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## Russia, Ukraine, and the Challenge of Wartime Accountability

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# TEXAS TECH LAW REVIEW 2023 CRIMINAL LAW SYMPOSIUM KEYNOTE: RUSSIA, UKRAINE, AND THE CHALLENGE OF WARTIME ACCOUNTABILITY

*Jeffrey Kahn\**

I do not know how you celebrated the St. Patrick's Day weekend here in Lubbock, but it was quite a busy weekend for international law and Russian politics. On the day itself, the International Criminal Court (ICC) issued an arrest warrant for President Vladimir Putin and his Commissioner for Children's Rights, Maria Lvova-Belova.<sup>1</sup> These warrants are for the war crimes of taking hostages and forcibly transferring civilians.<sup>2</sup> But this generic language from the Rome Statute obscures the fact that what is alleged is the stealing of thousands of Ukrainian children from their parents.

Two days prior, the Independent International Commission of Inquiry on Ukraine chaired by Judge Erik Møse separately concluded that not a single one of the 164 incidents it was able to examine satisfied the requirements set forth by international humanitarian law and, in fact, these constituted grave breaches of the Fourth Geneva Convention.<sup>3</sup> Judge Møse, the former President of the International Criminal Tribunal for Rwanda, identified many other violations of international humanitarian law, war crimes, and crimes against humanity committed following Russia's full-scale invasion of Ukraine in February of last year.<sup>4</sup>

But that invasion *itself* was a crime, the crime of aggression. Russia is not a state party to the Rome Statute, so only a referral from the Security Council would give the ICC jurisdiction to consider that crime.<sup>5</sup> As a result, many other international organizations and states—including the European

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1. *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INT'L CRIM. CT.: NEWS (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

2. *Id.*

3. Rep. of the Indep. Int'l Comm'n of Inquiry on Ukraine, ¶¶ 95–102, U.N. Doc. A/52/62 (Mar. 15, 2023) (referencing article 147 of Geneva Convention IV).

4. *Id.* ¶ 109.

5. Rome Statute of the Int'l Crim. Ct. art. 15*bis*(5), 15*ter*(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

Parliament of the European Union,<sup>6</sup> the Parliamentary Assembly of the Council of Europe,<sup>7</sup> the United Kingdom,<sup>8</sup> Germany,<sup>9</sup> not to mention Ukraine<sup>10</sup>—have all called for the creation of a special international tribunal of one form or another to prosecute the crime of aggression. Ten days after the ICC handed down these arrest warrants, the United States joined this group.<sup>11</sup> On March 27, U.S. Ambassador-at-Large for Global Criminal Justice Beth Van Schaack, a friend to many of us in this room, announced that “the United States supports the development of an internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine.”<sup>12</sup> This support is in addition to legislation that permits the U.S. to assist the ICC with its investigations and prosecutions for war crimes and crimes

6. European Parliament Resolution of 19 January 2023 on the Establishment of a Tribunal on the Crime of Aggression Against Ukraine (2022/3017 (RSP)), 5 2023 O.J. (C 214) 109–13. This was the second call. The “Impunity for War Crimes” Resolution of May 19, 2022, called at item number twelve for such a tribunal in more general terms: “the creation without delay of an appropriate legal basis, with the support of established multilateral forums such as the UN and the Council of Europe, to allow for the setting up of a special international tribunal for the punishment of the crime of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies.” European Parliament Resolution of 19 May 2022 on the Fight Against Impunity for War Crimes in Ukraine (2022/2655 (RSP)), 2022 O.J. (C 479) 7, 12. This same Resolution concluded that Russia was responsible for war crimes in Ukraine. *Id.*

7. *Legal and Human Rights Aspects of the Russian Federation’s Aggression Against Ukraine*, COUNCIL OF EUR. (Jan. 26, 2023) [hereinafter Resolution 2482], <https://pace.coe.int/en/files/31620/html>; Damien Cottier, Committee on Legal Affairs and Human Rights, *Legal and Human Rights Aspects of the Russian Federation’s Aggression Against Ukraine*, COUNCIL OF EUR. (Jan. 24, 2023), [hereinafter Report], <https://pace.coe.int/en/files/31576>. That body noted that “[d]omestic prosecutions, in Ukraine and in other countries, on the basis of the principles of territoriality or universal jurisdiction, face many legal and practical challenges, including in terms of perceived impartiality, legitimacy and immunities.” Resolution 2482, *supra*, at 5. The Parliamentary Assembly recommended denying personal immunity to the accused and asserted that functional immunities would not apply in the context of a charge of the crime of aggression; it also recommended complementary jurisdiction and evidence sharing with the ICC. *Id.* at 7.3, 7.5.

8. Patrick Wintour, *UK Offers Qualified Backing for Tribunal to Prosecute Russia’s Leaders*, GUARDIAN (Jan. 20, 2023, 9:07 AM), <https://www.theguardian.com/politics/2023/jan/20/uk-offers-qualified-backing-special-tribunal-to-prosecute-russia-leaders-putin-ukraine>.

9. Hans von der Burchard, *Germany’s Baerbock Proposes Special Tribunal to Prosecute Russian Leadership*, POLITICO (Jan. 16, 2023, 4:58 PM), <https://www.politico.eu/article/germany-annalena-baerbock-russia-ukraine-war-proposes-special-tribunal-to-prosecute-russian-leadership/>.

10. *Zelenskyy: We Want to Set Up Tribunal Regarding Russia via UN Resolution*, UKRAINSKA PRAVDA (Mar. 31, 2023, 8:34 PM), <https://www.pravda.com.ua/eng/news/2023/03/31/7395942/>.

11. Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., *Ambassador Van Schaack’s Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression*, U.S. DEP’T OF STATE: OFF. OF GLOB. CRIM. JUST. (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks/>.

12. *Id.* (“Although a number of models have been under consideration, and these have been analyzed closely, we believe an internationalized court that is rooted in Ukraine’s judicial system, but that also includes international elements, will provide the clearest path to establishing a new Tribunal and maximizing our chances of achieving meaningful accountability. We envision such a court having significant international elements—in the form of substantive law, personnel, information sources, and structure. It might also be located elsewhere in Europe, at least at first, to reinforce Ukraine’s desired European orientation, lend gravitas to the initiative, and enable international involvement, including through Eurojust.”).

against humanity in Ukraine.<sup>13</sup> Here I should say, as an aside, that this might be considered modest progress in the United States' position toward the ICC as observed from the baseline of the so-called Hague Invasion Act.<sup>14</sup>

But back to St. Patrick's Day weekend. The day after the arrest warrants, President Putin defiantly traveled to the Russian-occupied Ukrainian city of Mariupol, his first such trip to a war zone.<sup>15</sup> On Monday, he entertained Chinese President Xi Jinping at the Kremlin,<sup>16</sup> and that same day, Russia announced that it had opened its own criminal investigation against the prosecutor, Karim Khan, and three judges of the ICC.<sup>17</sup>

Finally, perhaps what we could call the Monday-morning hangover from this remarkable weekend, we saw the spectacle of Russia's former President Dmitry Medvedev tapping into his inner Trump with a post on his Telegram messaging app to say that "[i]t is quite possible to imagine the targeted use of a hypersonic carrier from the North Sea from a Russian ship at The Hague courthouse."<sup>18</sup> "[E]veryone walks under God and rockets," he observed. "So, citizen judges, attentively look to the sky . . . ."<sup>19</sup>

Moscow's announcement of its own investigation and Medvedev's crude verbal assault are typical of the rhetoric and whataboutism that Russian officials have long employed. I take them as the starting point of this talk because they typify a dramatic shift in the emerging Russian view of international law and international organizations. This shift predates Russia's invasion of Ukraine, or, I should say, Russia's most recent invasion of Ukraine, by almost a decade. Russia has changed its laws, its constitution, and its international commitments to divest itself from previously undertaken legal obligations. And Russia rejects, with increasing fervor, some of the most basic international legal norms and principles. In these remarks, I want to explore this shift with you.

Let me give one of the crudest and starkest examples of this change. It is from Dmitry Medvedev's Telegram post again. We might be prone to dismiss him as Putin's puppet, so it is worth noting that in addition to being Russia's former President and Prime Minister, he is currently the Deputy Chair of its Security Council and the Chairman of Единая Россия, the principle political party controlling nearly three-fourths of the seats in the

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13. *Id.*

14. 22 U.S.C. § 7427(a) ("The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.").

15. Laurence Peter & Samuel Horti, *Ukraine War: Putin Pays Visit to Occupied Mariupol*, *State Media Reports*, BBC NEWS (Mar. 19, 2023), <https://www.bbc.com/news/world-europe-65004610>.

16. *As Xi and Putin Meet, U.S. Assails 'Diplomatic Cover' for Crimes*, N.Y. TIMES, <https://www.nytimes.com/live/2023/03/20/world/russia-ukraine-xi-putin-news#heres-what-to-know-about-xis-visit-to-russia> (last updated Mar. 21, 2023).

17. *Id.*

18. Dmitry Medvedev (@medvedev), TELEGRAM (Mar. 20, 2023, 12:01 AM), [https://t.me/medvedev\\_telegram/283](https://t.me/medvedev_telegram/283) (author's translation).

19. *Id.* (author's translation).

Duma.<sup>20</sup> These are not marginal positions and his words are not necessarily only his own. This puppet shows its strings.

His rant just after St. Patrick's Day got the most press for its missile threat against The Hague. But in that same long post he also took aim at the foundations of the international legal order, which he called ineffective and unjust.<sup>21</sup> Medvedev cited the legal maxim *par in parem imperium non habet*, which is Latin for "an equal has no power over an equal."<sup>22</sup> This is a foundational principle of international law that explains why various doctrines of foreign state immunity may stop the courts of one country from imposing its law on certain acts by state officials of another country. Medvedev knows this, just as he knows that international courts operate on a different plane.<sup>23</sup> Nevertheless, here is his explanation for the failings of what he called "this shitty, useless ICC".<sup>24</sup>

After all, it is possible to judge a country and its leaders in two cases: 1) when the country itself has wildly weakened, almost lost its sovereignty and decided to recognize the court over itself; 2) when the country lost the war and capitulated. Otherwise, it's impossible. And everyone understands this.<sup>25</sup>

If just speaking these words out loud made them true, then Medvedev had an argument. But Medvedev is a lawyer (in fact, for a short time, he was

20. *Russian Ruling Party Sticks with Medvedev as Chairman, Other Familiar Faces*, RADIO FREE EUR./RADIO LIBERTY (Dec. 4, 2021, 10:13 PM), <https://www.rferl.org/a/united-russia-medvedev-continues/31594002.html>.

21. Medvedev, *supra* note 18 (author's translation).

22. *Id.* (author's translation).

23. Prosecutor v. Al-Bashir, ICC-02/05-01/09-397-Corr OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 115 (May 6, 2019), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019\\_02856.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02856.PDF) ("Accordingly, the principle of *par in parem non habet imperium*, which is based on the sovereign equality of States, finds no application in relation to an international court such as the International Criminal Court.")

24. Medvedev, *supra* note 18 (author's translation) ("Но главный порок системы международного публичного права в её неэффективности. Страны не хотят исполнять ангажированные акты Генассамблеи ООН, ветируют решения Совбеза ООН, покидают разные институты ООН. Причина в их несправедливости, которая основана на недопустимости принуждения группой стран-суверенов таких же суверенных государств. ИБО PAR IN PAREM NON HABET IMPERIUM. Равный не имеет власти над равным. Вот возьмём этот говённый, никому не нужный МУС, созданный на базе Римского статута, в который не вступили крупнейшие государства. Кого он привлёк к ответственности?" *Id.* ["But the main defect of the system of international public law is its ineffectiveness. Countries do not want to execute acts of commitment of the UN General Assembly, they veto decisions of the UN Security Council, they abandon various UN institutions. The reason is their injustice, which is based on the inadmissibility of coercion by a group of sovereign countries of exactly the same sovereign states. FOR PAR IN PAREM NON HABET IMPERIUM. An equal does not have the power over an equal. So we take this shitty, worthless ICC, created on the basis of the Rome Statute, which the largest states did not join. Who did it call to account?"]) (author's translation).

25. *Id.* (author's translation) ("Ведь судить страну и её лидеров можно в двух случаях: 1) когда сама страна дико ослабела, почти утратила суверенитет и решила признать суд над собой; 2) когда страна проиграла войну и капитулировала. Иначе – невозможно. И это понимают все.")

a law professor),<sup>26</sup> so he is familiar with the weakness of this *ipse dixit*. His Latin incantation that “an equal has no power over an equal” contorts this legal maxim into its opposite. It is a thinly veiled assertion that Russia *has* no equal, and thus, no obligation either to abide by any international law premised on such equality of states or to respect an international organization built on the foundation of a community of states. It also expresses distaste—almost revulsion—at the idea of a state subordinating its sovereignty in any way to an international court. Such sentiments would surely resonate with the Bolsheviks. But the post-Soviet Russian view used to be quite different.

A much better understanding of this Latin phrase, an old chestnut of international law, was offered by Yoram Dinstein way back in 1966.<sup>27</sup> He observed that the maxim expresses an aspect of sovereignty that means one state “cannot be subjected to the sway of another without losing its Statehood.”<sup>28</sup> If that is not a reason for Ukraine to fight, then sovereignty has no meaning and law can impose no order on the world.

Our attention is now focused on Ukraine. But Russia has been unraveling its ties to these fundamental norms for at least the last decade. In the time I have remaining, I would like to focus on one very specific example of such unraveling and then pull back the focus to look at how Russian leaders’ respect for international law has unraveled more generally.

The first, most immediate, and narrow unraveling is Russia’s predictable response to the ICC’s arrest warrants and its likely response to similar action by any future international tribunal. With regard to the jurisdiction of ordinary courts, the international law on immunity *ratione personae* is fairly clear. Heads of state, heads of government, and foreign ministers can qualify for immunity from prosecution by virtue of their positions—at least as long as they hold them and at least in national courts.<sup>29</sup> But the International Court of Justice,<sup>30</sup> the Appeals Chamber of the ICC,<sup>31</sup> and others have all concluded that such immunity does *not* apply before international tribunals that, like the ICC, act not for any particular sovereign but for the community of states.<sup>32</sup> The respect-for-an-equal-sovereign basis

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26. Биография, <https://web.archive.org/web/20090903083428/http://medvedev.kremlin.ru/biography>.

27. Yoram Dinstein, *Par in Parem Non Habet Imperium*, 1 ISR. L. REV. 407, 414 (1966).

28. *Id.* (“That is, as a matter of fact, a universally recognized and approved proposition.”).

29. International Law Commission, 73rd Session, Rep. of the Drafting Comm., *Immunity of State Officials from Foreign Criminal Jurisdiction*, art. 4(1), U.N. Doc. A/CN.4/L.969 (May 31, 2022).

30. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14), <https://icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

31. Prosecutor v. Al-Bashir, ICC-02/05-01/09-397-Corr OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 115 (May 6, 2019).

32. Not everyone agrees. See, e.g., ROGER O’KEEFE, INTERNATIONAL CRIMINAL LAW § 14.44 (Oxford Univ. Press ed., 2015) (stating that international tribunals, like the ICC, have no right to abrogate immunity *ratione personae*).

for such immunity is absent from these tribunals.<sup>33</sup> There is also immunity *ratione materiae* for certain actions or decisions taken in an official capacity, but this too might be limited or erased by the nature of the accusation.<sup>34</sup>

If Putin leaves office alive and free—and that is a big if since the quiet retirement of past leaders is the exception, not the rule, in Russian history—it is extremely unlikely that he would be extradited from Russia. That goes not just for Putin, but also for Commissioner Lvova-Belova, Chief of the General Staff Valery Gerasimov, Defense Minister Sergei Shoigu, Wagner Group Leader Yevgeny Prigozhin,<sup>35</sup> and every other indictable Russian soldier or citizen. All of them may expect to benefit from article 61 of the Russian Constitution, which prohibits the extradition of Russian citizens.<sup>36</sup> This was Russia’s ground for refusing to honor the extradition requested by the United Kingdom of Andrey Lugovoy, whom the Crown Prosecution Service accused of the brutal polonium-210 murder of Aleksandr Litvinenko in London in 2006.<sup>37</sup> To add insult to injury, Lugovoy was promptly selected for a seat in the Duma, which gave him additional immunity as a legislator.<sup>38</sup> And now that virtually anyone in a position of power in Russia is forbidden from holding foreign bank accounts, dual citizenship, or other means of independence from the Kremlin, there is less and less of an incentive to leave Russia anyway.

Now you might be entertaining the hopeful argument that article 102 of the Rome Statute, which distinguishes between “surrender” to the ICC and “extradition” to other states, provides a way out. Russia could *surrender* its

33. James A. Goldston & Anna Khalfaoui, *In Evaluating Immunities Before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters*, JUST SEC. (Feb. 1, 2023), <https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/>. This is reflected in the Rome Statute itself. See Rome Statute, *supra* note 5, art. 27.

34. For example, the Nuremberg Tribunal stated: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.” See Principle III, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. (1950), [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/7\\_1\\_1950.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf).

35. Prigozhin was referenced in this list of names in the keynote given on April 14, 2023. On August 23, a private plane carrying Prigozhin and nine other people crashed northwest of Moscow, killing everyone on board. A New York Times analysis of flight data and video footage described “at least one catastrophic midair event” before the plane crashed. Matthew Mpoke Bigg, *What to Know About the Plane Crash that Killed Yevgeny Prigozhin*, N.Y. TIMES (Aug. 30, 2023), <https://www.nytimes.com/2023/08/24/world/europe/prigozhin-plane-crash-russia-wagner.html>. Russia declined an invitation to conduct an investigation under international rules. Allison Lampert et al., *Exclusive: Russia Will Not Probe Prigozhin Plane Crash Under International Rules*, REUTERS (Aug. 29, 2023), <https://www.reuters.com/world/europe/russia-will-not-probe-prigozhin-plane-crash-under-international-rules-brazil-2023-08-29/>.

36. Статья 61(1), Конституция Российской Федерации (“Гражданин Российской Федерации не может быть выслан за пределы Российской Федерации или выдан другому государству”), [KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 61(1) (Russ.) (“A citizen of the Russian Federation may not be deported from the Russian Federation or extradited to another state.”)] (author’s translation).

37. Jacques Hartmann, *The Lugovoy Extradition Case*, 57 INT’L & COMPAR. L.Q. 194, 194 (2008).

38. *Id.* at 195 n.10.

citizens to the Court, not *extradite* them to another state. I could find no indication in the Rome Conference records that Russian delegates expressed an opinion about either word.<sup>39</sup> But the subtleties of the Rome Statute are unlikely to pierce this protection given the current obsequiousness of the Russian Constitutional Court, which would undoubtedly review any such attempted removal. And, as I will explain in a moment, Russia has repudiated its constitution's privileging of international law over domestic law.

But wait, there's more. As you know, the ICC operates on the principle of complementarity.<sup>40</sup> Under article 353 of the Russian Criminal Code, the planning, preparation, or initiation of a war of aggression is "punishable by imprisonment for seven to fifteen years," while actually waging such a war calls for ten to twenty years.<sup>41</sup> Genocide is also a crime in Russia, including by way of the forcible transfer of children.<sup>42</sup> So is looting during an armed conflict,<sup>43</sup> and the recruitment, training, and financing of mercenaries.<sup>44</sup>

You may rest assured that in Russia's current political context, Vladimir Putin cannot and will not be prosecuted there for anything. Article 91 of the Russian Constitution provides Putin with near absolute immunity while in

39. The states recording concerns were Sudan, Israel, Libya, and Algeria. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 38th plen. mtg., ¶¶ 19, 21–23, U.N. Doc. A/CONF.183/C.1/SR.38 (July 15, 1998), [https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf).

40. See Rome Statute, *supra* note 5, art. 17; see also Beth Van Schaack, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10 J. INT'L CRIM. JUST. 133, 134 (2012).

41. Статья 353. Планирование, подготовка, развязывание или ведение агрессивной войны, Уголовный кодекс РФ ("1. Планирование, подготовка или развязывание агрессивной войны - наказываются лишением свободы на срок от семи до пятнадцати лет. 2. Ведение агрессивной войны - наказывается лишением свободы на срок от десяти до двадцати лет."). [UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 353 (Russ.) ("1. Planning, preparation or unleashing of a war of aggression is punished by deprivation of liberty for a term of seven to fifteen years. 2. Conduct of a war of aggression is punished by deprivation of liberty for a period from ten to twenty years.")] (author's translation).

42. Статья 357. Геноцид, Уголовный кодекс РФ ("Действия, направленные на полное или частичное уничтожение национальной, этнической, расовой или религиозной группы как таковой путем убийства членов этой группы, причинения тяжкого вреда их здоровью, насильственного воспрепятствования деторождению, принудительной передачи детей, насильственного переселения либо иного создания жизненных условий, рассчитанных на физическое уничтожение членов этой группы, - наказываются лишением свободы на срок от двенадцати до двадцати лет с ограничением свободы на срок до двух лет, либо пожизненным лишением свободы, либо смертной казнью."). [UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 357 (Russ.) ("Actions directed to the complete or partial destruction of national, ethnic, racial or religious groups as such by way of the murder of members of this group, causing grave harm to their health, forcible prevention of procreation, forced transfer of children, forcible migration or the creation of other living conditions that are designed for the physical destruction of members of this group is punished by deprivation of liberty for a term of twelve to twenty years with limitation of liberty for a term of up to two years, or lifetime deprivation of liberty, or the death penalty.")] (author's translation).

43. Статья 356.1. Мародерство, Уголовный кодекс РФ. [UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 356.1 (Russ.)] (author's translation).

44. Статья 359. Наемничество, Уголовный кодекс РФ. [UGOLOVNYI KODEKS ROSSIJSKOI FEDERATSII [UK RF] [Criminal Code] art. 359 (Russ.)] (author's translation).



office.<sup>45</sup> Following amendments to the Russian Constitution in 2020, Putin is now eligible for re-election in 2024 and 2030.<sup>46</sup> So this immunity would have a long tail. His popularity is aided by near complete control of Russia's mass media space; this seems unlikely to diminish enough, or control of Russian elections likely to abate enough, for him to lose office. In any event, the 2020 amendments to the Russian Constitution added a provision extending this immunity to continue after his tenure in office.<sup>47</sup> And while it is true that a former president's immunity may be removed in the same way used to impeach a sitting president, the Russian impeachment process newly revised by those same amendments makes the U.S. approach look easy by comparison.<sup>48</sup> I would not bet a kopeck on it.

As to the others, prosecution under the Russian Criminal Code for their roles in this war of aggression, or for any other related crime, is also a nonstarter. In the first place, there are the constitutional protections and immunities I mentioned.<sup>49</sup> Additionally, Russia can be expected to obstruct any international effort over which it has legal, political, or economic leverage. The Russian state insists that it is not at war but involved in a special military operation of a defensive nature. Notwithstanding the Russian Constitution's parchment protections for freedom of speech and assembly,

45. Статья 91, Конституция Российской Федерации («Президент Российской Федерации обладает неприкосновенностью»). [KONSTITUTSIJA ROSSIJSKOJ FEDERATSII [KONST. RF] [CONSTITUTION] art. 91 (Russ.) (“The President of the Russian Federation shall have immunity.”)] (author's translation).

46. Upon Boris Yeltsin's resignation on the eve of the new millennium, Putin was appointed as acting president. He was then elected president in March 2000 and re-elected in March 2004. Two four-year terms were widely understood to be the constitutional limit set by the 1993 Russian Constitution. *See* Статья 81(1) и (3), Конституция Российской Федерации принята всенародным голосованием 12 декабря 1993 г. The length of each term was increased to six years by constitutional amendment in December 2008. JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS* 108 (1st ed. 2011). The prohibition on the same person serving more than two consecutive terms was evaded by political agreement between Dmitry Medvedev, who served as president from 2008 to 2012, and Putin, who served as prime minister during that time. The understanding was that Putin would return to the presidency. Putin returned to the presidency in elections held in 2012 and 2018. During the Duma debates on the 2020 constitutional amendments that included imposing an absolute two-term limit, Valentina Tereshkova, the former cosmonaut, “put forward an apparently extemporaneous proposal to amend [a]rticle 81, discounting existing presidential terms served” from this absolute limitation. JANE HENDERSON, *THE CONSTITUTION OF THE RUSSIAN FEDERATION: A CONTEXTUAL ANALYSIS* viii, 93–94 (2d ed. 2022).

47. Статья 92.1(1), Конституция Российской Федерации («Президент Российской Федерации, прекративший исполнение полномочий в связи с истечением срока его пребывания в должности либо досрочно в случае его отставки или стойкой неспособностью по состоянию здоровья осуществлять принадлежащие ему полномочия, обладает неприкосновенностью»), [KONSTITUTSIJA ROSSIJSKOJ FEDERATSII [KONST. RF] [CONST.] art. 92.1(1) (Russ.) (“The President of the Russian Federation who has ceased to exercise his (her) powers upon expiration of his (her) term of office or before the end of his (her) term due to his (her) resignation or persistent inability for health reasons to carry out the powers invested in him (her), shall have immunity.”)] (author's translation).

48. Статья 93(1)–(3), Конституция Российской Федерации. [KONSTITUTSIJA ROSSIJSKOJ FEDERATSII [KONST. RF] [CONST.] art. 93(1)–(3) (Russ.)] (author's translation).

49. *See supra* notes 38–39 and accompanying text (discussing the constitutional immunity resulting from being selected for a seat in the Duma).

anyone who says otherwise (in a public protest, an internet post, or even a school project) can be, and has been, prosecuted and subject to severe punishment.<sup>50</sup>

This disdain for the workings of the ICC is a characteristic that, unfortunately it must be said, is not limited to one state.<sup>51</sup> But it is relatively new in Russia. Russia voted in favor of the Treaty that contained the Rome Statute and signed the Treaty.<sup>52</sup> The deputy head of the Russian delegation, Kirill Gevorgian, who is now the Vice President of the International Court of Justice,<sup>53</sup> expressed the opinion at the final plenary meeting of the Rome Conference that an “international criminal court had been established that could act fully in accordance with recognized norms and standards of international law and human rights.”<sup>54</sup> The new court, he predicted, “would successfully take its place in the system for the maintenance of international peace and security.”<sup>55</sup> The head of the delegation, Deputy Foreign Minister Ushakov, insisted earlier in the conference that:

It was time to put into effect the principle of individual responsibility for the most serious crimes affecting the international community and to take steps to deter such crimes. . . . Its jurisdiction should extend to genocide, aggression, war crimes, crimes against humanity and the most serious terrorist crimes. . . . With respect to aggression, the [Security] Council would first have to determine that such an act had occurred. In other cases,

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50. Lauren A. McCarthy et al., *Four Months of “Discrediting the Military”: Repressive Law in Wartime Russia*, 31 DEMOKRATIZATSIYA 125, 126 (2023); Anton Troianovski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html>.

51. Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS (Aug. 11, 1998), <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court> (“At the end of the six-week Rome Diplomatic Conference for an International Criminal Court, on July 17, 1998, 120 countries (including virtually all of the United States’ allies) voted in favor of the Treaty containing the Statute for an International Criminal Court. The United States joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries voting in opposition to the Treaty. Twenty-one countries abstained.”). The U.S. fought hardest against inclusion of the crime of aggression, despite its historic role at Nuremberg in successfully prosecuting that crime. NOAH WEISBORD, *THE CRIME OF AGGRESSION: THE QUEST FOR JUSTICE IN AN AGE OF DRONES, CYBERATTACKS, INSURGENTS, AND AUTOCRATS 1* (2019) (describing the anger of former Nuremberg prosecutor Benjamin Ferencz “that the United States had lobbied forcefully to exclude the crime of aggression—individual criminal responsibility for aggressive war—from the ICC’s code of crimes, or—if aggression were included—that US leaders would not be prosecuted”).

52. Scharf, *supra* note 51 (“These protections proved sufficient for other major powers including the United Kingdom, France and Russia, which voted in favor of the Treaty.”).

53. *Vice-President Kirill Gevorgian*, [https://www.icj-cij.org/sites/default/files/gevorgian\\_en.pdf](https://www.icj-cij.org/sites/default/files/gevorgian_en.pdf).

54. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 9th plen. mtg., ¶ 102, U.N. Doc. A/CONF.183/C.1/SR.9 (July 17, 1998) [hereinafter U.N. A/Conf.183/C.1/SR.9], [https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf). K.G. Gevorgian was identified as Deputy Director of the Legal Department of the Ministry of Foreign Affairs. *Id.* at 31.

55. *Id.* ¶ 103.

the Court would have jurisdiction with the consent of the State on whose territory the crime was committed and of the custodial State.<sup>56</sup>

These fine words came at what might be called the highest point of Russia's post-Soviet efforts to be a democratic rule of law state, an aspiration (though it is stated as a declaration) found in the first clause of the first article of the first part of its constitution.<sup>57</sup> Article 15, in sharp contrast to Soviet times, declared universally-recognized norms of international law, international treaties, and agreements of the Russian Federation to be a component part of its legal system.<sup>58</sup> In fact, in the event of conflict, the Constitution prioritized the international treaty over Russian law.<sup>59</sup> And this initial eagerness to tie Russia more tightly into the international legal order coincided with Russia's ratification of a bevy of treaties and conventions, including most notably, the European Convention on Human Rights and acceptance of the European Court in Strasbourg to judge its compliance with,

56. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8th plen. mtg., ¶¶ 19–22, U.N. Doc. A/CONF.183/C.1/SR.8 (June 18, 1998) [https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf). U.V. Ushakov, Deputy Minister for Foreign Affairs, was identified as Head of Delegation. *Id.* at 31. Four days later, Mr. Panin, an expert from the Legal Department of the Ministry of Foreign Affairs, stated the following as the Russian Federation position:

40. Mr. Panin (Russian Federation) said that his delegation could not agree with the proposals of Germany and the Republic of Korea whereby the jurisdiction of the Court triggered by the complaint of a State could also extend to nonparties, as that approach was not consistent with international law. The Russian Federation was also unable to agree that an international treaty could create obligations for third parties which were not party to it. The only way the Court could exercise jurisdiction over a non-party was by means of a Security Council decision.

41. The Russian Federation saw the Court as exercising eminent jurisdiction when a situation was referred to it by the Security Council and when there were complaints from States in connection with the crimes of genocide and aggression. The agreement of the State affected was not necessary in such cases. In other cases, such as crimes against humanity and war crimes, jurisdiction should be exercised with the agreement of the State on whose territory the crime was committed and the custodial State. Such agreement could be general or relate to specific cases.

U.N. Conference A/CONF.183/C.1/SR.9, *supra* note 54, ¶¶ 40–41.

57. Статья 1(1), Конституция Российской Федерации («Российская Федерация - Россия есть демократическое федеративное правовое государство с республиканской формой правления.»), [KONSTITUTSIIA ROSSIĬSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 1(1) (Russ.) (“The Russian Federation–Russia is a democratic federative law-governed state with a republican form of government.”)] (author’s translation).

58. KONSTITUTSIIA ROSSIĬSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15 (Russ.).

59. Статья 15(4), Конституция Российской Федерации («Общепризнанные принципы и нормы международного права и международные договоры Российской Федерации являются составной частью ее правовой системы. Если международным договором Российской Федерации установлены иные правила, чем предусмотренные законом, то применяются правила международного договора.»). [KONSTITUTSIIA ROSSIĬSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.) (“Universally recognized principles and norms of international law as well as international agreements of the Russian Federation are an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.”)] (author’s translation).

and order remedies for, violations of the Convention.<sup>60</sup> That was a time when membership in an international legal system was sought out, not disparaged as weakness.

Article 15 remains in the Russian Constitution, but it no longer has any meaning. The retreat and descent from this interest is the second unraveling that I want to discuss. The promises Russia made to the Council of Europe in order to gain admission were promises of substantial legal reform. Much good came out of that relationship, which modernized Russian law, reduced corruption in the judiciary, created a professional bar of lawyers, and helped boost the Russian economy out of the devastation of the 1990s after the collapse of the Soviet Union.<sup>61</sup>

But these promises were all made by Boris Yeltsin at a time of acute economic, political, and social disintegration.<sup>62</sup> It fell to Putin to make good on them. And though he tended to honor them in his first years as president, these were not his promises and they quickly fell away when he no longer found use in keeping them.

First, consider the damage Russia did to the European Court of Human Rights before the Council of Europe expelled Russia last March. Under Putin, Russia slowly weakened the efficacy and legitimacy of that organization. Year after year, Russian victims of human rights violations overwhelmed the Court with thousands of petitions and Russia blocked reforms aimed at relieving a bottleneck that affected the forty-six other member states. Many of these petitions were repetitive, pointing to systemic problems in Russia's compliance with its international legal obligations.

For example, cases concerning inhumane conditions of confinement in Russian jails and prisons were a constant.<sup>63</sup> But the initial Russian response to these complaints was one of near puzzlement: How could any particular litigant complain when most detainees suffered in this way, i.e., the conditions of confinement were *Russian*.<sup>64</sup> And as Putin unleashed a second war in Chechnya, petitions concerning torture, disappearances, and failures to address other violations of the Convention were largely ignored. The Court imposed penalties on Russia (approximately €50,000 a case), which Putin seemed to prefer to pay almost as a human rights tax on his assault on Chechnya.<sup>65</sup>

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60. See Marina Aksenova & Iryna Marchuk, *Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights*, 16 INT'L J. CONST. L. 1322, 1326 (2019) (discussing Russia's international endeavors and the ratification of the European Convention on Human Rights).

61. Jeffrey Kahn, *The Rule of Law Under Pressure: Russia and the European Human Rights System*, 44 REV. CENT. & EUR. L. 275, 284 (2019).

62. *Id.*

63. William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. CENT. & E. EUR. L. 1, 24 n.123 (2008).

64. *Id.* at 23–24.

65. Jeffrey Kahn, *Vladimir Putin & the Rule of Law in Russia*, GA. J. INT'L & COMP. L. 511 (2008).

This may make you wonder why Russia bothered to join in the first place, a question animating my research agenda as much as the question of whether Russia's application should have been accepted as quickly as it was.<sup>66</sup> But join it did, voluntarily taking upon itself the obligation "to abide by the final judgment of the Court in any case" in which it was a party.<sup>67</sup> After increasingly chafing under this commitment, Russia passed a law in December 2015 giving its Constitutional Court the authority to determine whether any such judgment conflicted with the Russian Constitution and, if so, the obligation (not the choice) to forbid compliance with it.<sup>68</sup>

This domestic law purported to strip the European Court of Human Rights of the authority Russia gave it by international treaty, replacing it with the Russian Constitutional Court itself as the final authority. So much for article 15 and the primacy of international legal obligations. As I said, that was in December 2015.<sup>69</sup> Less than a year later, on November 30, 2016, Russia informed the Secretary-General of its intention not to ratify the Rome Statute.<sup>70</sup>

I pair these two actions because I want to conclude on a provocative note. Both actions are inspired by the same shift in policy—a shift in Russia's view of international law. Russia has returned to a nineteenth-century view of state sovereignty. It no longer wishes to abide by the post-war redefinition of state sovereignty as something less than absolute.<sup>71</sup> In the twenty-first century, as the U.S. Army's JAG School puts it: "States 'trade' aspects of sovereignty in order to reap the benefits of the international legal system."<sup>72</sup> Some trades are voluntary, but some have been established to be baseline obligations, most notably recognition of human beings as subjects, not

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66. Irina Busygina & Jeffrey Kahn, *Russia, the Council of Europe, and "Ruxit," or Why Non-Democratic Illiberal Regimes Join International Organizations*, 67 *PROBS. POST-COMMUNISM* 64, 65 (2020).

67. Convention for the Protection of Human Rights & Fundamental Freedoms art. 46(1), Nov. 4, 1950, E.T.S. No. 5.

68. See Jeffrey Kahn, *The Relationship Between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg*, 30 *EUR. J. INT'L L.* 933, 934 (2019) (providing a detailed analysis of this law, its origins, and its effects).

69. *Id.* at 941–46 (discussing federal constitutional law no.7-FKZ of the Constitutional Court of the Russian Federation).

70. *Treaty Status of Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, n.9, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en#9](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#9) (last visited Sept. 5, 2023). Russia signed the Rome Statute on September 13, 2000. *Id.*

71. Jocelyn Getgen Kestenbaum, *Closing Impunity Gaps for the Crime of Aggression*, 17 *CHI. J. INT'L L.* 51, 74 (2016) ("Furthermore, international legal norms have shifted away from absolute notions of state sovereignty.").

72. INT'L & OPERATIONAL L. DEP'T, U.S. ARMY JUDGE ADVOC. GENERAL'S LEGAL CTR. & SCH., *LAW OF ARMED CONFLICT DESKBOOK 2* (5th ed. 2015).

objects, of international law.<sup>73</sup> As such, some individual rights are no longer left solely to the tender mercies of the states in which they find themselves.<sup>74</sup>

Our system radically inverts the protections of sovereignty and the place of human beings in international law. It is new, less than a century old. It aligns with other changes, such as the world's rejection of irredentism, colonialism, and imperialism as forbidden goals of state. Bringing Russia into this world was a core ambition of the Council of Europe's decision to admit Russia as a member.<sup>75</sup> Russia's rejection of this legal order caused its expulsion.<sup>76</sup>

Russia's conception is one in which spheres of influence and great power status are not merely practical realities but principles. Some countries, as President Putin noted about Ukraine as far back as the NATO summit in Bucharest in 2008, are not real countries, and must therefore bow to the authority of those that are.<sup>77</sup> This is a little ironic, since Russia's *modus operandi* in Transnistria in 1992, Georgia in 2008, and Ukraine in 2014 and 2022 has been to create and recognize new states that no one else does in order to destabilize the environment and sometimes incorporate them into Russia itself.<sup>78</sup>

The Transnistrian example, in which Russia still maintains 1,500 soldiers and large caches of aging armaments, may suggest that Russia never changed—no matter its new constitution and international agreements from its early post-Soviet period. Former judge on the European Court, Dmitry Dedov, remarked in 2018 that “[i]t is only an illusion that Russia was liberal in the 1990s and is authoritarian today.”<sup>79</sup> That is a question for the historians.

But mention of history brings us to one last irony worth noting in conclusion. As the world considers how or when to prosecute Russia's

73. *Id.* at 187.

74. Jeffrey Kahn, “Protection & Empire”: *The Martens Clause, State Sovereignty, and Individual Rights*, 56 VA. J. INT’L L. 1, 3–4, 41 n.173 (2016).

75. Jeffrey Kahn, *The Legal Origins of Russian Membership in the Council of Europe and the Seeds of Russia’s Expulsion*, 14 NOTRE DAME J. OF INT’L & COMP. L. (forthcoming 2024).

76. Council of Europe, Resolution on the Cessation of the Membership of the Russian Federation, CM/Res(2022)2, (Mar. 16, 2022), <https://rm.coe.int/0900001680a5da51>.

77. Ольга Алленова, Елена Гёда, Владимир Новиков, *Блок НАТО разошелся на блокпакеты*, КОММЕРСАНТЪ («Когда же речь зашла об Украине, Путин вспыхнул. Обращаясь к Бушу, он сказал: “Ты же понимаешь, Джордж, что Украина — это даже не государство! Что такое Украина? Часть ее территорий — это Восточная Европа, а часть, и значительная, подарена нами!” И тут он очень прозрачно намекнул, что если Украину все же примут в НАТО, это государство просто прекратит существование. То есть фактически он пригрозил, что Россия может начать отторжение Крыма и Восточной Украины»). [Olga Allenova et al., *NATO Bloc Split Up Into Blocks*, КОММЕРСАНТЪ (“Just when the talk came around to Ukraine, Putin ignited. Turning to Bush, he said: ‘You do understand, George, that Ukraine isn’t even a state! Just what is Ukraine? Part of its territory is Eastern Europe, and part of it, a considerable part, was bestowed by us!’ And then he very transparently implied that if they still will admit Ukraine into NATO, this state will simply cease to exist. That is to say, he actually threatened that Russia may begin tearing away Crimea and Eastern Ukraine.”)] (author’s translation).

78. *Id.*

79. DMITRY DEDOV, *Foreword*, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT, at xix (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

leaders for the crime of aggression, we should stop to note that this crime owes much to its invention at Nuremburg by the Soviet jurist Aron Naumovich Trainin.<sup>80</sup> It was one of many contributions to international law that the Soviet Union and imperial Russia made, including the Martens Clause developed by Russian diplomat Fyodor Fyodorovich Martens at the 1899 Hague Conference that was convened at the invitation of Tsar Nicholas II.<sup>81</sup> Russia has often had a distinguished and impactful role in the development of international law that long predates its current preference for breaking it.

Last week saw the death of Ben Ferencz, the last remaining podium prosecutor at Nuremburg.<sup>82</sup> The world he sought to rebuild, in part on the concept developed by his Soviet counterpart Trainin, was a world based on international legal institutions and international organizations meant to prevent the sort of war that he experienced.<sup>83</sup> Russia's war of aggression and its cynical view of international law seeks to return us to that prior world. It is our obligation to follow the example of Ben Ferencz.

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80. KIRSTEN SELLARS, 'CRIMES AGAINST PEACE' AND INTERNATIONAL LAW 48–50 (2013); FRANCINE HIRSCH, SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II 22 (2020); Kirsten Sellars, *Book Reviews*, 32 EUR. J. INT'L L. 351, 354–55 (2021) (reviewing HIRSCH, *supra*).

81. Jeffrey Kahn, *Consistency and Change in Russian Approaches to International Law*, LIEBER INST. W. POINT: ARTICLES OF WAR (Mar. 9, 2022), <https://lieber.westpoint.edu/consistency-change-russian-approaches-international-law/>.

82. Robert D. McFadden, *Benjamin B. Ferencz, Last Surviving Nuremberg Prosecutor, Dies at 103*, N.Y. TIMES, <https://www.nytimes.com/2023/04/08/world/europe/benjamin-b-ferencz-dead.html> (last updated May 3, 2023).

83. *Id.*