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PREVENTING AND RESPONDING TO AGGRESSION: INTERNATIONAL LAW'S LIMITS AND (ALTERNATIVE) POTENTIALS?

This panel was convened on Friday, March 31, 2023 at 9:00 a.m. by its moderator Ata Hindi of the Institute of Law, Birzeit University (Palestine), who introduced the panelists: Aslı Bâli of Yale Law School (United States); Kateryna Busol of National University of Kyiv-Mohyla Academy (Ukraine); Asad Kiyani of the University of Victoria Faculty of Law (Canada); Melissa Verpile of Parliamentarians for Global Action; and Andreas Zimmermann of the University of Potsdam (Germany).

Introductory Remarks by Ata Hindi*

Good morning, everybody. It is a pleasure. We have a wonderful turnout here. Today, we have a panel that is going to be discussing the topic of preventing and responding to aggression under international law, its limits, and alternative potentials. We have a wonderful cast with us today. My name is Ata Hindi. I am a Research Fellow in International Law at Birzeit University Institute of Law where I work as an Assistant Editor to the *Palestine Yearbook of International Law*. And we have, in alphabetical order by first name, Andreas Zimmermann who is a Professor of Law at Potsdam University; Asad Kiyani who is Assistant Professor of Law at the University of Victoria; Aslı Bâli, Professor of Law at Yale Law School; Kateryna Busol, Senior Lecturer at the National University of Kyiv-Mohyla Academy; and Melissa Verpile, who is Director and of the Democratic Renewal and Human Rights Campaign at Parliamentarians for Global Action.

With respect to how this session is going to take place, we have, like I said, a wonderful cast of five individuals, six including myself. I am going to be speaking at an absolute minimum. I have a couple of questions that I would like the speakers to discuss, and then I am going to open it up to the audience to elaborate further on those questions, or ask different questions altogether. And if you do not have any questions, I have several that I can ask as well.

Generally speaking, this session looks at the issue of aggression and whether certain states' individuals are practically immune from responsibility for acts of aggression in looking at the situation in Ukraine and otherwise, and starting off with my first question, I am going to start in alphabetical order, as I mentioned, and then I will go backward for the second question. Looking at the situation in Ukraine, can we assume that the international legal order is insufficient in dealing with aggression under the rules of state responsibility; in other words, looking at non-recognition, non-aid and assistance, and the obligation to cooperate? Andreas, I am going to go start with you.

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Remarks by Andreas Zimmermann*

Thank you so much, Ata, for having invited me, and thank you everybody for joining this meeting.

As to your first question, I do believe that when we analyze the situation in Ukraine, we have to consider that this constitutes a very specific case. And why is this a very peculiar situation? This is due to the fact that the aggressor state is one of the five permanent members of the United Nations (UN) Security Council, i.e. one of the so-called P5. That means that the system of collective security set up by the UN Charter, and envisaged in 1945, could obviously not work due to the veto.

What I was surprised by, though, was why Art. 27, para. 3, last sentence, i.e. the obligation of a party to a dispute to abstain from voting in decisions under Chapter VI, was never considered. Why was the question never raised, whether the Russian Federation should not abstain, at least as far as measures under Chapter VI were concerned? We have further witnessed that, while the General Assembly has condemned the aggression via its powers under the Uniting-for-Peace mechanism, no further steps have so far been taken by the General Assembly and that is due to the fact that in the case at hand the aggressor state, i.e. the Russian Federation, is still a quite important powerful state. Thus, it seems, that at least in situations where one of the P5, is the aggressor state, it is quite unrealistic that further effective steps will be taken either by the General Assembly, and obviously even less so by the Security Council.

Still, considering the situation in Ukraine and the Russian Federation, I was positively surprised that at least certain steps have been taken, which might be considered important and more than just symbolic in nature. This includes the exclusion of the Russian Federation from the Council of Europe, from the Human Rights Council, or from some specific international organizations, such as the World Tourism Organization or the Danube Commission. That, as mentioned, somewhat came as a surprise for me.

The international community has thus done more *ex post facto* as compared to what I had expected *ex ante*. But moving beyond those kind of measures I have just mentioned , I think it is simply not realistic to expect more measures to be taken within the framework of the United Nations. Thank you.

Ata Hindi

Asad, would you like to elaborate on that?

Remarks by Asad Kiyani*

Thanks, Ata, for inviting me and bringing us all together, and thanks, everyone, for attending. I need to acknowledge where I am right now. I live and work and I am joining today from the University of Victoria, which is in Victoria, British Columbia, on the west coast of Canada. I need to acknowledge and offer my respect to the Indigenous peoples, the Lekwungen peoples on whose traditional territory the university stands, and the Songhees, Esquimalt, and WSANEC peoples whose historical relationships with that land continue to this day. These territorial acknowledgements, I think, are often perfunctory, but they may bear some special resonance to the kinds of issues we discuss in international criminal law. We are talking about aggression or occupation. I think there is something about the territorial acknowledgement that really matters here, and it is, of course, central to what is going on right now in respect of this conflict.

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To briefly address this first question, I think that it is pretty clear that the rules of international law and orders so far may provide for some theoretical possibility of assigning responsibility for the crime of aggression to either states or individuals and perhaps even a theoretical possibility of doing it in a formally equal matter. The reality of those seems to be fairly clear that the practical difficulties associated with pursuing individuals who are nationals of certain states and leaders of certain states are just such that there is no realistic possibility of actual prosecution.

The example I was pointing to in this case is the example of President al-Bashir of Sudan, who for many years was pursued by the International Criminal Court (ICC) and was never actually tried and traveled quite freely for many years without ever actually being arrested. It is hard for me to see a world in which al-Bashir cannot be arrested, in which states are not willing to arrest him but somehow will be willing to arrest members of the Russian leadership in this context. I think that practical difficulties are really where the stumbling block is, although I know there are recent moves toward establishing a tribunal for aggression, that the practical realities of power as interest alluded to will probably be the biggest obstacle here.

Ata Hindi

Thank you. Aslı, I am just going to add a little bit to that question. We do have a situation where it seems that some states are willing to act more freely, for example, on the situation with Russia, but again, does it really matter whether or not states are acting in line with their state responsibility obligations, third state obligations, if really at the end of the day, the framework on state responsibility might not actually be enough?

Remarks by Asli Bâli*

I thank you so much, Ata, for including me today, and it is great to see the participants, if only virtually. Building on what Andreas said, we have seen a surprising amount of action in the case of Ukraine. This underscores multiple different facets of what we learn about the international legal order by focusing on this case. Indeed, even the remarkable degree to which Ukraine is featured in many of the presentations at this meeting is a reminder of the focus among Western international lawyers on this conflict and raises the question of whether it is possible to bolster the international legal order in this moment.

The exceptional response to the Ukraine conflict across Western capitals underscores a troubling selectivity in the international legal order. The affirmation of the prohibition on the use of force and forceful acquisition of territory has been remarkably broad, notwithstanding some abstentions in the General Assembly. This stands in stark contrast to the tacit acceptance by great powers of annexations of territory in the Golan Heights and in Western Sahara. Similarly, the emphasis on the integrity of Article 2(4) and reinforcing the prohibition on the use of force, in this instance, stands in contrast with the failure to take an equally clear position in response to the Iraq aggression.

One worry is that this kind of selectivity can serve to undermine the expressive function of international law for many states in the international system. When international law is just one part of a broader geopolitical arsenal that can be deployed selectively by great powers competing with one another, the normative quality of the order is depreciated.

On the other hand, Ukraine also shows that when activated in a full-court press, there is a massive repertoire of rules and strategies available in international law to hold even powerful actors to

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account. For instance, the Ukraine conflict demonstrates that there are avenues of recourse when the UN Security Council is paralyzed in the ways that Andreas mentioned. The turn to the UN General Assembly as a competent organ to establish the illegality of actions in order to trigger the responsibilities of states is a creative workaround that may generate hope for greater international cooperation when a veto stands in way of Council action. Ukraine also provides examples of how states may imagine other ways of thinking about and moving forward with collective security that do not involve deployments of further use of force. While military coercion runs the risk of escalating an existing conflict in which there has been a serious breach and further destabilizing a region, other means of influencing the states involved may be more appealing. As an alternative, state parties may consider, for example, non-assistance to an aggressor and building on strategies of exclusion, as Andreas has mentioned. They may also develop a more systematic framework for the obligation to cooperate with a state facing aggression. The extraordinary multiplicity of different strategies deployed in the Ukraine context—and again, notably absent in earlier instances of great power violations of Article 2(4)—set important precedents for future collective security. At some level, however, one has to ask—and I think this is the question that underlies some of our discussion today—whether the problem of selectivity is so great as to undermine some of the gains achieved through the reaffirmation of the prohibition on the use of force. The prohibition has, of course, famously verged on precarity from the start, with the many deaths of Article 2(4) a topic international lawyers have debated for at least half a century. Yet there does seem to be something distinctive about this geopolitical moment when shifts in the distribution of power are replacing unipolarity with multipolarity and the selective application of international rules by Western states are engendering more resistance than might have been expected.

Ata Hindi

Kateryna? I would be interested to hear your take on how you feel. Is the regime working? Is it lacking? Being a lawyer from Ukraine, I would love to hear your thoughts on this, and if you can give a little bit of a personal opinion, it would be great as well.

Remarks by Kateryna Busol*

Thank you very much, and good morning or good afternoon, dear colleagues, depending on where in the world you are. Thank you very much for giving the floor also to one of the Ukrainian voices.

Reflecting on the comments of my colleagues. I would like to point out that Ukraine is both a beneficiary but also a victim of selectivity, because even if the international legal response to Russia's aggression has been unprecedented since the full-scale invasion, the aggression did start, indeed, in 2014. And for the initial eight years, Ukraine—and here I am speaking as a lawyer who has worked on conflict-related crimes since the beginning of the invasion—Ukraine as a civil society and as the government has struggled to refer different aspects of Russia's acts of aggression and of ensuing human rights violations and violations of international humanitarian law to available international fora.

There has been this gap, and even concerning the scholarly commentaries that discussed Ukraine's early legal redress initiatives. For instance, quite a few academic analyses were skeptical about Ukraine's initial resort to the International Court of Justice, aiming to hold Russia accountable for alleged racial discrimination in Crimea and alleged terrorism financing in eastern Ukraine.

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Such commentaries accused Ukraine of bringing the issues of the use of force and the issues of the sovereignty over the territory to the fora where those issues at that point could not be adjudicated. That showed a clear problem in international law that, indeed, there were few avenues for Ukraine to adjudicate Russia's state responsibility and that needed to be done creatively. Ukraine was trying to decipher the large conundrum of Russia's actions and single out the smaller aspects of Russia's state responsibility, which could be adjudicated by respective fora, pursuant to international law and jurisdictional requirements.

Addressing the state and not just the individual role of Russia's political, military, and media figures is very important. Because the act of aggression is a very comprehensive structural crime. It shows the involvement of different state enterprises, the social support, the complicity of the judiciary and academia in endorsing aggression. Therefore, while Ukraine is exceptionally lucky to benefit from strong international support since February 2022, before that, the nation had been struggling to assert both the state and individual aspects of Russia's responsibility in waging the aggressive war. Thank you.

Ata Hindi

Thank you. And last but not least, Melissa, we would love to hear your views on this as well.

Remarks by Melissa Verpile*

Thank you so much for the invitation, and thank you so much for joining us this morning. I echo a lot of what my colleagues have said. It is not that the international legal order is insufficient. There is no real gap in substantive norms. The issue is the enforcement of the system, including when the Security Council fails to act under its mandate because of the veto, and Professor Zimmermann very eloquently outlined this.

One aspect is the focus on individual criminal responsibility, which is very important, because by enforcing the law on individuals, we then bridge enforcement gaps of substantive rules upon states, because after all, states are led by individuals. It is really an enforcement problem, and we have seen in other instances, corporate, non-corporation issues, et cetera. In terms of substantive rules, we have them, and we have found creative ways to apply them, but I would say that in this instance on the crime of aggression, the enforcement is lacking. Thank you.

Ata Hindi

That is an excellent segue into the next question, because I appreciate what you said, that it is not a gap in the norms, and being a doctrinal person myself from spending too much time with Andreas, I believe that, yes, it is a problem probably with compliance and enforcement. But when we look at compliance and enforcement, you mentioned, for example, individual criminal responsibility, and now we are looking at the ICC and other mechanisms of international criminal law. The question is, can we work with what we have, which is the ICC, in particular, in removing ourselves a bit from the state responsibility into the individual criminal responsibility regimes, or do we look toward setting up ad hoc tribunals or something else.

Melissa, going back to you, I would love to hear your thoughts on whether or not the ICC might be the answer or is there a way to set up ad hoc tribunals? What are the types of approaches that you have looked into or thought about that might be beneficial in situations like the situation in Ukraine and, of course, elsewhere?

* Parliamentarians for Global Action.

Melissa Verpile

On the International Criminal Court, at Parliamentarians for Global Action, within the International Law and Human Rights Program, we have advocated for the universality of the Rome Statute.

Currently, I have to say that looking at the statute, there is no equality before the law on the crime of aggression because of the restrictive jurisdictional regime of the ICC over the crime of aggression, which—except for a UN Security Council referral, will not take place, obviously, because Russia would veto immediately—requires an acceptance of the jurisdiction over the crime of aggression by the aggressor, both by the aggressor state and the victim state, and Russia is not a state party to the Rome Statute.

This limitation, which does not apply to crimes against humanity, genocide, and war crimes, has allowed the act of aggression by the Russian Federation that took place in February 2022 to go unpunished, and we have seen the consequences of such limited jurisdiction and practice.

Now, there has been a push for a two-track approach amending the amendments, to remove this jurisdictional bar, and align the current jurisdiction of the crime of aggression with that of other war crimes. That is the first track, which is complicated because we all know that it takes a lot of time to negotiate an amendment. Also, there has not been any state proposing this amendment or tabling it at the moment. This is really a mid- to long-term solution.

In parallel to this, because this is extremely important, the modality of establishing this special tribunal that seemed to garner the most support is to have one that is an international tribunal created by a treaty between Ukraine and the United Nations. It would come after a request by the government of Ukraine and upon a resolution of the United Nations General Assembly, which would recommend the creation of this tribunal and request the UN Secretary-General to initiate negotiations with the government, et cetera.

It is really a two-pronged approach, because the ongoing crimes in Ukraine merit our attention and merit that a proper investigation and prosecution of those most responsible, and the crime of aggression is a leadership crime that is a crime against the international community as a whole. Thank you.

Ata Hindi

Thank you. I will go straight to Kateryna.

Kateryna Busol

Thank you. I would add that the two-pronged approach has actually received more support recently. For instance, by the Parliamentary Assembly of the Council of Europe (PACE), as evidenced in its resolution called "Legal and Human Rights Aspects of Russia's Aggression Against Ukraine," adopted in January 2023. The PACE has said that it supports the establishment of the special tribunal, but to address the selectivity issue, it also endorses this larger long-term reform of the ICC, which is needed, and which can be done with the described model of extending the ICC's jurisdiction applicable to war crimes, crimes against humanity, and genocide, to the crime of aggression, or allowing referrals by the UN General Assembly.

The UN Commission of Inquiry on Ukraine in its March 2023 report also supported the idea that the prosecution of Russia's aggression should be parallel to the wider reform of the ICC.

What has been lacking in this discussion is also the clear position of the Ukrainian government, that they are aware of the selectivity issue and that in lobbying justice for the country, for the people of Ukraine, they are also aware of this wider structural problem within the ICC, and that they might

be ready to actually join the advocacy campaign for the reform of the Rome Statute. But for that, of course, Ukraine should also ratify the Rome Statute, and I am grateful that we have the voice of the Parliamentarians of Global Action today who have been together with the Ukrainian civil society, making the argument to the government for years now that the non-ratification really casts an unpleasant shadow on Ukraine's current justice efforts. Thank you.

Ata Hindi

Thank you. I will go straight to Aslı.

Asli Bâli

Thank you. I think it might be worthwhile to step back and consider the ways that the ICC has already been involved in the Ukrainian case, apart from aggression. As we know, the prosecutor has announced that he has moved forward with investigations and now with a warrant for Putin and for the person in charge of child deportations. Once more the exceptionalism with which the Ukraine conflict has been treated is striking. Rarely has the ICC moved so quickly and with so much Western support, including from the U.S., a country that not only exempts itself from the jurisdiction of the Court but was recently imposing sanctions on the Court's personnel to deter investigation of its own conduct and that of its close allies.

Before we even turn to the question of a special tribunal and why we will not see amendments of the Rome Statute any time soon, it is worth underscoring the degree that the prosecutor's decision to investigate here stands in stark contrast to the recent decision—under American pressure—not to investigate the United States or the United Kingdom for their conduct in Afghanistan on the grounds that resource constraints precluded such an investigation by the ICC. Against this backdrop, it is hard to miss the significance of the remarkable influx of resources to the Court to investigate alleged crimes committed in Ukraine since November 2013. Nor are the resources made available to the ICC the whole story. The significant international effort dedicated to developing a second track for accountability in the form of an ad hoc or special tribunal to overcome the jurisdictional limitations that the ICC prosecutor faces on pursuing the charge of aggression against Russia is perhaps even more striking.

There are multiple levels here of selectivity and exceptionalism that form the context for calls to amend the Rome Statute. This makes it all the more important to consider why such amendments are extremely unlikely. The opposition to amending the ICC statute itself emanates from the very states that are most supportive of pursuing charges of aggression against Russia today. In other words, the goal is not producing a forum that can assert jurisdiction against all those who commit acts of aggression. Rather, the goal is to produce a form of jurisdiction limited to trying only Russia acts of aggression, or perhaps more generally those forms of aggression disfavored by states who reserve to themselves the right to use force with impunity in the pursuit of their own security and other interests.

Beyond this obvious difficulty, the ICC itself is also proving to be an institution that is internally selective in ways that may dissuade other, non-Western states from expanding its jurisdiction or empowering further discretionary choices by an inconsistent prosecutor.

Turning to the idea of a special tribunal, there are two possible tracks here. There is a special tribunal that we have been discussing so far, which would involve an agreement with presumably the UN General Assembly or the United Nations in some form on Ukraine that produces an international court. Second, there is a hybridized model, which is the one that the United States and the UK have expressed support for, which would be grounded in the national jurisdiction of Ukraine and have international elements. These states are more supportive of this approach because they

prefer to avoid the precedent of endorsing another special tribunal. This double bind of, on the one hand, wanting to aggressively pursue every available international law avenue to punish Russia today, but always with a view to the flank to ensure no precedent that might redound against the states urging prosecution for their own future behavior is, of course, on prominent display. Little wonder that many states in the General Assembly express increasing skepticism about the plausibility of an impartial system of international criminal law.

Everyone in this room shares an enormous sense of solidarity with Ukrainians. But this is quite separate from the potential damage done to the international legal order by the forms of selectivity being marshalled to the Ukrainian cause. To what extent can we speak of a collective international legal order rather than a selective one in the service of the interests of one subset of powerful states when we have this much inconsistency in the treatment of violations of Article 2(4)? Moreover, contestation over such selectivity itself has real geopolitical significance that ranges far wider than the case of Russia. When international legal rules are reduced to an à la carte menu of strategies for boxing in adversaries the depreciation of the law may have far-reaching consequences. China's position on the Ukraine conflict and its criticisms of Western proposals for accountability are likely to gain greater adherence globally due to the selectivity exhibited by proponents of international accountability for Russia.

In light of these considerations, the choice between a special tribunal and a hybridized court raises interesting questions. From the perspective of the rest of the world, there might be something quite attractive about a hybridized model that could conceivably proceed through an agreement between Ukraine and a group of other states without the need of UN endorsement. Whether or not the General Assembly would support a hybridized court is an open empirical question given the voting record that we have seen on Ukraine in that body. But if Ukraine were to enter into a treaty with a set of other interested nations to create such a hybridized tribunal, the precedent set could be replicated by many states against their adversaries, producing a more pluralized universe of accountability mechanisms.

That said, such a more pluralized landscape would also be shot through with a level of politicization and selectivity that would give rise to legitimate concerns about the credibility of international law. Resisting strategies that underline basic principles of the rule of law at the international level should not be mistaken for a failure of solidarity with Ukraine. When international lawyers support selectivity out of purported solidarity, they run the risk of destabilizing a legal order designed to constrain unlawful uses of force through generalizable rules and institutions applicable to all.

Ata Hindi

Asad?

Asad Kiyani

Let me take up this question of a specialized tribunals and the idea that the United States and UK are pushing a particular version of this specialized tribunal, which would be modeled on what happened in Sierra Leone, the Special Court for Sierra Leone a number of years ago.

I think there's three salient features to this internationalized tribunal, which would be grounded, as Aslı said, in domestic Ukrainian jurisdiction, with some internationalized elements, probably judges and registrars or something along those lines, a mix there, the exact parameters having not yet been established.

The three salient features are, one, that this would leave the ICC framework and, thus, U.S. vulnerability to the ICC unaffected. It would ensure that the parameters of international criminal

justice are still controlled by great powers, and it would also have this interesting idea that Aslı alluded to about reinvigorating the entrepreneurial legalism of international criminal justice from about two decades ago, the 1990s, in particular.

Taking up that first point, as you have noted, this kind of internationalized tribunal would avoid the procedural hurdles that Melissa described with respect to the ICC. You can claim jurisdiction over aggression without those obstacles, and this would potentially affect the impetus to change the procedural hurdles of their own statutes, which again would broaden jurisdictions such that American leaders would then be vulnerable as well.

I am always encouraged to hear others insisting on the continuation of the two-pronged approach, and I am not saying that would not happen, but simply noting that I believe one of the intentions of pursuing this internationalized tribunal or effects of doing so may be to mute that impetus somewhat.

The second is that this would ensure the parameters of international criminal justice are still controlled by parties that have very strong interests in ensuring that international criminal law can be applied to their political opponents but not to themselves. And one of the joys of doing this through an internationalized Sierra Leone-type tribunal is that you avoid the need to go to the UN General Assembly, and the UN General Assembly cannot, of course, bind anything, but it can recommend that the UN agree to a treaty with Ukraine. That recommendation may include something that changes, alters, or broadens the mandate or jurisdiction of this tribunal beyond what the United States and United Kingdom, in particular, might want to see happen. That risk may be muted again by pursuing this particular kind of model that is internationalized as opposed to international.

The third case about reinvigorating the entrepreneurial legalism of international criminal jurisdiction is really just a signal to this possibility that comes from internationalized tribunals and the idea that we do not have to anchor ourselves to the ICC, that we are able to coalesce, build coalitions independently, because they are multilateral enough. The question of what is multilateral enough to make it an international and internationally legitimate tribunal is one that we have not fully explored yet in this realm. We have always anchored things to the UN for the most part, but there is this question here. What would make it a sufficiently international tribunal to give it the legitimacy to do the kind of very controversial work that international criminal law always is?

The risk of doing that is that these tribunals can, as Aslı said, be used to prosecute members of other great powers, nationals of other great powers. It also creates this other potentially weird historical analogue, and that is what happened after the First World War when the Germans, the French, and the English all pursued tribunals in their own home jurisdictions that were not really international but were not seen as legitimate elsewhere, in part, because they were competing over the same cases.

One of the joys of this is the pluralism that comes with it, potentially. There is also this really interesting possibility of contradiction in congruity. There's no requirement, for example, that you have only one tribunal for any one conflict, and you can imagine a scenario, again, like what happened after the First World War in which you have three different international tribunals or three different tribunals going on at the same time, all purporting to judge conflict, the same conflict and at sometimes the same actors within the same conflict. The Germans, in particular, were very excited about running trials in which they would put Germans on trial for alleged war crimes and serially acquit them as ways of delegitimating what the French and British were doing at the same time. There is a real Pandora's box potential here as well to actually create many more tribunals to combat the selectivity that happens at so many different levels with the ICC in terms of prosecutorial discretion, in terms of its design, its procedures, but also many other tribunals. That selectivity question, as Aslı said, animates so much of what is happening here. But I think it really animates this push for an internationalized tribunal.

But even if we can escape that trap, there is always going to be the question of the legitimacy of what comes afterward, and I think there is something really powerful but also something really potentially destabilizing associated with that. Again, I do not say destabilizing in a bad way. I am not sure I am convinced by the international criminal system as it is. But I think that maybe there are a lot of unintended consequences, but we will definitely cut it to play there as well.

Ata Hindi

Thank you. Andreas?

Andreas Zimmermann

Thank you so much. Let me start with a more general remark on the issue of selectivity. While I obviously deplore prior violations of Art. 2(4) by other states, I think the quality of the violation of the prohibition of the use of force we are now facing, and the scope of violations by the Russian Federation we have been witnessing in the last year of both, the *jus ad bellum* and the *jus in bello*, is unique. Hence, eventually creating an ad hoc tribunal in this case might be really legitimate, while in other cases it might be different, given, as mentioned, the quality and the quantity of the violations of international law we are now seeing.

While that was a more general introductory remark as to the issue of selectivity, let me now move to your specific question.

As to the ICC and the possible 'Kampala 2.0.' amendment, you might be aware that the German Minister of Foreign Affairs is on record that Germany will pursue a process aiming at enlarging the ICC's jurisdiction as to the crime of aggression so as to also encompass crimes of aggression committed by non-state parties of the Rome Statute, as well as those committed by state parties that have not ratified the original 2010 Kampala amendment. But I also note that, as of today, out of the 123 contracting parties of the Rome Statute, approximately only one-third have ratified the current Kampala amendment on the crime of aggression. We should thus not be over-optimistic, to say the least, as to the envisaged additional amendment. On the more technical side, we must also be aware of the fact that nationals of those contracting parties of the Rome Statute, which so far have not ratified Kampala (and will neither do so in the foreseeable future) are not subject to the Court's jurisdiction. That concerns notably France and the United Kingdom given Article 121(4) and (5) of the Rome Statute.

Accordingly, even if a 'Kampala 2.0.' amendment were to be amended, it could never be applied vis-à-vis those contracting parties of the Rome Statute that have neither ratified the current 2010 Kampala amendment, nor will ratify any future 'Kampala 2.0.' amendment. Put otherwise, even if we were to reach the required majority in the Assembly of States Parties to adopt any such amendment, it could in the future again only be applied, let's say, to one third of states parties of the Rome Statute plus to third states not party to the Rome Statute, and one might wonder whether then that makes sense, plus whether it might not overburden the Court politically. There are thus both, very significant political *and* technical treaty-law related problems to be overcome if we were to consider such a 'Kampala 2.0.' amendment, which therefore I do not believe is realistic to come about in the next few years.

Now, on the second prong concerning a possible ad hoc tribunal issue, I certainly would only opt for a tribunal to be created along the STSL model, i.e. the Special Tribunal for Sierra Leone. Why? Because it is only if we were to get a decision by the General Assembly we by the same token would get sufficient legitimacy for such a tribunal to be created. Even if that were the case, it should however not suffice, politically speaking, to reach the required two-thirds majority of the states present and voting, as required by the Charter, but that we would, politically speaking, need

much more. In my perception, in order for such an ad hoc tribunal to be perceived as possessing a sufficient degree of legitimacy, it ought to receive at least a majority of let's say one hundred states voting in favor of the creation of such a special ad hoc tribunal

I am however wondering whether states in the General Assembly, notably those from the Global South, will be willing, or would be willing, to vote for such a tribunal if we consider the recent resolution on the Ukraine-related register of war damages where we only got ninety votes in favor of the creation of such a register of damages. That shows us that we might get even less votes in the General Assembly when it comes to the creation of an ad hoc criminal tribunal. I am thus somewhat pessimistic. Thank you.

Ata Hindi

Thank you. I do have one more question. I am going to leave it open to whoever wants to respond to it so that we do have at least time for at least two questions from the audience. The question I ask is, since you mentioned a couple of states, in particular, Andreas, and in line with the others, with the other contributions, it goes back to the question, do the rules prohibiting aggression and the mechanisms that exist benefit some and will never benefit others? I do not know who, if anyone, would like to take up that question. I would be especially appreciative of individuals that might have some critical inquiries or expand on critical inquiries like TWAIL, Critical Race Theory, or other inquiries in terms of their academic and professional work in this topic. Aslı and Asad, in particular, I am looking at you.

Asli Bâli

All right. I am happy to get us started. I only hesitated because I think both of my previous answers indicate my position on this question. I think the problem of selectivity in the application of the prohibition on aggression is deeply problematic. Obviously, it is also hotly contested, beyond even the question of how the ICC might proceed. To begin with, the states most responsible for neutering the crime of aggression jurisdictionally at the ICC and most motivated by concerns to shield themselves from any form of international accountability for their own prior acts of aggression are now the ones most enthusiastic about investigating and prosecuting Russia, a double standard that risks undermining basic rule of law precepts. Today's debates unfold in the shadow of the Iraq War and the absence of accountability for those who violated the prohibition on the use of force in that case. The fact that these are the same actors now proposing a new special tribunal goes some way toward explaining the skepticism with which their proposals have been received in the General Assembly. I agree with Andreas, as I mentioned in my own previous remarks, that a vote in the General Assembly is unlikely to be favorable. It is certainly not that states in the Global South wish to see the prohibition on the use of force undermined or unraveled. I think quite the opposite. But the concern is that participating actively in these forms of selectivity will only further undermine the sanctity of the prohibition by undermining the expectation that like cases be treated alike. Basic rule of law precepts against selective justice are part of the expressive function of an international legal order that consists of rules applicable to all. Moreover, the purpose of a special tribunal would be the one identified by Andreas: to express international indignation over the crimes that are being committed by Russia, qualitatively and quantitatively. Yet proposing a tribunal has had the effect of undermining the sense of solidarity with Ukraine precisely because it has made the selective reliance on international rules prohibiting aggression so explicit. A tribunal against Russian aggression supported by the architects of the violation of Iraqi sovereignty—states that unleashed untold violence across the Middle East for which they have taken no

responsibility—stands little chance of being seen as anything but an expression of geopolitics. It is difficult to see how the international legal order can be well served by such an exercise.

There was a brilliant piece recently published in a blog symposium comparing the cases of Ukraine and Iraq as a matter of international law by Ntina Tzouvala and Anastasiya Kotova. Their contribution addressed why it is so problematic to try to distinguish the Iraq aggression from what is happening in Ukraine, putting aside entirely the empirical question of which crimes are worse or where more have suffered, a factual comparison alluded to a moment ago in the suggestion that there is an obvious qualitative or quantitative distinction. Putting that aside, the blog post focuses exclusively on the purported doctrinal distinction between acts of aggression associated with acquisition of territory and those that are not. The basic claim of those who seek to distinguish Ukraine from Iraq is that there was no attempt to acquire Iraqi territory through use of force. Tzouvala and Kotova observe, quite rightly, that Article 2(4) protects *both* territorial integrity *and* political independence, and the decision to prioritize territorial integrity ahead of political independence is directly related to the nature of imperial power at this time. On their telling, there is a reason that a country like the United States might not need to acquire territory, which they put very succinctly. The United States manages its geopolitical hegemony in its spheres of influence through coups, containers, and investment treaties. That is a quote from them. That is, the form of imperial control preferred by the U.S. does not require outright annexations, but it does require political dependency of a particular kind. Violations of Article 2(4) that topple governments, occupy countries, subject territories to a decade or more of military action, produce and unleash violence that destabilizes an entire region, and produces tens of millions of refugees—flows of humans fleeing violence but finding doors closed to them in capitals the world over—cannot be exempt from the prohibition on the use of force. All of the harms produced by a selective focus on territorial integrity without emphasizing political independence cannot be encapsulated in a short presentation, but those harms clearly underlie the resistance in the UNGA and elsewhere over American-led denunciations of Russian uses of force. Moreover, setting the Iraq war example to one side, many in the Global South and beyond will remember that only a few years ago the United States openly endorsed territorial annexation and the acquisition of territory through use of force when it recognized the Israeli annexation of the Golan Heights and the Moroccan assertion of sovereignty over Western Sahara, positions taken by the Trump administration that the Biden administration has not repudiated.

The language of sanctimonious indignation with respect to Russian crimes in Ukraine may ring hollow due to the inconsistencies of the positions taken by the U.S. and other Western powers, despite feelings of solidarity with Ukrainians. The worry is that acquiescing in the instrumentalization of international law will only further depreciate the norms, including especially the prohibition on the aggressive use of force, on which so many in the Global South depend.

Andreas Zimmermann

Ata, if I may?

Ata Hindi

Yes, please.

Andreas Zimmermann

Now, I am always wondering about this issue of selectivity. If we remember Nuremberg, it was selective justice, and it was good that it was done, was it not? Would we not all agree that

Nuremberg was a huge step ahead? So why do we not go for the prosecution of the crimes committed on the territory of Ukraine, including possibly by a GA resolution, the crime of aggression? Then eventually we might move forward in the next five or ten years, but if we do not do it in the case of Ukraine, then we end up saying that even in such obvious violations of Article 2(4) with the attempt to annex foreign territory and destroy a whole neighboring state, even then we would not go for international justice. I am not that much concerned about selectivity. At one point you have to start and you have to get the game going, right?

I end with one last remark. I like that the United States is now saying, look, it is good that nationals of Myanmar, or the nationals of Russia are exposed to the court, to the ICC's jurisdiction, despite the fact that they are third-party nationals. That undermines the whole argument by the United States previously made that nationals of non-state parties could not be exposed to the court's jurisdiction.

Now, if we then reach the point of, let us say, Israeli nationals being exposed to the ICC's jurisdiction, the United States would be in a much weaker position to a sudden claim that Israeli nationals could not be exposed to the ICC's jurisdiction. I think the process in itself might be helpful. Thank you.

Asad Kiyani

Ata, maybe I can jump in here?

Ata Hindi

Please go ahead.

Asad Kiyani

There is a lot of interesting conversation happening now about progress and selectivity, and I want to go back to a couple things that Aslı was pointing out, one about this point about how aggression is framed and defined and the connection to Article 2(4), which I find interesting in part because the definition of aggression that we do have in terms of international criminal law, in the Rome Statute, does not require any kind of annexation of territory and simply says the use of armed force against sovereignty, territorial integrity, or political independence, an invasion or occupation, however temporary, that is all aggression. I think that is actually really important to keep in mind that when Kampala happened, it had a very particular kind of turn or twist to the idea of aggression that after the Second World War, it was very clearly designed to exclude the kinds of colonial histories of aggression that had preceded the Second World War and the way in which the law was applied to Japan, as it was then defined, at least how aggression was defined then, was clearly hypocritical in the sense that it focused on Japanese colonial aggression without acknowledging the colonial history of aggression that preceded what Japan did and occupied territories and colonized territories when it engaged in its act of aggression.

There has actually been a long history of defining aggression and trying to define aggression in ways that permitted Western imperialism to not be considered as aggression, and I think the anchoring to Article 2(4), as opposed to Article 8*bis* of the Rome Statute, is a reversion to that kind of modality of understanding aggression. Again, international criminal law says something very different than the UN Charter on this point, and we should be careful about reversing in that sense as opposed to progressing in the way that Article 8*bis* encourages us to do so.

On the significance of selectivity and its relation to this idea of the progress narrative of international criminal law, the idea being that if we give this growing body of law enough time, it will

eventually become less selective and start to prosecute all the things that should be prosecuted and taking those into account under its umbrella. I think what we are actually seeing is evidence of the opposite.

A number of years ago I wrote this article in the *Journal of the International Criminal Justice*, and I am sorry to plug it here, I know that is uncouth, but the reason I wrote it was because I wanted to point out what third-world or post-colonial states were doing with selectivity that was really interesting. What they were doing was controlling referrals to the ICC such that the ICC could only investigate the domestic government's political opponents or those who had been defeated by that particular government in a particular civil war. That is to say, they controlled access to witnesses and material and evidence in a way that skewed ICC prosecutions toward only certain parties to a conflict.

Now, maybe that is a good thing. Maybe it is better to prosecute some and not others, but as Aslı alludes to, there is an expressive component to international criminal law. And the expressive component is just fundamental to its justification according to many, and the message that is being sent and internalized by many states is that you can actually use that expressive function of labeling someone as an international criminal to delegitimate political opponents. In the context of international law, we often think about, okay, the United States trying to delegitimate Russia or something along those lines, but now we see post-colonial states doing the same thing internally in the context of civil wars.

What I am saying here is that rather than thinking about this as potential progress, we should think about potential resistance to what many states are now internalizing and actually doing. The ones that do engage willingly with international criminal law do so in terms that are designed to further the political aims of the government in power. We have alluded to what happened with the UK in Iraq and the United States in Afghanistan and how quickly that happened is apparent, right? It does not escape any of us what is happening in this situation.

But it is also important to look at all the other cases that do not have great power interest clearly at stake and what is happening there and similar patterns of selectivity. It is not about the same kinds of power interest, but the same patterns of controlling and ensuring these prosecutions are aimed in one direction and not in other directions is what is taking hold.

Andreas Zimmermann

But what about the Kenya investigation then, where the ICC Prosecutor also formally withdrew its investigation?

Asad Kiyani

No, I am not just talking just about Kenya. I am talking about Uganda, Kenya, Côte d'Ivoire, et cetera. I am talking about quite a few different investigations, and again, I am happy to share the references to all these situations in which that happens, and it is not a question.

But I just wanted to make that point that when we are talking about progress and selectivity, selectivity is not a thing that just happens. It actually changes how we do international criminal law, and we have seen that with the ICC.

Ata Hindi

Thank you. Melissa and Kateryna, I would love to hear your views as well.

Melissa Verpile

Thank you so much to all the colleagues for the really enriching commentaries. I think just because the system is imperfect does not mean that we should not aim at correcting what is wrong with it. We can definitely point out all of the flaws, and of course, we should analyze the flaws and try to remedy them. But right now, there is a situation where there is annexation of territory. There are alleged crimes against humanity and war crimes happening. So we may wish to really push to find a solution to bring to account the perpetrators of all these crimes. Thank you.

Kateryna Busol

Thank you. I am building upon what my colleague said. Because of the very acuteness, both of the atrocities against Ukrainians and of the selectivity concern that has been there around the ICC for years, Ukraine's position is very important. Again, apart from just lobbying for the prosecution of Russia's and Belarus' aggression, whatever form this prosecution might take, Ukraine should develop a deeper engagement with the Global South nations and should really take a stance in advocating for the amendments to the Rome Statute aggression jurisdiction provisions.

The amendments will not happen within the next year or two, and politically, it will be hard because the nations that currently support the aggression prosecution in the direct or the hybrid mode like France, the UK, or the United States, might not be happy about such ICC advocacy by Ukraine. However, it is an important position, both for Ukraine's government and civil society, for it will help to solidify the legitimacy of a judgment of the Russia/Belarus aggression proceeding, whatever form it might take to say that it was sought for not just in one particular situation, but in parallel to the efforts to also close the impermissible accountability gap for the other countries.

I fully second Melissa here in saying that the fact that the system is so imperfect now does not mean that we also cannot start the work of reforming it, even though it is going to be a long-term process. The Special Advisor of the ICC Prosecutor on Crime of Aggression, Professor Claus Kreß from Germany, has also said that the prosecution of aggression against Ukraine should be a transitional block to the wider ICC reform. Ukraine should build a stronger voice in this process, to solidify the remedy for all survivors affected by aggressions globally and to contribute to deterring this "supreme international crime" in the first place.

Ata Hindi

Thank you.