DEVELOPMENTS IN INTERNATIONAL LAW

Accountability of Sovereign Power for International Crimes*

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Abstract

This paper is a redacted version of the author's Goler T. Butcher Lecture, delivered on 8 April 2022. The talk centered on the problem of holding heads of state accountable for international crimes on occasion of Russia's invasion of Ukraine. It enumerated the challenges behind establishing the jurisdiction of the ICC in aggression cases, as well as the factors impeding the creation of an ad hoc tribunal for the same purpose. Dismantling pro-immunity arguments, the author turns to substantiating the customary international law nature of the accountability of heads of state for international crimes, concluding the paper with an overview of negotiations leading up to the drafting of Article 227 of the Versailles Treaty.

Keywords: sovereign immunity, ICC, Rome Statute, Russia, Ukraine.

1. Introduction

When Mark Agrast[1] and I settled on the title of a lecture on 4 February 2022, the idea was to speak generally about the accountability of sovereign power for international crimes. I had no particular cause to discuss any serving particular head of state – only the historical figures whose behaviors had compelled international law to develop the norm of individual criminal responsibility for everyone accused of international crimes, including heads of state. Then, three weeks later, on 24 February 2022, President Putin invaded Ukraine in a blatant war of aggression, which international law considers a crime, effectively volunteering himself as the live prop for my lecture. "Mr Eboe-Osuji," he must be saying, "why refer to historical figures that came before your time: when I'm right here, in your own time?"

Well, there's no doubt that he got what he asked for. President Joe Biden, much to the discomfort of aides at the White House and allies like France's President

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Emmanuel Macron, did not hold back in repeatedly calling Putin a criminal in international law, even a genocidal one, who must be brought to justice. Other leaders like Canada's Prime Minister Justin Trudeau and UK's Prime Minister Boris Johnson have, at least, shaded that view of President Putin. As we will see, President Biden broke no new ground in calling for the prosecution of another head of state or head of government for international crimes.

At the end of World War I, French Premier Georges Clemenceau, UK Prime Minister David Lloyd George – later joined by US President Woodrow Wilson – called for the prosecution of Kaiser Wilhelm II (Emperor of Germany and King of Prussia) – and took concrete steps to make that happen. In the middle of World War II, US President Franklin D. Roosevelt, UK Prime Minister Winston Churchill and Soviet Premier Joseph Stalin called for the prosecution of Adolf Hitler and other leaders of Germany's *Third Reich*. These were early developments that charted the course of customary international law.

2. "Oh, No! There Is A Gap in the Rome Statute!"

International law attaches special opprobrium to the crime of genocide, crimes against humanity, war crimes and the crime of aggression. International lawyers familiar with the negotiation of the crime of aggression provisions of the Rome Statute of the ICC are used to hearing the crime of aggression described as 'special' amongst all the other international crimes – because, the argument goes, it is a crime of leadership. I'm not sure that the crime of aggression deserves a 'special' status for that reason: nay, I'm satisfied that it does not. There is, however, a different reason that the crime of aggression deserves status as a truly special crime. That reason was supplied by the International Military Tribunal at Nuremberg in their 1946 judgment, in the following words:

> "To initiate a war of aggression [...] is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[2]

That observation doesn't invite elaborate explanation. It is enough to observe that most of histories genocides have been committed under the cover of war. Wars are accepted jamborees of homicide. So, why not use the occasion to exterminate a racial, ethnic, religious or national group you've always loathed? Perhaps, no one would notice. It is against that background of 'accumulated evil of the whole' of international crimes that the execration of Russia's war of aggression against Ukraine must be appreciated. It is, of course, a matter of much interest that leaders of Western nations and much of their citizens now want Mr Putin prosecuted for the crime of aggression, amongst other international crimes.

2 Trial of Major War Criminals before the International Military Tribunal, Nuremberg Judgment, 14 November 1945 to 1 October 1946, p. 186.

The trouble is: there's a gap in the available international accountability framework – in relation to the crime of aggression. And now, those who want Mr Putin prosecuted are ruing that gap. Notably, the Rome Statute's provisions on the crime of aggression are drafted in the diffident manner of ensuring that the ICC does not exercise jurisdiction over a citizen or the territory of a non-State Party to the Rome Statute, without referral by the UN Security Council. For present purposes, let us call this 'the first limitation'.

There is yet a second limitation. This concerns whether the ICC can even exercise jurisdiction over the crime of aggression in relation to the nationals of a member State of the Rome Statute that had not specifically 'opted in' to be bound by the Rome Statute's provisions on the crime of aggression. But we can leave that second limitation to one side for now, because it does not concern Russia, which is not a State Party. Russia is only concerned with the first limitation.

We see that limitation in the combined operation of Article 15*bis*(5) and Article 15*ter*(1) of the Rome Statute that delineates the ICC's jurisdiction. Article 15*bis*(5) provides that as regards "a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory." It is important to note that it is only in relation to the crime of aggression – not genocide, crimes against humanity or war crimes – that we have a specific provision that says that the ICC cannot exercise jurisdiction over nationals or the territory of a State that is not a party to the Rome Statute. The only exception to that limitation is when the UN Security Council refers the situation to the ICC Prosecutor for investigation and prosecution. And we see that in Article 15*ter*(1), which provides that the "Court may exercise jurisdiction over the crime of aggression in accordance with Article 13, paragraph (b), subject to the provisions of this Article." Article 13(b) is the provision which says that the Court may exercise its jurisdiction with respect to a crime proscribed in the Rome Statute, if

> "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

Article 13(b) is just as limiting: the Security Council is the only organ of the UN recognized in the Rome Statute capable of referring a situation to the ICC for investigation and prosecution, and the Security Council may only make that referral when acting under Chapter VII of the UN Charter, the chapter where the apogeal powers of the UN are laid down. The result is that the ICC cannot now be the forum to try Mr Putin (and his colleagues in the Russian leadership) for the crime of aggression. This is because Russia is not a State Party to the Rome Statute; and will veto any referral from the Security Council, which is currently the only authority that can trigger prosecution for the crime of aggression against Ukraine.

What to do now? Desperate efforts are now being made to cover that gap. The efforts are aimed at creating an *ad hoc* special international tribunal to prosecute the crime of aggression in Ukraine. The Right Honorable Gordon Brown, former UK Prime Minister, has emerged as the champion of the cause.

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2.1. A Deliberate Gap

Any effort to ensure accountability – including this particular effort – must be applauded as a matter of principle. But the line must be drawn at the point where the intended 'special tribunal' for the crime of aggression in Ukraine is so 'special' that the outcome of it is to manipulate international law to snare only some people branded as 'bad' in the chorus of popular media, and then close the gate of accountability in ways that leave untouched others who may do the same thing in future. Let us recall that the US delegation drew exactly that line that during the London Conference of 1945, when the allies were negotiating the modalities of the Nuremberg trials. It is an irony of history, that on that occasion, the Russian delegation seemed determined to press "a definition [of crimes] which [...] had the effect of declaring certain acts crimes only when committed by the Nazis."[3] The US delegation firmly drew the line of compromise against that idea, "even if it meant the failure of the Conference."[4] They insisted that

> "the criminal character of such acts could not depend on who committed them and that international crimes could only be defined in broad terms applicable to statesmen of any nation guilty of the proscribed conduct. At the final meeting the Soviet qualifications were dropped and agreement was reached on a generic definition acceptable to all."[5]

Precisely the same concern arises where a 'special' tribunal is contemplated for a crime for which there should be a generic jurisdiction in a permanent court. The concern is particularly engaged in light of the story of how this gap came to exist in the Rome Statute in relation to the crime of aggression. And that story needs to stress that the gap was not an oversight. It resulted precisely and directly from pressure that was brought to bear during the negotiation and drafting of the aggression provisions of the Rome Statute. That pressure came mostly from the US government,[6] joined by others amongst the five permanent members of the UN Security Council.[7]

At the time, all the permanent members of the Security Council (including the Rt Hon Mr Brown's own country) bullishly pushed to give the Security Council alone the deciding power – famously called the 'trigger' – on whether the crime of aggression may be prosecuted at all at the ICC in any given case. That is to say, all the permanent members of the Security Council were pushing to give themselves

3 *See* Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London 1945 [1947], US Department of State, pp. vii-viii.

4 Id. p. vii.

5 Id. p. viii.

6 *See* Harold Hongju Koh & Todd F. Buchwald, 'The Crime of Aggression: The United States Perspective', *American Journal of International Law*, Vol. 109, Issue 2, 2015, p. 257.

7 The union of views amongst all five permanent members of the UN Security Council is adequately capture in the official records of the Review Conference held in Kampala, where the Rome Statutes substantive provisions were adopted. *See* Rome Statute Assembly of States Parties, Review Conference of the Statute of the International Criminal Court, Kampala 31 May-11 June 2010, Official Records, Doc No RC/9/11 (2010) at p. 122 (France), p. 124 (UK), p. 125 (China), p. 126 (Russia) and p. 126 (US).

– including Russia – the power to veto the prosecution of the crime of aggression at the ICC.

Perhaps, a 2015 piece in the American Journal of International Law by two renowned American scholars says much about the gap that now exists in the Rome Statute on the crime of aggression. As they put it, "the crime of aggression issue has prominently figured" in the 'rocky' relationship between the US and the ICC.[8] As they wrote, "The treatment of aggression contributed significantly to the sense of disappointment with which the United States reacted to the ICC treaty adopted at Rome (the Rome Statute)."[9]

Shortly before the Kampala Conference of June 2010, where the aggression provisions of the Rome Statute were to be adopted, the Council on Foreign Relations, an influential American thinktank, published a report in which it was notably asserted that the ICC's exercise of jurisdiction over the crime of aggression "would jeopardize US cooperation with the Court."[10] In that regard, the author wrote as follows:

> "Prosecuting aggression risks miring the court in political disputes regarding the causes of international controversies, thereby diminishing its effectiveness and perceived legitimacy in dispensing justice for atrocity crimes. ICC jurisdiction over aggression also poses unique risks to the United States as a global superpower. It places US and allied leaders at risk of prosecution for what they view as necessary and legitimate security actions. Adding aggression to the ICC's mandate would also erode the primacy of the UN Security Council in managing threats to international peace."[11]

That accurately sums up the official position of the US as then understood in relation to giving the ICC jurisdiction over the crime of aggression, independent from the control of the UN Security Council. It is thus clear enough from that perspective that the sentiments which resulted in limiting the ICC's jurisdiction in relation to the crime of aggression were as follows. *(i) Rationalization*: The crime of aggression is a non-justiciable political matter. *Quaere*: Does aggression become justiciable only when we create a 'special tribunal' to prosecute it on a case-by-case basis? Or when the Security Council manages to authorize the prosecution? *(ii) Rationalization*: ICC jurisdiction over the crime of aggression poses a unique risk to the US as 'a global' superpower. *Quaere*: Does that concern preclude any other State that may qualify as 'a global superpower' or see herself as such? Should it? *(iii) Rationalization*: "An ICC jurisdiction over the crime of aggression will place the US and allied leaders at risk of prosecution for what they view as necessary and legitimate security actions." *Quaere*: If the leaders of the US and her allies must be spared the risk of prosecution for what "they view as necessary and legitimate

8 Id. p. 257.
9 Id. p. 258.
10 Id. p. 260. *See also* Vijay Padmanabhan, *From Rome to Kampala: The U.S. Approach to the 2010 International Criminal Court Review Conference*, Council on Foreign Relations, Special Report No. 55, 2010, p. 4.
11 Id. p. 4.

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security actions," on what credible basis should any other State and her own allies be excluded from a class of persons who must also be spared the risk of prosecution for what they, too, view as necessary and legitimate security actions? Should the leaders of Russia be excluded from that class of protection for what they have now declared as necessary and legitimate security action – in Crimea and in mainland Ukraine – to the horror of the whole world? *(iv) Rationalization*: "Adding aggression to the ICC's mandate would also erode the primacy of the UN Security Council in managing threats to international peace." The Security Council ended up having that primacy to trigger prosecution for the crime of aggression in relation to Russia. And here we are.

2.2. A Special Tribunal and Questions Arising

Those familiar with international relations would know how difficult it is to create international criminal tribunals – permanent or *ad hoc* – in the context of a Cold War. And we are in the middle of a second Cold War. In the event, the following questions arise. Leaders of the G7 may now want to create such a special tribunal. But would the G77 go along with any effort to create such a tribunal in the context of the UN – which is the most authoritative context in which to create it? Can this be done without the cooperation of the G77 in the context of the UN – merely by avoiding the UN in the first place or altogether and reaching back to the Nuremberg Tribunal model that was used in 1945, when much of the world was under colonial rule and the UN had not been created to be the clearing house for efforts to manage and maintain international peace and security? Perhaps, such a tribunal could be created by the Council of Europe in an effort to prosecute Mr Putin, in the same way that the African Union created a special chamber in Senegal to prosecute Hissène Habré, the former President of Chad. But, will European leaders have the political stomach or unity to do so? Vladimir Putin is no Hissène Habreé, nor is Russia Chad, and it was not easy for the African Union to set up the special chamber in Senegal. These are some of the difficult questions arising. And I haven't got the answers. I merely raise them.

2.3. The Hard Lessons of Political Expediency

What we must not do is ignore the hard lessons that the present circumstances teach us about short-sighted political expediency. It was politically expedient to limit the reach of the Rome Statute in relation to the crime of aggression, in order to save the leaders of powerful nations from accountability. And now the chickens have come home to roost.

It would be foolish to brush that hard lesson aside and carry on as if nothing happened; as if the gap in the Rome Statute was an oversight, when it really resulted from the deliberate policy of self-interest that ignored the central message of Robert H Jackson, delivered more than 70 years ago in a lecture titled 'The Rule of Law among Nations'. In the middle of Russia's brutal invasion of Ukraine in 2022, America's political leaders who never wanted international law to reign over them and their nationals now want that law to reign over the leadership of Russia and her citizens. But, at the end of World War II, Jackson presciently warned Americans against that attitude. As he put it:

> "It is futile to think [...] that we can have an international law that is always working on our side. [...] We cannot successfully cooperate with the rest of the world in establishing a reign of law, unless we are prepared to have that law sometimes operate against what would be our national advantage."[12]

It is important to stress that message. The point is not to rub the faces of the architects of the gap (that exists in the aggression provisions of the Rome Statute) in their own costly folly. It is necessary to stress the mistake of ignoring Jackson's counsel, so we don't keep making it. Is it too much to imagine that had the US demonstrated a willingness to be bound by the Rome Statute and its aggression provisions, there would, first, have been no gap in the Rome Statute in the first place, and, second, it might have added a layer of deterrence against Russia's invasion of Ukraine? Or, perhaps, the question boils down to whether Russia's invasion of Ukraine – and any other future invasion of Ukraine or any other country – are a good bargain for sparing the US' leadership the risk of prosecution for the crime of aggression. Perhaps, that question is not America's alone. But, in a world in which a war of aggression is a threat to international peace and security in more ways than are readily appreciated at any given time, it is a question for the international community.

2.4. The Need to Amend the Rome Statute

It is against the foregoing background that I stress the need for corrective amendment of the Rome Statute – whether or not a special tribunal for the crime of aggression in Ukraine is established, but more so if it is. One minimum way to do that is to delete article 15*bis*(5) of the Rome Statute, which provides that as regards

> "a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."

Additionally, it is necessary to amend Article 13(b) of the Statute: in a way that allows the ICC to exercise jurisdiction when the UN General Assembly – using its Uniting for Peace procedure – either refers a situation to the ICC Prosecutor or when UN Member States make such a referral upon the specific recommendation of the General Assembly pursuant to the specific resolution of the General Assembly, when the Security Council fails to make a needed referral because of the use of the veto power.

It must be pointed out in this connection that the cleanest solution would obviously be an arrangement in which a clear construction of the UN Charter would have enabled the General Assembly to make a direct referral to the ICC. But, such a clean solution may be difficult in light of the text of Articles 10 to 12 of the Charter, which tends to limit the powers of the General Assembly to only

12 Robert H Jackson, 'The Rule of Law among Nations', *American Society of International Law Proceedings*, Vol. 39, 1945, pp. 17-18.

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discussions and recommendations. Life in its messy reality must, if need be, make do with the solution that involves only recommendations from the General Assembly to UN Member States to make the needed referral to the ICC. It will then be for the ICC judges to determine whether such a referral – derived from the recommendation of the General Assembly – would be sufficient to anchor the jurisdiction of the ICC in situations of Article 13(b) of the Rome Statute, where the only source of jurisdiction would be a Security Council referral under Chapter VII of the Charter which veto power prevented.

Here, I must recall an Igbo parable. The dog would have you serve him his food, as you may, and leave him to worry about wresting it from the spirits of your ancestors (who also have an interest in food served the same way). From the perspective of that parable, it may be that ICC judges would consider the Chapter VII power of the Security Council in the context of the power's overarching need. That need is the maintenance of international peace and security through the UN as the global clearing house of action. But, when the Security Council as the UN organ with the primary function in that regard is disabled from acting, due to the selfish or improper motives of one or more of the permanent members, then the General Assembly must – as a function of incidental power – perform that function itself on behalf of humanity. Such a construction, if made, would not be the first time that an international court would have construed an incidental power to exercise the crucial function of an organization, where no such power had been spelt out in the constating instrument.[13]

3. Sovereign Immunity

With that, I come to another frame of the presentation that I was going to deliver today – before Mr Putin walked himself into it as the live prop. That is to say: even if it is possible to set up the special tribunal for the crime of aggression, there is one big question that we must all consider. It is the question of immunity. That question asks whether you can even prosecute Mr Putin for the crime of aggression or indeed any other international crime for that matter, given that he is a head of state.

Here, I'm naturally expected to recall that when I served as the President of the ICC and presided over the *Jordan Referral re Al-Bashir* appeal in 2019, the Appeals Chamber categorically answered that question of immunity in relation to the work of the ICC. The Chamber held that customary international law never recognized head of state immunity in processes of an international criminal court; and that Article 27 of the Rome Statute, which abjured immunity at the ICC, is fully consistent with a proper understanding of customary international law.

That finding rejected the creed of a certain cohort of academics who had made a reputation arguing for long that customary international law recognized

13 *See e.g. Advisory Opinion No 13 (Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer)* (1926) PCIJ, Series B, No 13.

sovereign immunity even before an international court – including the ICC.[14] Within less than three short hours of delivering the judgment mentioned above, the leader of that pro-immunity school promptly deployed a blog-post in harsh tenor – in what in effect was an insurrection by social media against the Appeals Chamber's judgment that overruled his cherished view point – making sure to describe the judgment as 'controversial'.[15] A twitter-storm ensued around that initial blog. The tag of 'controversial' thus stuck around the judgment, as a result of a commentary on social media made before the author – by his own admission[16] – had actually read the lengthy opinions of the Appeals Chamber judges, which explained in great detail the steps in the reasoning process that resulted in the pronouncement. Not even the more reflective analyses of other academics[17] – who saw no controversy at all in the Appeals Chamber's pronouncements – have been able to clear out that initial branding of the judgment as 'controversial' in the minds of those who had not actually taken the trouble to read the judgment and judge its conclusions for themselves.

14 The leading academic amongst this cohort of scholars is Professor Dapo Akande of Oxford University. A non-exhaustive sampling of his writings on the subject include the following: Dapo Akande, 'International Law Immunities and the International Criminal Court', *American Journal of International Law*, Vol. 98, Issue 3, 2004, p. 407; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice*, Vol. 7, Issue 2, 2009, p. 333; Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get Another Immunity Case?', *EJILTalk!*, 8 February 2012, at www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/; Dapo Akande, 'An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue', *EJILTalk!*, 31 March 2016, at www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/; Dapo Akande, 'The Immunity of Heads of States of Non-parties in the Early Years of the ICC', *AJIL Unbound*, Vol. 112, 2018, p. 172.

15 *See* Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', *EJILTalk!*, 6 May 2019, at www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/.

16 As the commentator said in the opening two sentences of his blog: "The Appeals Chamber of the International Criminal Court (ICC) has, this morning, issued what seems to be an extremely controversial decision on Head of State Immunity. *At the time of writing, the full written judgment is not yet available* in the appeal by Jordan against the decision of the Pre-Trial Chamber referring that state to the UN Security Council for failing to arrest then President of Sudan, Omar Al Bashir when he attended an Arab League Summit in March 2017," *EJILTalk!*, 6 May 2019, emphasis added. It must be pointed out that the lead judgment and the detailed joint concurring opinion of the four judges cross-referenced in the lead judgment, explaining the reasoning, were uploaded within less than two hours of conclusion of oral reading of the summary judgment.

17 Amongst them, Leila Sadat, 'Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising', *Just Security*, 12 July 2019, at www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/; Claus Kreß, *Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*, at www.toaep.org/ops-pdf/8-kress. *See also* the ASIL Head of State Immunity Panel's discussion, featuring Professor Andrew Boyle, Professor Adil Haque, Professor Leila Sadat, Professor David Scheffer, Professor Milena Sterio and Professor Ingrid Wuerth, where Professor Boyle observed that only a minority of legal scholars insist that heads of state enjoy immunity. *See* at www.youtube.com/watch?v=znHErfBwhmY.

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Now, consider this with care. The central thesis of pro-immunity academics proceeds from the premise that customary international law recognizes the immunity of one sovereign before the courts of an equal sovereign, based on the doctrine often expressed in the Latin maxim *par in parem non habet imperium*. And the logic of that doctrine, these scholars have argued, also prevents an international court from exercising jurisdiction over a head of state arraigned before it – notwithstanding that the doctrine was established in the context of jurisdiction of national courts, and not that of international courts.

I should note that the contention of this school of thought is founded merely on a perceived train of logic, presented as law. And that logical train transports into international courts a rule of immunity that was developed in the sphere of national courts. The theory of immunity is thus not based on actual data or experience of international law – but only on purported logic. Now, even assuming that their logic is flawless – and I am satisfied that it is seriously flawed – one eminent stalwart that stands between these scholars and their juristic destination is Oliver Wendell Holmes Jr. We recall him cautioning that "the life of the law has not been logic; it has been experience." As we will see presently, the actual experiences or data of international law say something quite different from what the pro-immunity scholars contend with so much confidence.

3.1. A Hopelessly Flawed Logic

The main track upon which the pro-immunity scholars run their train of logic is the argument that goes like this: *(i)* international law recognizes sovereign equality amongst States, as a result, no sovereign can exercise jurisdiction over another sovereign – *par in parem non habet imperium*; *(ii)* the foregoing rule poses a problem for an international court, which is a court established by States acting together. This, the protagonists argue, is because if none of these States acting alone can override the immunity of a head of State, it follows that acting together as an international organization, they cannot overcome immunity; because they cannot do 'through' an international organization – in this case a court of law – what none of them can do alone at the national level.

There's a certain self-assurance that attends the attitude of those who make this argument, as they think that logic is on their side. But the theory is deeply flawed for this argument – a whited sepulcher – and it is surprising that any international lawyer would make it so boldly. The problem is much deeper than the elementary flaw of mistaking logic for positive law. More than that, this argument is the nodal rationale that unravels the overarching framework of the immunity theory that its protagonists have tried to construct from the premise of the *par in parem* doctrine.

Here, we may look past the flaw that the law of physics presents against the proposition that a number of people cannot do what none is able to do alone. The law of physics plainly suggests that thinking as flawed at the elementary level. Indeed, the primary reason for joint action is the impossibility or serious inconvenience of doing certain important things alone. No human can lift a weight of 500kg alone, but 192 people can join hands and very easily do so. Eleanor

Roosevelt translated that law of physics into a norm of international relations in the following exhortation to her compatriots:

> "Our own land and our own flag cannot be replaced by any other land or any other flag. But you can join with other nations, under a joint flag, to accomplish something good for the world that you cannot accomplish alone."

Quite apart from the foregoing, deeper hazards still confront the argument that international courts must respect head of state immunity because no state can reject it before its own national court. It is recalled that the reasoning offered for this is that no one state can do 'through' an international criminal court what no State can do alone.

Notably, the argument of doing 'through' supposes the application of the agency law maxim: *qui facit per alium facit per se* (he who does something through another, does it himself).

But, is it really the case that an international organization or institution is a mere agent "through" which the members do things in their notional units? Competent international lawyers should immediately see what is wrong with the argument. Did they not know that the ICJ held in the *Reparation* case that the UN – an international organization – enjoys a legal personality that is independent of its Member States, notwithstanding that the UN Charter is silent on that very question?[18] Hence, the UN is not a mere agent of its Member States 'through' which they act. Notably, while the UN Charter is silent on the matter of independent legal personality of the UN, Article 4 of the Rome Statute is quite explicit in that regard: "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

But, it may be considered that the understanding of the significance of 'legal personality' requires no legal education at all. It was as a high school pupil in Nigeria that I first learnt that a business entity with legal personality is not to be mistaken as an *alter ego* 'through' which the shareholders do things.

Indeed, the fallacy of the agency argument is readily seen in the following example, amongst many. That no state may use force against the territorial integrity or political independence of another State is a cardinal principle of international law, recognized in Article 2(4) of the UN Charter. But, down the line, Article 42 of UN Charter authorizes the Security Council to use force, when necessary, to maintain international peace and security, or to contain a threat to international peace and security. When that happens, is it to be understood that member States would have done 'through' the UN what they are forbidden to do individually? When the UN required Belgium to withdraw her troops from Congo in 1960, would that action be seen as Belgium acting 'through' the UN to require itself to withdraw from the Congo? Similarly, when the UN commissioned an inquiry into the

18 ICJ, *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* [1949] ICJ Reports 174, at pp. 182-184.

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situation in Darfur and consequently referred that situation to the ICC, was that Sudan doing those things to itself 'through' the UN?

Finally, the maladroitness of the agency argument when lawyers make it in the context of the present debate is heightened in the circumstances of a court of law. In other words, the argument ignores the independence of a court of law – an essential attribute of the judiciary. Lawyers are expected to know that feature of a court of law, even if it is not spelt out so explicitly as it is in Articles 40(1) and 42(1) of the Rome Statute.

3.2. The Judge and the Academic – Different Approaches to the Law

President Woodrow Wilson was known to have lamented that international law "has perhaps sometimes been a little too much thought out in the closet."[19] This is especially the case with international criminal law. It is important to try to understand the different perspectives from which some legal scholars approach their work. Here, it may be necessary to understand the fundamental difference from which judges approach their work in a criminal case.

The judge does her work in a criminal courtroom. There, she sees humanity at both its worst and its most vulnerable; and she is driven to bring justice to bear. The legal scholar, for his part, does his work in the best place to be in society – the university – famously described as the 'ivory tower' of society. That sobriquet must be apt for any place where we find humanity at its curated best – the best of society's youth, from the best families or families doing their best to set their progeny on the path of becoming the best of society, taught by the best people who had followed a similar path. The more reputable – hence the more exclusive – the university the higher it is on the pecking rungs of that ivory tower. In the circumstances, some scholars become easy prey to the constant seduction of academic work that can be out-of-touch with humanity's ordinary core.

Or, perhaps, the more apt explanation for the bewildering propositions often found in legal scholarship lies in the following observations of Robert H Jackson:

> "I think it was Henry Adams who complained that he was educated in one century and was living in another. All of us, even some of our international lawyers, suffer the same dislocation of ideas. The difference is that Henry Adams recognized it. Some of our scholarship has not caught up with this century […]."[20]

3.3. The Turns of the Wind Vane

But, the warts of providence have their way of catching out voluble scholarship. It was, of course, more than surprising to see the leading proponent of head of state immunity now turn around and argue that President Putin can be prosecuted

19 *See* Address of Robert H Jackson, the Attorney-General of the US, Inter-American Bar Association, Havana Cuba, 27 March 1941, published in the *American Journal of International Law*, Vol. 35, Issue 2, 1941, p. 350.

20 Id.

before the special international tribunal that Mr Gordon Brown now wants to set up.[21]

Efforts were actually made to explain this turn of the wind vane by the argument that any immunity that a head of state enjoys in international law before the courts of equal sovereigns can be overcome by resorting to the jurisdiction of Ukraine to prosecute President Putin of Russia, notwithstanding the original premise of the *par in parem* doctrine that was syllogistically imported into the sphere of international criminal courts. In the process, the following argument was made: Ukraine is fighting a war of self-defence in Ukraine; that right of self-defence on the territory of Ukraine even entitles it to effect regime change in Kremlin; the special international tribunal would 'derive' its jurisdiction from Ukraine; hence, it would be 'far-fetched' to say that the special tribunal would not have jurisdiction to try President Putin of Russia, since the tribunal would have 'derived' its jurisdiction from Ukraine's right of self-defence.[22] By that argument, it must then be accepted that the Special Court for Sierra Leone was correct in deciding that it had jurisdiction to try Charles Taylor, because the Special Court derived its jurisdiction from Sierra Leone, which had the right of self-defence against Liberia, including the right to remove Charles Taylor from power in Monrovia.

There is surely something to the argument that belligerency customarily encompassed the right to defeat an adversary and assert dominion over its leadership, to the fullest extent possible. And this is not limited to a State fighting a war of self-defence. It is a right of belligerency in general – even if no longer imported by the old Latin slogan *Vae Victi!* It is what explained, for instance, the extra-judicial banishment of Napoleon Bonaparte into exile, by the concert of powers then at war with France. But, that phenomenon is yet another striking rationale against the proposition that customary international law never recognized immunity of heads of State for international crimes. This is because the right to punish a co-belligerent without the due process of law must include the right to punish him pursuant to the due process of the law – as was the case in Nuremberg and Tokyo.

Now, the question arises: Does the theory of 'derivative' jurisdiction of an international apply exclusively to the right of self-defence or the right to defeat and assert dominion over a co-belligerent. Should that theory of 'derivative' jurisdiction not also follow in every case in which the jurisdiction of an international criminal court is said to 'derive' from the national jurisdiction. Should that derivative jurisdiction of an international criminal court not also follow from the situation in a national jurisdiction where a tyrannical sovereign has put himself 'in a state of war'[23] against the population, thus entitling them to resistance, rebellion and revolution, such as were implicated in the many historical instances in which rulers have lost their heads in the hands of their subjects?

21 *See* Dapo Akande speaking at Chatham House webinar, 'A Criminal Tribunal for Aggression Tribunal in Ukraine', 4 March 2022, counter 38:57 *et seq*., available at www.chathamhouse.org/events/all/research-event/criminal-tribunal-aggression-ukraine.

22 Id.

23 *See* Emer de Vattel, *The Law of Nations* (1758) [edited and with an Introduction by Béla Kapossy and Richard Whatmore], Liberty Fund, Indianapolis, 2008, pp. 104-109, especially at p. 105.

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Ultimately, what all these Swiss cheese exceptions and gerrymandering in legal reasoning does is betray the unsustainability of the fallacy so insouciantly propagated by the leadership of the immunity school, in their insistence that customary international law recognized head of state immunity before an international court trying an international crime.

Instructively writing in the 18th century, Vattel observed that the truth of limited inviolability of despotic sovereignty "is acknowledged by every sensible writer, whose pen is not enslaved by fear, or sold for hire."[24] That reproach of transactional scholarship has not lost its resonance in the 21st century. There are modern academics whose scholarship is always consistent in its alignment with the axis of geopolitical power or with countries and organizations that had retained them as consultants and counsel in topical legal questions of the day.

Against that background, it was always difficult to see where you would demarcate the acceptable limits of a theory of sovereign immunity that would sit well with some 21st century constituencies but which theory would have legally served impunity on a platter to Adolf Hitler and Pol Pot for the crime of genocide, merely because they were heads of state.

The crime of genocide – that is the legacy of Adolf Hitler and Pol Pot – is often described as "the crime of all crimes." One would think it astonishingly immoral of any legal theory to permit any human being – even a head of state – to escape from accountability for that odious crime. It is encouraging to see that people now also recognize the immorality of allowing President Putin to escape accountability for the invasion of Ukraine – another crime also seen as a supreme international crime.

Here, let us recall that characterization which the Nuremberg Tribunal gave to wars of aggression, as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Notably, Russian prosecutors and judges were full participants in the judicial process that resulted in that jurisprudence – and that pronouncement – in 1946.

In the final analysis, neither Mr Putin nor any head of State enjoys immunity before an international criminal court for international crimes. But the reason that heads of state do not enjoy immunity in customary international law for international crimes, when prosecuted before international courts flows not merely from a principle of natural law discoverable through the path of morality alone. The rejection of immunity resulted rather from a deliberate principle of positive law formulated as such by the powerful nations that hewed the path of international law at the material time.

3.4. A Brief View of History

We may begin the story on 20 November 1918, less than two weeks after the end of World War I. British Prime Minister David Lloyd George was chairing the Imperial Cabinet meeting. During the meeting, Lord Curzon briefed his colleagues on his meeting with French Premier Georges Clemenceau in Paris the week before. Clemenceau was desirous of prosecuting Kaiser Wilhelm II, Emperor of Germany and King of Prussia, for starting the war and for fighting it with extreme brutality.

24 Id. p. 104.

[Notably, there was general public clamor in Europe and America to try the Kaiser. The same clamor that we see now for the prosecution of President Putin.]

To that end, Clemenceau had tasked some of France's top international law jurists to research the matter and give an opinion on what international law held on the matter. At the end of Curzon's briefing, Lloyd George also registered his own burning desire to prosecute the Kaiser. Having so indicated, Lloyd George instructively added this: "With regard to the question of international law, well, we are making international law, and all we can claim is that international law should be based on justice."

Now, I will not detain you with the work of the Macdonnell Committee that the UK Government had set up to study the question of prosecuting the Kaiser, and how that committee concluded that the Kaiser must be prosecuted before an international court, notwithstanding the absence of precedent in international law. I spoke at length about the work of the Macdonnell Committee in my Western University lecture[25] delivered on 9 November 2021. I will not repeat the discussion here. It is on *YouTube*. I also need not detain you with the acrimonious debate that raged during the work of Sub-Commission III of the Paris Peace Conference Commission on Responsibility for the Authorship of the War and the Enforcement of Penalties. For that, I also refer you to the Western University lecture.

Within this presentation I only need to recall that the US delegation to both the Commission and the Sub-Commission III – in the persons of US Secretary of State Robert Lansing, who was the chairman of both the Commission and the Sub-Commission, and his delegation colleague James Brown Scott – had fought tooth and nail against prosecuting the Kaiser at all, and against creating an international criminal court to prosecute him. The grounds for the objections of Lansing and Scott included absence of precedent in international law, as well as a view of immunity of heads of state. But the British delegation led by Solicitor General, Sir Earnest Pollock KC, supported by the French delegation, led by Dean Ferdinand Larnaude of the University of Paris, had fought back with relentless vigor. In the end, the majority of the Commission and the Sub-Commission voted overwhelmingly – by a vote of 8:2 – to prosecute the Kaiser before an international tribunal for war crimes. The AUS delegates, Lansing and Scott, filed a minority position, the Japanese delegation filed the second dissenting view.

Next came the deliberations of the Council of Four – colloquially known as the 'Big Four' – of the Paris Peace Conference. They were Clemenceau, Lloyd George, Vittorio Orlando, and Woodrow Wilson. It was up to the Council of Four to decide what the Peace Conference was to do with the reports of the Commission on Responsibilities.

Throughout their deliberations, Clemenceau and Lloyd George maintained their relentless determination to prosecute the Kaiser. Orlando, was tentatively supportive, although he had doubts. The person that needed convincing was Wilson. Their meetings of 2 to 8 April 1919 were truly instructive. Having been

25 *See* Chile Eboe-Osuji, 'Immunity before International Courts: How there never was', Third Annual International Law and Global Justice Lecture, 9 November 2021, at www.youtube.com/watch?v=DqFGBfGlPbE.

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fully briefed by Lansing about the objections of the US delegation to the Commission and Sub-Commission, President Wilson indicated initial misgivings against the insistence of Clemenceau and Lloyd George to prosecute the Kaiser. But Clemenceau and Lloyd George remained unwavering to that commitment to prosecute the Kaiser. Lloyd George even went as far as intoning that he might find it difficult to accept a peace treaty that did not include the Kaiser's prosecution. Eventually, Wilson caved in. Before he did, he graciously invited Orlando to express his views. Orlando had been mostly silent during the deliberations. Orlando tentatively indicated agreement in principle, but also tentatively ventured some concerns about the lack of 'precedent' in international law, as well as the importance of respecting the sovereignty of Germany whose people must be viewed as a unit with their Kaiser and who must be left to punish their own head of state. That only provoked an emphatic riposte from Clemenceau. "Was there a precedent when liberty was given to men for the first time?" Clemenceau demanded. "Everyone must assume his own responsibility, and I assume mine."[26] And elaborating on legal responsibility, he continued, "For me, one law dominates all others: that of responsibility. Civilization is the organization of human responsibilities."[27]

In an apparent demonstration of understanding that "general principles of law recognized by civilized nations" can be a source of international law, although he did not articulate his arguments in those terms, Clemenceau continued his mini-masterclass.

> "M. Orlando says: 'Yes, within each nation.' I say: 'In the international field.' I say this along with President Wilson who, by establishing the foundations of the League of Nations, has had the honor of transferring the essential principles of national law into international law."[28]

And, pointing to the forward-looking adjustments they were making to international law, he continued

> "What we want to do today is essential if we want to see international law established. None of us doubts that William II bears responsibility for the war. I agree with M. Orlando on the solidarity of the German people with their sovereign. However, there is one man who gave the order, whilst the others followed it. We are told: 'It is better to exile him and to expose him to the scorn of the world, without convicting him.' It is a sanction which can be defended; it is not the one I prefer. Today we have a perfect opportunity to carry into international law the principle of responsibility which is at the basis of national law."[29]

26 Paul Mantoux, *The Deliberations of the Council of Four (March 24-June 28, 1919): Notes of the Official Interpreter* [Translated and Edited by Arthur S. Link, with the Assistance of Manfred F. Boemeke], Princeton University Press, 1992, p. 193.

27 Id.

28 Id.

29 Id.

With that, Clemenceau cycled back to the complaint about absence of precedent.

> "There is no precedent? There never is a precedent. What is a precedent? I'll tell you. A man comes; he acts – for good or evil. Out of the good he does, we create a precedent. Out of the evil he does, criminals – individuals or heads of state – create the precedent for their crimes. We have no precedent? But that is our best argument. Was there a precedent in recent generations for the atrocities committed by the Germans during the present war – for the systematic destruction of wealth in order to end competition, for the torture of prisoners, for submarine piracy, for abominable treatment of women in occupied countries? To those precedents, we will oppose a precedent of justice."[30]

When Clemenceau was done, Orlando promptly agreed with Clemenceau, Lloyd George and Wilson that the Kaiser must be prosecuted.

In that story is revealed the deliberate adjustment of international law in 1919, with a clear determination to prosecute sovereigns who, in future, would violate international law. And that determination was memorialized in the text of Article 227 of the Treaty of Versailles, which, amongst other things, provides as follows:

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan."

3.5. A Lingering Misconception

I must address a certain lingering misconception about Article 227 of the Versailles Treaty. That misconception is that the US delegation to the Paris Peace Conference had opposed Article 227. That was not quite so. Indeed, Lansing and Scott as the American delegation to the Commission on Responsibilities – and its Sub-Commission III – had vigorously opposed to the end the idea of both trying the Kaiser and setting up an international tribunal to do so. And, yes, they filed a dissenting report to that end. But that does not mean that the US delegation to the Paris Peace Conference 1919 had dissented from Article 227 of the Versailles Treaty that explicitly called for the prosecution of the Kaiser.

The reason that we cannot say that the American delegation to the Peace Conference dissented from the provision is as follows: *(i)* although he did initially express reservations against the idea of prosecuting the Kaiser, in sympathy with Lansing's objections, President Wilson – Lansing's and Scott's principal – did in the end agree with his fellow heads of government (Clemenceau and Lloyd George) that the Kaiser must be prosecuted. Once Wilson agreed to that project, he threw

30 Id.

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his full weight behind it, including the call on the Netherlands to surrender the Kaiser to the tribunal for his prosecution; and *(ii)* not only did Wilson agree that the Kaiser must be prosecuted, in fact, Wilson himself personally drafted Article 227 of the Versailles Treaty. It must be recalled that he was a trained lawyer, a university professor and a hands-on president. He knew how to draft documents.

4. Conclusion: Crystallization of the Head of State Accountability

The norm thus cast in Article 227 of the Versailles Treaty was ultimately crystallized after World War II, when Russia (then USSR) joined France, UK and US to lay down the principle captured in Article 7 of the Nuremberg Charter, Article II(4)(a) of the Control Council No 10 and Article 6 of the Charter of the International Military Tribunal for the Far East, to the effect that no head of State enjoys immunity for international crimes – including the crime of aggression – when tried by an international tribunal. That principle became the Third Principle in the International Law document known as 'The Nuremberg Principles', having also been captured in Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide. That principle has also consistently and repeatedly been re-affirmed in more modern instruments like the statute of the International Criminal Tribunal for the former Yugoslavia [Article 7(2)]; the Statute of the International Criminal Tribunal for Rwanda [Article 6(2)], the Statute of the Special Court for Sierra Leone [Article 6(2)], and the ICC Statute Article 27]. It all started in 1919. That is customary international law on the point.

It is on that basis that President Putin or any other leader in the world today, should be prosecuted when implicated in the commission of international crimes.