanisha M. Fazal, *The Return of Conquest?: Why the Future of Global Order Hinges on Ukraine*, FOREIGN AFFS., May/June 2022, at 20 (discussing the idea that the outcome of the war in Ukraine could result in a loss of respect of borders between nations).

120. Gberie, *supra* note 100. A letter between the late president of Sierra Leone, Ahmad Tejan Kabbah, laid the groundwork for a

That wasn't just a done deal—even though the president of Sierra Leone had asked the UN for help.<sup>121</sup> So again, it's going to have to be a political decision at the right moment—where there's a comfort level—where they can move forward. Right now, people are a little timid around Putin, who is rattling a rather large saber called a nuclear weapon. People are just not quite ready to cross the threshold of a justice mechanism for aggression, because they're looking for other options. Perhaps it is unfortunate that the prosecutor of the ICC is mouthing those words. I think it is not helpful, because we do have to, in fact, prosecute the crime of aggression. In the statute that we drafted to create this tribunal, we clearly state that the special tribunal for Ukraine and the ICC would work concurrently and sharing resources.<sup>122</sup>

**Michael Scharf:** So, let me turn to Paul for a second and ask him about the elephant in the room—and that is, Paul, should the United States be concerned about the precedent of establishing an aggression tribunal outside of the Security Council?

**Paul R. Williams:** No.

**Michael Scharf:** Okay—you're very confident of that, but what if a bunch of countries went to the General Assembly and created a tribunal for aggression for Israel and the United States could not use its veto power to stop that? Isn't that something that the US should be concerned about?

**Paul R. Williams:** I think David, Jennifer, and Milena have hit on this. The United States should be concerned about what happens when we accommodate or appease aggression. We did that with Crimea<sup>123</sup>—we now have an all-out war against

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Special Court of Sierra Leone. The UN and Sierra Leone established the Special Court in 2002 with the first indictments arriving in 2003. *Id.*

121. Barbara Crossette, *Sierra Leone Asks U.N. for Role in War Court*, N.Y. TIMES, June 21, 2000, [www.nytimes.com/2000/06/21/world/sierra-leone-asks-un-for-role-in-war-court.html](http://www.nytimes.com/2000/06/21/world/sierra-leone-asks-un-for-role-in-war-court.html) [<https://perma.cc/5MLM-PG4E>].

122. See Draft Statute for Ukraine Tribunal, *supra* note 12.

123. See, e.g., Holly Ellyatt, *Russia Took Crimea from Ukraine in 2014. Now, Kyiv Is Fighting Back*, CNBC, [www.cnbc.com/2022/08/18/russia-took-crimea-from-ukraine-in-2014-now-kyiv-is-fighting-back.html](http://www.cnbc.com/2022/08/18/russia-took-crimea-from-ukraine-in-2014-now-kyiv-is-fighting-back.html) (Aug. 18, 2022, 9:25 PM) (discussing the history of the Russo-Ukrainian War and recent military developments) [<https://perma.cc/YY6T-X3AL>].

Ukraine. We need to worry about Taiwan. You need this type of justice for a durable—international, secure infrastructure—and we're not going to get it if we don't take Putin's invasion of Ukraine seriously and hold him and his inner circle accountable.

**Michael Scharf:** Paul, I'm going to let that be the final word. I'm getting the signal from our producer that it's time to bring our program to a close. I'd like to thank our experts for being with us today and helping us make sense of the complicated issue of accountability for war crimes in Ukraine. Dr. Paul Williams, Chief Prosecutor David Crane, Professor Jennifer Trahan, and Professor Milena—thank you so much for providing your insights about this important topic. I'm Michael Scharf. You've been listening to "Talking Foreign Policy."



