

# INTERNATIONAL CRIMINAL LAW AND THE ROLE OF NARRATIVE IN THE WAR IN UKRAINE

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## INTERNATIONAL CRIMINAL LAW AND THE ROLE OF NARRATIVE IN THE WAR IN UKRAINE

Jonathan Hafetz<sup>1</sup>

### ABSTRACT

This article examines the multiple ways that international criminal law (ICL)—the body of international law that seeks to impose criminal responsibility on individuals for international crimes—has impacted the conflict in Ukraine. Most violations remain unpunished, and ICL’s legal accountability mechanisms continue to face significant obstacles. But even absent prosecutions and trials, which remain contingent on an array of shifting factors, ICL has affected the Ukraine conflict in multiple ways.

The article focuses on how ICL has helped shape narratives about the war in Ukraine. In doing so, the article cautions against a strict law/politics dichotomy and instead focuses on the more dynamic and multi-faceted interaction between international law, policy, and politics. It offers some broader conclusions about the opportunities as well as the challenges that a reliance on narrative presents for ICL’s overarching aim of holding individuals accountable for mass atrocities through prosecutions. As the article explains, narrative can advance ICL’s goals, but harnessing narrative’s full potential requires a more consistent commitment to ICL’s norms and principles, especially from the most powerful states. Further, an overreliance on narrative, without judicial enforcement, carries significant risks, particularly in today’s digital world, where facts can be distorted, stories manipulated, and disinformation widely and

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rapidly disseminated. Extensive reliance on narrative, moreover, can dilute the norms on which ICL is based, weakening its status as law and breeding cynicism. Thus, the more disputes about atrocity crimes are resolved through competing narratives rather than by courts, the more blurred the distinction may become between ICL's regime of individual responsibility and the world of international power politics.

#### KEYWORDS

International Criminal Law, ICL, narratives around war, power vs. law, war crimes, Ukraine, War in Ukraine

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## INTRODUCTION

Russia's invasion of Ukraine has led to the deaths of hundreds of thousands, displaced millions, and caused massive economic devastation across the world. The war in Ukraine highlights the challenges of deterring and holding accountable those most responsible for international law violations when the stakes are highest. The Ukraine conflict, moreover, followed on the heels of the Syrian civil war, which caused a profound global humanitarian crisis that highlighted similar obstacles and raised similar concerns about what is commonly referred to as the rules-based international order. Conflicts with devastating consequences for civilians continue to rage around the world, including in Sudan, Myanmar, and Gaza.

Yet, if the Ukraine conflict exposes international law's limitations in deterring atrocities and punishing perpetrators, it also demonstrates international law's continuing potential to influence how conflicts are framed, waged, and ultimately remembered. Thus, the paradox: international law continues to exert gravitational pull and may have significant practical consequences, even if it often remains unenforced and falls short of its professed ideals.

This article examines the multiple ways that international criminal law (ICL)—the body of international law that seeks to impose criminal responsibility on individuals for international crimes—has impacted the conflict in Ukraine even as norms have been breached and most violations remain unpunished. As the article describes, ICL's formal accountability mechanisms—essentially, the myriad tribunals established over the last several decades to try and hold perpetrators of atrocity crimes responsible—continue to face significant legal, political, and practical obstacles. But even absent prosecutions and trials, which remain contingent on an array of shifting factors, ICL has impacted the Ukraine conflict in multiple ways. The article explores ICL's impact on narratives about the war in Ukraine. In that regard, the article engages with long-running “power vs. law” debates surrounding ICL and realist critiques that dismiss international law as mostly irrelevant to international relations, a field dominated and driven by geopolitics.<sup>2</sup>

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<sup>2</sup> See, e.g., Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship between International Law and International Politics*, 5 EUR. J. INT'L L. 313, 313 (1994) (discussing the impact of power-law dynamics on international law); see also Douglas Guilfoyle, *Litigation as Statecraft: Small States and the Law of the Sea*, BRITISH YEARBOOK INT'L L. 1, 2–3 (2023) (summarizing the debate).

In discussing the important and multi-faceted role of narrative, the article cautions against a strict law/politics dichotomy and instead focuses on the more dynamic and multi-faceted interaction between international law, policy, and politics. It then offers some broader conclusions about the opportunities as well as the challenges that a reliance on narrative presents for ICL's aims of holding individuals accountable for mass atrocities through prosecutions. Narrative can advance ICL's goals, but harnessing narrative's full potential requires a more consistent commitment to ICL's norms and principles, especially from the most powerful states. Further, an overreliance on narrative, without judicial enforcement, carries significant risks, particularly in today's digital world, where facts can so easily and dangerously be distorted, and stories manipulated. Extensive reliance on narrative, moreover, can dilute the norms on which ICL is based, weakening its status as law and breeding cynicism. Thus, the more disputes about atrocity crimes are resolved through competing narratives rather than by courts, the distinction between ICL's regime of individual responsibility and the world of international power politics could become increasingly blurred.

Part I examines the various attempts to hold Russia legally accountable for aggression and atrocities in Ukraine and the obstacles they face. Part II describes the way in which states and other actors have sought to use ICL to influence the conflict outside formal legal mechanisms. Part III draws some conclusions about how the construction of narratives around wars and mass atrocities can inform theories and practice of ICL and international law generally.

## I. UKRAINE AND INTERNATIONAL CRIMINAL LAW

Russia's invasion of Ukraine and its subsequent conduct of the war has been widely denounced for violating international law.<sup>3</sup> Russia's invasion of Ukraine violated Article 2(4) of the U.N. Charter, which requires that U.N. member states refrain from the "use of force against the territorial integrity or political independence of any state," an act of aggression under ICL.<sup>4</sup> Russia has also committed war crimes, crimes against humanity, and, arguably, genocide since invading Ukraine in February 2022.<sup>5</sup>

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<sup>3</sup> U.N. Affairs, Denouncing Russia's war in Ukraine, German Chancellor calls for upholding rules-based global order, U.N. News (Sept. 20, 2022), <https://news.un.org/en/story/2022/09/1127401> (calling on member states to uphold the founding purposes of the U.N. Charter).

<sup>4</sup> U.N. Charter art. 2, ¶ 4.

<sup>5</sup> See Yuras Karmanau, et al., *Russia invades Ukraine on multiple fronts on 'brutal act of war'*, PBS NEWSHOUR (Feb. 24, 2022, 8:00 PM),

Although there are also reports of war crimes by Ukrainian forces,<sup>6</sup> Russia appears to have committed the bulk of the international law violations as well as the most consequential one through its invasion of Ukraine.<sup>7</sup> Multiple efforts to hold Russian officials accountable for ICL violations are underway, along with extensive efforts to lay the groundwork for future proceedings.<sup>8</sup> At the same time, these efforts face legal, practical, and political obstacles, and, like other accountability mechanisms, remain highly uncertain and contingent on the outcome of the conflict and other external factors.<sup>9</sup> This section briefly surveys these accountability efforts and the challenges they confront.

#### A. *The Quest for Legal Accountability*

Russia's invasion of Ukraine has generated a flurry of activities by states, international organizations, and other actors seeking to establish Russia's violations of international law and, where possible, to prosecute those individuals responsible for them.<sup>10</sup>

Following Russia's invasion of Ukraine on February 22, 2022, Ukraine initiated a case against the Russian Federation in the International Court of Justice (ICJ). Ukraine argued that Russia's attempt to justify its military action by claiming that Ukraine was engaged in acts of genocide

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<https://www.pbs.org/newshour/world/russia-invades-ukraine-on-multiple-fronts-in-brutal-act-of-war>; Jamey Keaten, *UN Rights Experts Decry War Crimes by Russia in Ukraine and Look into Genocide Allegations*, ASSOCIATED PRESS (Sept. 23, 2023), <https://apnews.com/article/russia-ukraine-war-human-rights663b3a4ba24499d93f3f889e98f8b652>.

<sup>6</sup> Matt Kersten, *Ukraine Must Investigate Alleged War Crimes By Its Forces*, AL JAZEERA (Dec. 16, 2022), <https://www.aljazeera.com/opinions/2022/12/16/ukraine-must-investigate-alleged-war-crimes-by-its-forces>.

<sup>7</sup> See, e.g., Marti Flacks, *The ICC Wants Putin. Now What?*, CTR. STRATEGIC & INT'L STUD. (Mar. 20, 2023), <https://www.csis.org/analysis/icc-wants-putin-now-what> (stating the ICC requested an arrest warrant for Russian President Vladimir Putin for war crimes) (last visited Dec. 21, 2023); Lily Hyde, *Meet the Ukrainians Documenting Russian War Crimes, in Real-Time*, POLITICO (May 19, 2022), <https://www.politico.eu/article/ukraines-sprawling-unprecedented-campaign-to-document-russian-war-crimes>.

<sup>8</sup> See Flacks, *supra* note 7 (discussing how the criminal charge against Maria Lvova-Belova, the Russian Federation's Commissioner of Children's Rights, for involuntary deportation of children, helps to demonstrate how President Putin may have been personally involved in the commission of that crime).

<sup>9</sup> See *id.* (discussing future charges against President Putin, including 65,000 additional war crimes, the prosecution of which may depend on political expediency).

<sup>10</sup> See Situation in Ukraine, ICC-01/22, Investigation (Mar. 2, 2022) (reporting on coordinated State Parties referrals to the ICC urging an investigation of war crimes and genocide committed in Ukraine).

within the Luhansk and Donetsk oblasts gave rise to a dispute under the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>11</sup> thus triggering the ICJ’s jurisdiction.<sup>12</sup> Less than one month later, the ICJ ruled that Ukraine was entitled to provisional relief and called on Russia to “immediately suspend its military operations.”<sup>13</sup> Ukraine also sought relief from the European Court of Human Rights (ECtHR), based on the European Convention on Human Rights,<sup>14</sup> requesting that the court impose urgent interim measures to address the “massive human rights violations committed by the Russian troops in the course of military aggression.”<sup>15</sup> On March 1, 2022, the ECtHR granted Ukraine’s request and directed Russia “to refrain from military attacks against civilians and civilian objects” and “to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by [its] troops.”<sup>16</sup>

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<sup>11</sup> U.N. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, available at [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm).

<sup>12</sup> *Id.* art. 6; Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed.), Provisional Measures, 2022 I.C.J. 212, ¶ 3 (Mar. 16) [hereinafter ICJ Provisional Measures].

<sup>13</sup> See ICJ Provisional Measures, *supra* note 12, ¶ 86. Ukraine had previously brought another case against Russia before the ICJ in 2017, arguing that Russia’s support for separatist forces in eastern Ukraine since 2014 violates the International Convention for the Suppression of the Financing of Terrorism and that Russia’s suppression of rights of Crimean Tatars and ethnic Ukrainians violates the International Convention on the Elimination of Racial Discrimination in Crimea. See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ. Fed.), Press Release, 2024/8 I.C.J. (Jan. 31, 2024), <https://www.icj-cij.org/case/166> (announcing the ICJ’s Judgment).

<sup>14</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14, and 15, *opened for signature* Nov. 4, 1950, E.T.S. No. 5. At the time both countries were parties to the ECHR and thus subject to the jurisdiction of the European Court on Human Rights. *Id.* art. 31. Following the ECtHR’s decision, Russia announced it would withdraw from the Council of Europe and from the ECtHR. The Council of Europe expelled Russia, and Russia thus ceased to be a high contracting party to the ECHR, effective September 16, 2022, six months after its expulsion. See Kristen E. Eichensehr, *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT’L L. 631, 634–35 (2022). The ECtHR has determined, however, that it remains competent to address applications against Russia for violations of the ECHR that occurred prior to September 16, 2022. *Id.* at 635.

<sup>15</sup> Press Release, Registrar of the Court, The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory, Eur. Ct. H. R. 068 (Mar. 1, 2022).

<sup>16</sup> *Id.*



The ICC prosecutor has opened an investigation into events in Ukraine.<sup>17</sup> Although neither Ukraine nor Russia is a party to the ICC, Ukraine consented to the ICC's jurisdiction over alleged crimes committed on its territory since November 2013.<sup>18</sup> Following ICC Prosecutor Karim A.A. Khan's announcement on February 28, 2022, that he would seek authorization to open an investigation into the situation in Ukraine, he received referrals from numerous State parties.<sup>19</sup> On March 17, 2023, the ICC Pre-Trial Chamber II issued arrest warrants for Russian Federation President, Vladimir Putin, and Maria Alekseyevna Lvova-Belova, Russia's Commissioner for Children's Rights, concluding that there were reasonable grounds to believe that both suspects hold some degree of responsibility for the war crimes of unlawful deportation and transfer of Ukrainian children to the Russian Federation.<sup>20</sup>

International institutions have also created mechanisms to investigate reports of Russian war crimes and other abuses that could one day lead to criminal prosecutions.<sup>21</sup> The UN Human Rights Council (HRC), for example, has established an independent international commission of inquiry to investigate and gather evidence of Russian human rights abuses.<sup>22</sup> Ukraine, with the support of numerous other states, invoked a provision of the Organization for Security and Co-operation in Europe (OSCE) to establish an expert mission to investigate reports of human rights abuses in Ukraine,<sup>23</sup> and the OSCE subsequently issued a report finding evidence of clear and widespread international humanitarian law (IHL) violations by Russia.<sup>24</sup>

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<sup>17</sup> See Situation in Ukraine, ICC-01/22, Investigation (Mar. 2, 2022), <https://perma.cc/BW3V-7JUX>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (listing over 40 countries which have given referrals to the prosecutor's Office).

<sup>20</sup> *Id.* The ICC subsequently issued arrest warrants for two senior Russian military officials for war crimes and crimes against humanity for harm to civilians and civilian objects. See Int'l Criminal Court, Press Release, *Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov* (Mar. 5, 2024) (describing ICC arrest warrants for Lieutenant General Sergei Ivanovich Kobylash and Admiral Viktor Nikolayevich Sokolov).

<sup>21</sup> Eichensehr, *supra* note 14, at 639.

<sup>22</sup> Human Rights Council Res. 49/1, U.N. Doc. A/HRC/RES/49/1, at ¶ 11 (Mar. 7, 2022) (establishing an independent commission of inquiry made up of three human rights experts charged with monitoring the human rights mission in Ukraine).

<sup>23</sup> Eichensehr, *supra* note 14, at 639.

<sup>24</sup> See Wolfgang Benedek et al., *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine*

Ukraine, meanwhile, has moved aggressively to prosecute Russian soldiers in its domestic courts. Ukraine's prosecutor general declared in May 2022 that her "main agenda" included investigating and prosecuting war crimes.<sup>25</sup> As of September 29, 2023, Ukrainian authorities in the Office of the Prosecutor General of Ukraine claimed that they had recorded 108,904 potential war crimes committed by Russian forces.<sup>26</sup> As of November 2023, 300 suspects in Ukraine had been indicted and 66 convicted.<sup>27</sup>

Other countries have also sought to prosecute Russian soldiers for war crimes and crimes against humanity in their respective domestic courts based on principles of universal jurisdiction.<sup>28</sup> Universal jurisdiction describes the authority of states to prosecute crimes in their own courts "regardless of where the crime occurred or the nationality of the victim or the perpetrator" based on the nature of the crime itself.<sup>29</sup> Numerous countries in Europe have either launched or indicated that they intend to launch their own investigations into war crimes and crimes against humanity committed by Russian forces in Ukraine based on universal jurisdiction.<sup>30</sup>

### B. *Obstacles to Accountability*

Legal and practical obstacles, however, complicate efforts to hold Russian officials accountable through criminal prosecutions. The most significant obstacles surround prosecuting the crime of aggression.

The International Military Tribunal at Nuremberg famously labeled aggression "the supreme international crime" for "contain[ing] within itself the accumulated evil of the whole."<sup>31</sup> Russia's invasion of Ukraine

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*Since 24 February 2022*, OFF. DEM. INST. H. R. GAL/26/22/Rev. 1 (Apr. 13, 2022), <https://www.osce.org/files/f/documents/f/a/515868.pdf>.

<sup>25</sup> Jill Goldenziel, *An Alternative to Zombieing: Lawfare Between Russia and Ukraine and the Future of International Law*, 108 CORNELL L. REV. 1, 10–11 (2023).

<sup>26</sup> ANDREW S. BOWEN & MATTHEW C. WEED, CONG. RSCH. SERV., R47762, WAR CRIMES IN UKRAINE (2023).

<sup>27</sup> Maggie Miller, *Ukraine says it has evidence of 109,000 Russian war crimes*, POLITICO (Nov. 18, 2023), <https://www.politico.com/news/2023/11/18/ukraine-russia-war-crimes-00127936>.

<sup>28</sup> See Yvonne M. Dutton, *Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?*, 55 CASE W. RES. J. INT'L L. 391 (2023).

<sup>29</sup> *Id.* at 398; see also Eugene Kontorovich, *The Parochial Uses of Universal Jurisdiction*, 94 NOTRE DAME L. REV. 1417 (2019) (discussing universal jurisdiction).

<sup>30</sup> Dutton, *supra* note 28, at 391.

<sup>31</sup> *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 186 (1947).

has renewed the international community's focus on aggression and revitalized efforts to create mechanisms for prosecuting it.<sup>32</sup> In March 2022, the UN General Assembly issued a historic resolution condemning Russia's aggression in Ukraine.<sup>33</sup> Since then, efforts to find a way to hold Putin and other senior Russian leaders responsible have continued to gather steam.<sup>34</sup> But aggression has not been prosecuted at the international level since World War II, and no international court presently has jurisdiction over it.<sup>35</sup> Moreover, numerous states—including many of the same Western states that now loudly denounce Russian aggression—previously resisted the development of the crime of aggression. These nations sought to maintain UN Security Council control over any prosecutions of aggression due to a fear that their leaders (or leaders of close allies) might otherwise one day face such charges.<sup>36</sup>

The ICC, the most obvious forum for an aggression prosecution, is highly constrained in its ability to prosecute this crime.<sup>37</sup> Although the Rome Statute recognized aggression as an international crime,<sup>38</sup> the provision was not ratified until the Kampala Conference in 2010<sup>39</sup> due to prior disagreement at the Rome Conference over the definition of aggression

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<sup>32</sup> BOWEN & WEED, *supra* note 26.

<sup>33</sup> G.A. RES. A/ES-11/1, at 2 (Mar. 2, 2022); *see also* Press Release, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022) (indicating the General Assembly A/ES-11/1 resolution was adopted by a vote of 141 in favor to 5 votes against with 25 abstentions).

<sup>34</sup> *See, e.g., Holding Russia accountable*, EU SOLIDARITY WITH UKRAINE, [https://eu-solidarity-ukraine.ec.europa.eu/holding-russia-accountable\\_en](https://eu-solidarity-ukraine.ec.europa.eu/holding-russia-accountable_en) (last visited Apr. 27, 2024).

<sup>35</sup> Tom Dannenbaum, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, JUST SECURITY (Mar. 10, 2022), <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (questioning whether and how a criminal case against Russia's aggressive war could be prosecuted).

<sup>36</sup> Milena Sterio, *The Ukraine Crisis and the Future of International Courts and Tribunals*, 55 CASE W. RES. J. INT'L L. 479, 494–95 (2023).

<sup>37</sup> *See* Claus Kress et al., *The Ukraine War and the Crime of Aggression: How to Fill the Gaps in the International Legal System*, JUST SECURITY (Jan. 23, 2023), <https://www.justsecurity.org/84783/the-ukraine-war-and-the-crime-of-aggression-how-to-fill-the-gaps-in-the-international-legal-system/> (explaining how the ICC cannot prosecute Russia for acts of aggression as long as President Putin retains veto power in the U.N. Security Council).

<sup>38</sup> Rome Statute of the International Criminal Court, art. 5(d), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>39</sup> Assemb. of States Parties to Rome Convention, RC/Res. 6, (June 11, 2010).

and the conditions for exercising jurisdiction over it.<sup>40</sup> Under the Rome Statute (as amended), the crime of aggression remains subject to its own jurisdictional framework that, among other things, limits its application to non-States Parties.<sup>41</sup> So while the ICC can exercise jurisdiction over Russian nationals for war crimes and crimes against humanity committed on Ukraine's territory, it cannot exercise jurisdiction over Putin or other senior Russian officials for the crime of aggression under the Rome Statute absent a referral by the UN Security Council.<sup>42</sup> This is a non-starter at least as long as Putin remains in power and in control of Russia's permanent veto on the Security Council.<sup>43</sup>

These limitations on the ICC's exercise of jurisdiction have prompted considerable effort at identifying alternative paths towards prosecuting Russia's aggression in Ukraine.<sup>44</sup> As Tom Dannenbaum put it, "[t]he burgeoning political will to pursue criminal accountability for this particular war of aggression is striking both for the publicity surrounding it and for its historical rarity."<sup>45</sup> Scholars, advocates, and government officials have offered various proposals for closing this accountability gap. They include: amending the ICC statute to give the Court greater power over acts of aggression, including those committed by non-States Parties;<sup>46</sup> creating a special international tribunal for Ukraine;<sup>47</sup> creating a hybrid or

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<sup>40</sup> John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 87 n. 120 (2003).

<sup>41</sup> Rome Statute, *supra* note 38, art. 15bis.

<sup>42</sup> *Id.* art. 13(b); 15bis, ¶ 1; *see also* Kress et al., *supra* note 37 (summarizing the history of non-State party exclusions from the Rome Statute and the 2010 Kampala amendments).

<sup>43</sup> Further, even if both Ukraine and Russia were to become ICC States Parties, their ratifications of the treaty would not have retroactive effect. *See* Rome Statute, *supra* note 38, art. 11, ¶ 2.

<sup>44</sup> *See, e.g.*, Kress et al., *supra* note 37 (discussing various reforms including reform of the Kampala amendment to allow prosecution for the crime of aggression); *see Crime of Aggression*, JUST SECURITY, <https://www.justsecurity.org/tag/crime-of-aggression/> (last visited Dec. 23, 2023) (collecting articles and proposals on prosecuting the crime of aggression).

<sup>45</sup> Dannenbaum, *supra* note 35.

<sup>46</sup> *See* Jennifer Trahan, *The Need for an International Tribunal on the Crime of Aggression*, 46 FORDHAM INT'L L. J. 671, 681–82 (2023) (discussing proposals to amend article 15bis of the Rome Statute and additional provision allowing the Court's jurisdiction to be triggered by a referral of the U.N. General Assembly under the Uniting for Peace process).

<sup>47</sup> *See* Statement, Off. Gordon & Sarah Brown, *Calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine*, (2022), <https://gordonandsarahbrown.com/wp-content/uploads/2022/03/Combined-Statement-and-Declaration.pdf>; *see also* Parliamentary Assembly, *PACE calls for the setting up of an*

internationalized national tribunal in the courts of Ukraine,<sup>48</sup> a proposal endorsed by the United States,<sup>49</sup> and prosecuting Russian aggression in a domestic court,<sup>50</sup> either through the exercise of territorial jurisdiction or universal jurisdiction.<sup>51</sup> These proposals vary in form, structure, and manner of operation. For example, a hybrid tribunal could be created through a regional agreement among countries or within the European Union, or through an agreement between Ukraine and the United Nations.<sup>52</sup> Each proposal, moreover, would need to grapple with various legal issues, such as the uncertain status of a hybrid tribunal in Ukraine under Ukrainian law;<sup>53</sup> the coercive authority of the UN General Assembly (as opposed to the UN Security Council) to create an international tribunal on its own initiative;<sup>54</sup> and personal and functional immunities under international law, which could arguably shield Putin from legal responsibility. This is especially true in a domestic or hybrid tribunal where the case for the application of immunities is much stronger than in international courts,<sup>55</sup>

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*ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine* (Apr. 28, 2022), <https://pace.coe.int/en/news/8699/pace-calls-for-the-setting-up-of-an-ad-hoc-international-criminal-tribunal-to-hold-to-account-perpetrators-of-the-crime-of-aggression-against-ukraine>.

<sup>48</sup> Kevin Jon Heller, *Options for Prosecuting Russian Aggression Against Ukraine: A Critical Analysis*, J. GENOCIDE RSCH. 1,1 (2022).

<sup>49</sup> See Beth Van Schaack, Ambassador-at-large for Global Criminal Justice, *Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression* (Mar. 27, 2023), in U.S. Dep't St. Off. Glob. Crim. Just., <https://www.state.gov/ambassador-van-schaacks-remarks/> [hereinafter Van Schaack, *Remarks*] (proposing a tribunal rooted in Ukraine's judicial system with added international elements).

<sup>50</sup> See Sergey Sayapin, *A Curious Aggression Trial in Ukraine: Some Reflections on the Alexandrov and Yerofeyev Case*, 16 J. INT'L CRIM. JUST. 1093, 1093 (2018) (discussing how Ukrainian courts previously prosecuted two Russian military servicemen for the crime of aggression at a domestic level based on events that occurred in 2014 and 2015).

<sup>51</sup> See Dannenbaum, *supra* note 35 (noting that approximately 20 states provide for universal jurisdiction over aggression in their domestic law).

<sup>52</sup> See Sterio, *supra* note 36.

<sup>53</sup> Alexander Komarov & Oona A. Hathaway, *Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression*, JUST SECURITY (Apr. 5, 2022), <https://www.justsecurity.org/80958/ukraines-constitutional-constraints-how-to-achieve-accountability-for-the-crime-of-aggression/> (questioning the legality under Ukrainian law of a court established between Ukraine and the U.N.).

<sup>54</sup> Derek Jinks, *Does the U.N. General Assembly have the authority to establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 14, 2014), <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>.

<sup>55</sup> James A. Goldston & Anna Khalfaoui, *In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters*, JUST SECURITY

where such immunities have been found not to apply.<sup>56</sup> On top of these obstacles are concerns surrounding the legitimacy of aggression prosecutions, particularly given the inconsistent way the international community has treated aggression in the past.<sup>57</sup> Most scholars agree that an international tribunal—backed by the UN General Assembly—offers the best hope for addressing legal challenges, such as those posed by personal or functional immunities, as well as legitimacy challenges, given that such a tribunal may be said to “act on behalf of the international community as a whole”<sup>58</sup> rather than individual states.<sup>59</sup>

The most significant obstacle to prosecuting aggression, however, is not legal but rather practical and political. As long as Putin remains in power, obtaining jurisdiction over him or other individuals within Russia with sufficient power to influence or shape policy in a way that allows for prosecution for a leadership crime like aggression<sup>60</sup> would depend on Russia’s complete surrender, which is virtually unthinkable for a host of reasons, not least Russia’s nuclear capability.<sup>61</sup> In the longer term, a window for an aggression prosecution might be opened through some form of

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(Feb. 1, 2023), <https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters>.

<sup>56</sup> Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Majority Opinion of Judge Carranza, ¶¶ 113–117 (May 6, 2019) (finding no head of state immunity under customary international law); see also Prosecutor v. Taylor, Case No. SCSL-2003-01-I, ¶¶ 52–53 (May 31, 2004) (finding that a head of state does not have personal immunity before an international tribunal); see also Dannenbaum, *supra* note 35 (explaining that functional immunities, which inhere in the official nature of the act (rather than the status of the person performing it) would apply to a wider range of individuals, including all state officials).

<sup>57</sup> Kress et al., *supra* note 37.

<sup>58</sup> Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Majority Opinion of Judge Carranza, ¶ 115 (May 6, 2019).

<sup>59</sup> See, e.g., Miguel Lemos, *The Law of Immunity and the Prosecution of the Head of State of the Russian Federation for International Crimes in the War against Ukraine*, EJIL TALK (Jan. 16, 2023), <https://www.ejiltalk.org/the-law-of-immunity-and-the-prosecution-of-the-head-of-state-of-the-russian-federation-for-international-crimes-in-the-war-against-ukraine/> (explaining how international tribunals address immunity issues).

<sup>60</sup> See Rome Statute, *supra* note 38, art. 8 *bis*, ¶ 1 (limiting the crime of aggression to those who can exercise or direct the political or military action of a nation); see also Nuremberg Military Tribunals, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10. NUREMBERG, 489 (1949) (including the High Command Trial (U.S. v. Wilhelm von Leeb, et al.)), which limited liability for the crime of aggressive war to individuals who possessed the “actual power to shape and influence the policy of their nation”).

<sup>61</sup> See J. Andrés Gannon, *If Russia Goes Nuclear: Three Scenarios for the Ukraine War*, COUNCIL FOREIGN RELATIONS (Nov. 9, 2022), <https://www.cfr.org/article/if-russia-goes-nuclear-three-scenarios-ukraine-war> (discussing Russia’s potential use of tactical nuclear weapons in Ukraine).

regime change in Russia, although the prospect that a future government would allow Putin or other (former) high-level officials to be subjected to prosecution for aggression in any Western-backed tribunal is dubious.

The incentive to reach a negotiated resolution to the conflict presents another challenge to imposing accountability through criminal prosecutions. While all accountability prosecutions operate in the shadow of competing demands of peace and justice, the Ukraine conflict puts the tension into stark relief given the conflict's mounting toll of death and destruction, global economic disruption, and risk of further escalation, along with the increasingly tenuous nature of support for Ukrainian resistance.<sup>62</sup> Any negotiated resolution, whether with Putin or a successor Russian government, could create additional barriers to an aggression prosecution, as well as to the continued prosecution of soldiers and low-level officials for other international crimes.

To be sure, the renewed focus on aggression could have positive consequences by strengthening the international framework around aggression even if Putin and/or any other senior Russian officials are never prosecuted. But even so, the array of obstacles underscores the degree to which prosecutions for aggression and other international crimes are inherently contingent on an array of shifting and unpredictable circumstances. This prompts the question of what impact focusing on prosecuting aggression, along with *jus in bello* offenses, has given the uncertainty of criminal trials, particularly for senior officials.

## II. ICL'S IMPACT BEYOND THE COURTROOM

ICL-based principles of individual responsibility and legal accountability operate on multiple levels, even outside the context of actual trials. States and nongovernment actors have invoked those principles in an effort to impact how the war in Ukraine is framed and waged.<sup>63</sup> Examining

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<sup>62</sup> See, e.g., *Ukraine war: Path of further escalation 'must be reversed,' Security Council hears*, U.N. NEWS (Oct. 21, 2022), <https://news.un.org/en/story/2022/10/1129792> (describing concerns of further escalation in Ukraine and the increased suffering it could cause to the people of Ukraine, Russia, and the rest of the world); *Western help for Ukraine is likely to diminish next year*, THE ECONOMIST (Sept. 21, 2023) (discussing the gradual erosion of continued support for military assistance and economic support to Ukraine).

<sup>63</sup> Gabriella Blum, *The Shadow of Success: How International Criminal Law Has Come to Shape the Battlefield*, 100 INT'L L. STUD. 133, 136 (2023) (explaining that ICL's narrow definition of criminal offenses has become a focal point for normative judgments concerning behavior in military conflicts and critiquing the conflation of ICL with IHL, a complementary but nonetheless distinct body of law).

these efforts can enrich understandings of ICL's role and of the varied, often dynamic interaction between law and politics in international relations.

A. *The Enduring Power of the "Nuremberg Moment"*

The allure of another "Nuremberg Moment" helps explain ICL's role in shaping narratives around Ukraine. The term Nuremberg Moment is used—often deliberately—to capture the aspiration that Putin and other senior Russian officials who are the architects of Russia's invasion of Ukraine and who are responsible for many of the ensuing atrocities will be brought to justice, much as many Nazi leaders were tried and punished after World War II.<sup>64</sup> Nuremberg reinforces the idea that international law—by adjudicating and assessing individual culpability through the mechanism of a criminal trial—can help restore the international legal order that Russia's invasion of Ukraine has so badly frayed and hold accountable those Russian leaders responsible for causing the widespread atrocities.<sup>65</sup> War has for centuries been viewed through a frame of morality, with a focus on the "justness" of the use of military force and the consequent harm to civilians.<sup>66</sup> Nuremberg and the subsequent development of ICL have infused and transformed this framework with notions of legality and individual responsibility, especially with that of crime and punishment.<sup>67</sup> Nuremberg has given rise to and helped sustain a framework

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<sup>64</sup> *Briefing with Ambassador-at-Large for Global Criminal Justice Beth Van Schaack on Justice and Accountability for Russia's Atrocities in Ukraine*, U.S. DEP'T OF STATE (Nov. 21, 2022), <https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine/> ("[T]his is definitely a new Nuremberg moment").

<sup>65</sup> *See id.*

<sup>66</sup> *See generally* Alexander Moseley, *Just War Theory*, INTERNET ENCYC. PHIL., <https://iep.utm.edu/justwar/> (last visited Dec. 23, 2023) (providing an overview of "just war" theory, centering on "the justification of how and why wars are fought"); *see also* John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 223 (2004) (positing that international law "to a large degree represent[s] the development of the just war tradition"); A. Walter Dorn, *Measuring Israel by the Just-War Yardstick*, N.Y. TIMES (Nov. 12, 2023), <https://www.nytimes.com/2023/11/12/opinion/israel-gaza-war-crimes.html> ("[J]ust war theory . . . has guided Western thought for centuries and forms the intellectual framework for international law on the use of force."). *But see* Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L L. 1, 36 (2012) (arguing that "the [U.N.] Charter system obviates any need for . . . moral and political reasoning").

<sup>67</sup> *See* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 589 (1997); Blum, *supra* note 63, at 142.



for critiquing Russian actions in Ukraine as violations of international law justifying criminal prosecution.<sup>68</sup>

Nuremberg, moreover, has proven particularly alluring during the current conflict in Ukraine—a war of aggression within Europe that serves as a reminder of the horrors of World War II.<sup>69</sup> In that respect, it echoes the war in the former Yugoslavia in the 1990s, which helped revive international criminal law following its post-Nuremberg dormancy during the Cold War.<sup>70</sup>

The ICC Prosecutor's opening of an investigation into war crimes less than a week after Russia's invasion of Ukraine's and the issuance of arrest warrants for Putin and Lvova-Belova the following year reflects a deliberate effort to seize upon and harness the power of the Nuremberg narrative. The speed at which the investigation was opened had an important effect on how the conflict was initially reported on and framed by the international media, reinforcing the view that Putin and other Russian officials had breached international norms, were responsible for the ensuing humanitarian crisis, and should be punished. The ICC indictments have amplified this effect.<sup>71</sup> While the indictments do not include the crime of aggression, which was central to the International Military Tribunal at Nuremberg but which remains outside the ICC's jurisdiction,<sup>72</sup> they seek to hold Putin and other senior Russian officials accountable

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<sup>68</sup> See Directorate-General for Neighbourhood and Enlargement Negotiations, *Ukraine: Statement by High Representative Josep Borrell and Commissioner for Crisis Management Janez Lenarčič on the Destruction of the Khakovka Dam*, EUR. COMM'N (June 6, 2023), [https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-statement-high-representative-josep-borrell-and-commissioner-crisis-management-janez-2023-06-06\\_en](https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-statement-high-representative-josep-borrell-and-commissioner-crisis-management-janez-2023-06-06_en) (recalling that those who commit war crimes will be held responsible in accordance with ICL as was the case in the Nuremberg trials).

<sup>69</sup> Van Schaack, *Remarks*, *supra* note 49 (describing the lasting impact of World War II).

<sup>70</sup> MICHAEL BAZYLER, *HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* 235–36 (2016) (discussing how the atrocities in the former Yugoslavia reaffirmed the Nuremberg principles); Emma Daly, *Beyond Justice: How the Yugoslav Tribunal Made History*, HUM. RTS. WATCH (Dec. 19, 2017, 6:06 PM), <https://www.hrw.org/news/2017/12/19/beyond-justice-how-yugoslav-tribunal-made-history> (discussing how the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia by passing a resolution).

<sup>71</sup> Senthnan Selvarajah & Lorenzo Fiorito, *Media, Public Opinion, and the ICC in the Russia–Ukraine War*, 4 *JOURNALISM AND MEDIA* 760, 784–85 (2023).

<sup>72</sup> See *supra* text accompanying notes 37–38.

through a criminal trial.<sup>73</sup> The indictment of Putin, moreover, marks only the second time that the ICC has issued an arrest warrant against a head of state.<sup>74</sup> The arrest warrants not only complement the ongoing domestic prosecution of Russian soldiers in Ukraine and elsewhere, but also help bolster the ideal that there should—and one day might—be accountability for even the most senior officials. Even if Putin and other top Russian officials are never brought to trial, the ICC’s indictment has a strong signaling effect, helping to brand Putin a war criminal before foreign audiences and to bifurcate the world into those who support or oppose the Russian leader.<sup>75</sup>

In the short-term, the ICC indictments have the potential to limit Putin’s travel, as all ICC member states (currently 124 countries) are now obligated to arrest Putin and transfer him to the ICC if he is found in their territory (although whether all countries would do so is another question).<sup>76</sup> This has impacted Putin’s ability to travel to other states: Putin, for example, skipped an economic summit in South Africa and has not traveled to a country that is a signatory to the Rome Statute since his indictment.<sup>77</sup> These constraints on Putin’s ability to travel abroad help reinforce the notion that Putin has become an outsider within the larger international community, especially in North American and Europe, where he

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<sup>73</sup> See Rebecca Hamilton, *The ICC Goes Straight to the Top: Arrest Warrants Issued for Putin*, JUST SECURITY (Mar. 17, 2023), <https://www.justsecurity.org/85529/the-icc-goes-straight-to-the-top-arrest-warrant-issued-for-putin/>.

<sup>74</sup> Brishna Gehani, *Putin’s Arrest Warrant, Immunity and the International Criminal Court*, RSCH. SOC’Y OF INT’L L. (June 15, 2023), <https://rsilpak.org/2023/putins-arrest-warrant-immunity-and-the-international-criminal-court/>.

<sup>75</sup> See Mark Lawrence Schrad, *It’s Easy But Wrong to Be Cynical About Putin’s Indictment*, FOREIGN POL’Y (Mar. 21, 2023), <https://foreignpolicy.com/2023/03/21/putin-indictment-icc-international-justice-war-ukraine/>.

<sup>76</sup> See Rome Statute, *supra* note 38, art. 86 (obligating all State Parties to cooperate fully with the ICC prosecutions); Francesca Ebel et al., *Putin, charged with war crimes, must limit travel to avoid arrest*, WASH. POST (Mar. 24, 2023), <https://www.washingtonpost.com/world/2023/03/24/putin-arrest-war-crimes-travel/> (noting that in 2015, South Africa failed to arrest Sudanese leader Omar Hassan al Bashir, who was charged before the ICC with genocide).

<sup>77</sup> *Putin is Downplaying Skipping South Africa Summit Amid ICC Warrant Controversy*, ASSOC. PRESS (July 29, 2023), <https://apnews.com/article/russia-putin-brics-summit-icc-warrant-1d2c52944bc3c20fa73eb5f8684e7419>. Putin has, however, traveled to some non-ICC member States. See Anna Chernova & Christian Edwards, *Putin Makes Rare Foreign Visit to UAE as Ukraine War Grinds On*, CNN (Dec. 6, 2023), <https://www.cnn.com/2023/12/06/middleeast/putin-russia-saudi-uae-vist-israel-intl/index.html> (noting Putin’s trip to the United Arab Emirates and Saudi Arabia as war rages in the Middle East and in Europe).

is largely treated as a pariah.<sup>78</sup> At the same time, this branding has impacted Russia's political behavior, causing it to seek alliances and to develop a counter-narrative that is based on resistance to a Western-dominated international legal system.<sup>79</sup>

Attempts to design a new tribunal with the power to prosecute aggression serve a different but related function. The establishment of such a tribunal would create the possibility that Putin himself could be prosecuted. It would strengthen the legal framework around the crime of aggression, thus providing a potential basis for its prosecution in future conflicts. It also could help reinforce moral clarity around the legal norm. But the most immediate and perhaps significant impact of such a tribunal would be in shaping the narrative about the war in Ukraine by strengthening the perception of Putin as a rule-breaker who, along with other senior Russian officials, not only should, but one day could, be held criminally responsible because there exists a court with the power to do so.<sup>80</sup>

The prospect of a Nuremberg moment framed around Russian aggression has helped mobilize support for military assistance to Ukraine and economic sanctions against Russia internationally.<sup>81</sup> Russia's invasion of Ukraine has increased negative views of Putin and Russia in many countries around the world.<sup>82</sup> It has helped strengthen domestic support against the war in Europe.<sup>83</sup> The European Union has tied economic and

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<sup>78</sup> Ebel, *supra* note 76 (noting that Putin is isolated as an international leader due to the war in Ukraine and has not traveled to countries that are deemed 'unfriendly' by the Kremlin).

<sup>79</sup> *Id.* (indicating that Russia has established alliances with China and Iran); Elliot Smith, 'It's Not a Pretty Picture': Russia's Support is Growing in the Developing World, CNBC (Mar. 30, 2023, 2:42AM), <https://www.cnbc.com/2023/03/30/ukraine-war-how-russias-support-is-growing-in-the-developing-world.html>.

<sup>80</sup> See Adam Chilton & Katerina Linos, *Preferences and Compliance with International Law*, 22 THEORETICAL INQUIRIES IN L. 247, 274 (2021) ("[I]nformation that a policy is consistent with UN recommendations or international norms, even when these norms are non-binding, leads to significant increases in support for the policy.").

<sup>81</sup> See Press Release, White House Briefing Room, FACT SHEET: One Year of Supporting Ukraine (Feb. 21, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/21/fact-sheet-one-year-of-supporting-ukraine/> (showing how the U.S. and its international allies have provided military assistance and put sanctions on Russia following its invasion of Ukraine).

<sup>82</sup> Moira Fagan et al., *Large Shares See Russia and Putin in a Negative Light, While Views of Zelenskyy More Mixed*, PEW RSCH. CTR. (July 10, 2023), <https://www.pewresearch.org/global/2023/07/10/large-shares-see-russia-and-putin-in-negative-light-while-views-of-zelensky-more-mixed/>.

<sup>83</sup> *Putin's War Has Given Birth to Geopolitical Europe*, EUR. UNION EXTERNAL ACTION SERV. (Mar. 3, 2023), <https://www.eeas.europa.eu/eeas/putins-war-has-given->

military support to Ukraine to Russia's aggression and other violations of international law.<sup>84</sup> In the United States, Russia's ICL violations are repeatedly cited as justifications for providing continued military and economic aid to Ukraine. President Biden, for example, has pointed to Russian "atrocities and aggression" in seeking congressional approval for additional security assistance to Ukraine.<sup>85</sup>

Framing the conflict around ICL violations has also helped to mobilize political support within the United States for the ICC, as demonstrated by the unanimous passage of a Senate resolution calling for legal accountability for Putin and other senior Russian leaders and by U.S. assistance to the ICC to investigate Russian war crimes and support victims and witnesses.<sup>86</sup> It likewise has contributed to the enactment of legislation to strengthen the United States' domestic war crimes statute—passed on the eve of Ukrainian President Volodymyr Zelensky's address to a joint session of Congress—that extended federal war crimes jurisdiction over any individual in the United States.<sup>87</sup> The legislation's sponsors connected this

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birth-geopolitical-europe\_en. Putin's support has declined in Europe even among right-wing populists. Moira Fagan & Laura Clancy, *Even Among Populist Parties in Europe, Favorable Views of Putin have Declined*, PEW RSCH. CTR. (Sept. 23, 2022), <https://www.pewresearch.org/short-reads/2022/09/23/among-european-right-wing-populists-favorable-views-of-russia-and-putin-are-down-sharply/>.

<sup>84</sup> EU Response to Russia's Invasion of Ukraine, COUNCIL E.U., <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/#support> (last visited Dec. 23, 2023) (detailing the domestic measures the EU has taken in support of Ukraine in its conflict with Russia); Administration Team of the E.U. Delegation to the United States, *E.U. Assistance to Ukraine (in U.S. Dollars)*, DELEGATION OF THE E.U. TO THE U.S. (Dec. 21, 2023), [https://www.eeas.europa.eu/delegations/united-states-america/eu-assistance-ukraine-us-dollars\\_en?s=253](https://www.eeas.europa.eu/delegations/united-states-america/eu-assistance-ukraine-us-dollars_en?s=253) (describing EU military assistance to Ukraine).

<sup>85</sup> Joseph R. Biden, Jr., President, United States, Remarks by President Biden on the Security Assistance to Ukraine (May 3, 2022) (explaining how the U.S. continues to supply anti-tank, anti-air, and other defense systems to Ukraine in light of Putin's continued atrocities and war crimes) [hereinafter Remarks by President Biden on the Security Assistance to Ukraine].

<sup>86</sup> *U.S. Senate Approves Resolution Probing Putin for War Crimes*, ASSOC. PRESS (Mar. 15, 2022, 8:23 PM), <https://apnews.com/article/russia-ukraine-putin-war-crimes-europe-international-criminal-court-097ff97679abd5e856fccc40c6a0c29>; see also Press Release, U.S. Senate Judiciary Comm., Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC's Investigation into Atrocities in Ukraine (Mar. 24, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-graham-bipartisan-group-of-senators-urge-president-biden-to-support-the-iccs-investigation-into-atrocities-in-ukraine> (urging U.S. President Biden to support the ICC in its investigations of Russian officials by sharing key evidence).

<sup>87</sup> Justice for Victims of War Crimes Act, Pub. L. 117-351, § 2, 136 Stat. 6265 (2023) (amending the War Crimes Act of 1996). Previously, such jurisdiction was limited to cases in which the victim or perpetrator was a U.S. national or service member. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441).

legislation to the United States' continuing support for countering Russian atrocities in Ukraine, underscoring that the United States must not be used as a "safe haven by the perpetrators of these heinous crimes."<sup>88</sup> This language of accountability and justice has further served as a buffer—at least temporarily—against the growing political backlash within the United States against assistance to Ukraine.<sup>89</sup>

Ukraine, meanwhile, has often centered its pleas for military and economic assistance around Russia's ICL violations, capitalizing on the narrative space created by the accountability framework. Ukraine's President, Volodymyr Zelensky, for example, has repeatedly underscored the need for prosecutions of Russian leaders and soldiers for aggression, war crimes, and genocide.<sup>90</sup> Ukraine's use of ICL in its messaging around the war has helped entrench a narrative in which Putin and other Russian officials should be held accountable for their actions.<sup>91</sup>

Economic sanctions have been at the core of the Western response to Russia's war in Ukraine. Both the United States and the European Union have imposed unprecedented and far-reaching sanctions affecting every

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<sup>88</sup> Press Release, Chuck Grassley, U.S. Senator, Senate Passes Grassley, Durbin Proposal to Broaden War Crimes Jurisdiction (Dec. 21, 2022), <https://www.grassley.senate.gov/news/news-releases/senate-passes-grassley-durbin-proposal-to-broaden-war-crimes-jurisdiction> (sponsoring the legislation with Senator Dick Durbin (D-IL)).

<sup>89</sup> See Susan Davis, *Zelenskyy's U.S. Visit Comes as Republican Opposition to Ukraine Aid Grows*, NPR (Sept. 19, 2023, 5:00 AM), <https://www.npr.org/2023/09/19/1199503861/zelenskyy-ukraine-aid-republican-congress-shutdown-spending> (quoting Sen. Rand Paul, "[t]here's no national security interest for us in Ukraine, and even if there were, it would be trumped by the fact that we have no money."); Press Release, Josh Hawley, U.S. Senator, Hawley Delivers National Security Speech 'China and Ukraine: A Time for Truth' (Feb. 16, 2023), <https://www.hawley.senate.gov/hawley-delivers-national-security-speech-china-and-ukraine-time-truth/> (stating "our current foreign policy isn't working . . . for the American people. It's cost many of them their jobs, their towns, [and] their communities.").

<sup>90</sup> *Id.*

<sup>91</sup> See Mike Corder, *International Center Opens to Help Hold Russian Leadership Accountable for Aggression in Ukraine*, ASSOCIATED PRESS (July 3, 2023, 5:47 AM), <https://apnews.com/article/ukraine-russia-aggression-prosecution-eurojust-4a29d857c2be9c63dafa3763ffe48850>; see also Carrie Johnson, *Garland Supports Effort to Hold Russia Accountable for War Crimes*, NPR (Mar. 3, 2023, 2:01 PM), <https://www.npr.org/2023/03/03/1160959713/garland-supports-effort-to-hold-russia-accountable-for-war-crimes>; Steve Holland & Doina Chiacu, *Biden, Macron Resolve to Hold Russia Accountable for Atrocities, War Crimes in Ukraine*, REUTERS (Dec. 1, 2022, 1:32 PM), <https://www.reuters.com/world/europe/biden-macron-resolve-hold-russia-accountable-atrocities-war-crimes-ukraine-2022-12-01/>.

aspect of the Russian economy.<sup>92</sup> The sanctions, which are outside the umbrella of the UN Security Council, have been imposed and coordinated by over thirty, primarily Western nations.<sup>93</sup> The size and scope of the sanctions—directed against the world’s eleventh largest economy<sup>94</sup>—are unprecedented. They include asset freezes against Russian leadership and elite, measures targeting the Russian financial system, sanctions targeting Russia’s energy sector, measures to limit international trade, transportation restrictions, and the suspension of operations in Russia by large corporations.<sup>95</sup>

These measures underscore the “central role of sanctions as a tool of the post-1945 legal order,” enabling states to exert significant economic pressure while avoiding direct military involvement or escalation of the conflict.<sup>96</sup> Economic sanctions, as Sarah Cleveland has observed, “are a primary means by which various members of the international community articulate collective standards, monitor international behavior, and communicate outrage at noncompliance by rogue states.”<sup>97</sup> Economic sanctions have helped isolate Russia and brand it as a rogue nation operating

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<sup>92</sup> See Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AM. J. INT’L. L. 135, 135 (2022). A small subset of sanctions had already been imposed in response to Russia’s annexation of Crimea, malicious cyber activity, and human rights violations, and thus predated the widespread sanctions following Russia’s February 2022 invasion of Ukraine. *Id.*

<sup>93</sup> See Avidan Y. Cover, *Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia*, 100 UNIV. DETROIT MERCY L. REV. 441, 443 (2023) (discussing the significance of the sanctions being outside of the United Nations Security Council).

<sup>94</sup> *Id.*

<sup>95</sup> Chachko & Heath, *supra* note 92, at 135–36; see also CONG. RSCH. SERV., IN11869, RUSSIA’S WAR AGAINST UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER RESPONSES (2023); see also *EU sanctions against Russia explained*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions> (last visited Oct. 27, 2023) (summarizing EU sanctions); Press Release, Antony J. Blinken, Secretary of State, Continuing to Hold Russia to Account for its War against Ukraine (Dec. 15, 2022), <https://www.state.gov/continuing-to-hold-russia-to-account-for-its-war-against-ukraine/> (stating that in addition to holding President Putin accountable, “the Department of State is imposing sanctions on Vladimir Potanin, one of Russia’s wealthiest oligarchs” and “further holding accountable the corporate leadership of Russian state-owned companies by designating five individuals serving on the Board of Directors of Russian Railways, including two Deputy Prime Ministers of Russia, Andrey Removich Belousov and Dmitriy Nikolaevich Chernyshenko”).

<sup>96</sup> Chachko & Heath, *supra* note 92, at 137.

<sup>97</sup> Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1, 87 (2001).

outside shared international norms.<sup>98</sup> Russia's ICL violations have frequently been invoked in connection with the imposition of sanctions. The United States has pointed to Russian atrocities in Ukraine in describing the need to impose "swift and punishing" economic costs on Russia.<sup>99</sup> The European Union has consistently referenced Russia's ICL violations in pressing the case for sanctions.<sup>100</sup> The G7 has likewise emphasized Russia's aggression as a justification for the imposition of economic sanctions.<sup>101</sup>

Although it is more common to view sanctions as a means to foster compliance with international law,<sup>102</sup> international law—and the construction of narratives around it—may also be viewed as a way of gaining support for sanctions among domestic and international audiences. ICL's contribution to this narrative, by reinforcing the criminal nature of

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<sup>98</sup> Press Release, Prime Minister's Office, G7 Leaders' Statement on the invasion of Ukraine by armed forces of the Russian Federation (Feb. 24, 2022) (UK), <https://www.gov.uk/government/news/g7-leaders-statement-on-the-invasion-of-ukraine-by-armed-forces-of-the-russian-federation-24-february-2022> (condemning Russia's "large-scale military aggression" and "unprovoked and completely unjustified attack" against Ukraine); see also Holly Ellyatt, *With outlaws for allies, is Russia becoming another 'rogue state'?*, CNBC (Sep. 15, 2023, 1:49 AM), <https://www.cnbc.com/2023/09/15/is-russia-a-rogue-state-.html> (stating how Russia is becoming a "rogue state" after its invasion of Ukraine and subsequent international sanctions).

<sup>99</sup> Joseph R. Biden, Jr., President, United States, Remarks by President Biden on the United Efforts of the Free World to Support the People of Ukraine (Mar. 26, 2022).

<sup>100</sup> See Press Release, COUNCIL E.U., Ukraine: Declaration by the High Representative on behalf of the EU on Russian atrocities committed in Bucha and other Ukrainian towns (Apr. 4, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/04/04/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-russian-atrocities-committed-in-bucha-and-other-ukrainian-towns/>; see also Press Release, COUNCIL E.U., Russia's War of Aggression Against Ukraine: EU Adopts 11th package of economic and individual sanctions (June 23, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/06/23/russia-s-war-of-aggression-against-ukraine-eu-adopts-11th-package-of-economic-and-individual-sanctions/>.

<sup>101</sup> See Press Release, The White House, G7 Leaders' Statement on Ukraine (May 19, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine/#:~:text=With%20a%20view%20to%20a,and%20deter%20future%20Russian%20aggression> (stating how the U.S. continues to reduce Russia's financial revenue for aspects such as energy extraction for sanctioning purposes in reaction to Russia's violation of the U.N. Charter).

<sup>102</sup> See, e.g., Klinton W. Alexander, *The Helms Burton Act and the WTO Challenge: Making a Case for the United States under the GATT National Security Exception*, 11 FLA. J. INT'L L. 559, 560 (1997); see also Lori Fidler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 249, 254 (2019).

Russia's invasion of Ukraine and conduct of the war, is particularly important given the challenge of maintaining support for economic sanctions against Russia in the face of the tremendous economic disruption they have caused,<sup>103</sup> including their unintended consequences and dramatic spillover effects.<sup>104</sup> One audience for this narrative is in the West, where stories of Russian aggression and atrocities help bolster political support for continued military assistance to Ukraine.<sup>105</sup> Other important audiences are located elsewhere, such as in the Global South, where many countries have endured significant adverse consequences from sanctions that they did not necessarily support and despite a professed Western commitment to international law that they find inconsistent at best.<sup>106</sup> Accounts of Russia's ICL violations can help soften familiar critiques that western nations are acting merely out of political expediency.<sup>107</sup> Given the wide latitude states have in imposing sanctions unilaterally, the notion that the states imposing those sanctions are seeking to enforce human rights obligations—and, especially, obligations *erga omnes*<sup>108</sup>—can help deflect criticisms that they are violating non-intervention principles.<sup>109</sup> In this respect, ICL may be understood as an important part of the broader contest over

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<sup>103</sup> See Nicholas Mulder, *The Sanctions Weapon*, INT'L MONETARY FUND (June 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder> (describing the unprecedented sanctions on Russia and its effect on the global economy).

<sup>104</sup> Cover, *supra* note 93, at 447 (describing the various unintended consequences of economic sanctions).

<sup>105</sup> See, e.g., Jim Garamone, *Ukraine Defense Contact Group Members Remain Unified in Support Of Kyiv*, U.S. DEP'T DEF. (July 18, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3462714/ukraine-defense-contact-group-members-remain-unified-in-support-to-kyiv/> (describing the U.S. Secretary of Defense's depiction of Russia's actions as "atrocities"); see also Remarks by President Biden on the Security Assistance to Ukraine, *supra* note 85.

<sup>106</sup> Chachko & Heath, *supra* note 92, at 138 (explaining that "despite the enthusiasm for sanctions among European and NATO countries, much of the world, including all of Central and South America, Africa, and most of Asia, remains on the sidelines, and populations there are likely to suffer from a prolonged, sanctions-induced recession").

<sup>107</sup> See Jonathan Guyer, *How the left is reckoning with Russia's war*, VOX (Mar. 9, 2022) (critiquing the United States' use of international criminal law to explain sanctions against Russia).

<sup>108</sup> See Case Concerning Barcelona Traction, Light & Power Company, Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 32, ¶¶ 33, 35 (Feb. 5) (referring to human rights obligations in which "all States can be held to have a legal interest in [protecting]").

<sup>109</sup> IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS 74 (Thomas Cottier, et al. eds., 2022) (identifying criticisms of unilateral economic sanctions); see also Cover, *supra* note 93, at 466 (explaining how the General Assembly's oversight of unilateral sanctions may limit their unintended harm on global financial systems and lessen abuses by any single state).



competing narratives surrounding the costs and consequences of large-scale economic warfare.<sup>110</sup>

### B. *Contestation and the Counter-Narrative*

Russia, in turn, has advanced a multipronged counter-narrative in an attempt to justify its actions in Ukraine to audiences at home and abroad.<sup>111</sup> This counter-narrative includes an alternative factual account of the conflict and its causes, a critique of the rules-based international legal order, and the propagation of an alternative vision of that order aimed at providing a counterweight to the United States and Europe.<sup>112</sup>

Russia has employed systematic information manipulation and disinformation as an operational tool in the conflict.<sup>113</sup> Russia targets multiple audiences, both at home and abroad.<sup>114</sup> Domestically, “Russia has cracked

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<sup>110</sup> See Directorate-General Communication, *EU sanctions against Russia following the invasion of Ukraine*, EUR. COMM’N, [https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine\\_en](https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine_en) (last visited Dec. 26, 2023) (clarifying that EU imposed sanctions against Russia do not threaten the supply of agri-food, medical equipment or medicines for Russia’s general population).

<sup>111</sup> *Countering disinformation with facts - Russian invasion of Ukraine*, GOV’T OF CAN., [https://www.international.gc.ca/world-monde/issues\\_developpement-enjeux\\_developpement/response\\_conflict-reponse\\_conflits/crisis-crisis/ukraine-fact-fait.aspx](https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/response_conflict-reponse_conflits/crisis-crisis/ukraine-fact-fait.aspx) (last visited Dec. 25, 2023) (listing in chronological order, Russia’s spread of disinformation in connection with the war in Ukraine); see also Press Release, U.S. Mission Org. Sec. & Coop. Eur., Ambassador Gilmore Refutes Russian False Narrative about Ukraine (Jan. 31, 2020), <https://osce.usmission.gov/press-release-ambassador-gilmore-refutes-russian-false-narrative-about-ukraine/> (critiquing Russia’s creation of a false narrative around Ukraine).

<sup>112</sup> See, e.g., Mikhail Zygar, *Putin’s New Story About the War in Ukraine*, FOREIGN AFF. (Nov. 10, 2023), <https://www.foreignaffairs.com/ukraine/putins-new-story-about-war-ukraine>; Simon Waxman, *What Rule-Based International Order?*, BOSTON REV. (Mar. 2, 2022), <https://www.bostonreview.net/articles/what-rule-based-international-order/> (reporting on how Russia is undermining a rule-based global order in effect since WWII); see also Elina Lange-Ionatamishvili, *Analysis of Russia’s Information Campaign Against Ukraine*, NATO STRATCOM CTR. EXCELLENCE 1, 7 (2015), [https://stratcomcoe.org/cuploads/pfiles/russian\\_information\\_campaign\\_public\\_12012016fin.pdf](https://stratcomcoe.org/cuploads/pfiles/russian_information_campaign_public_12012016fin.pdf) (explaining Putin’s vision of establishing a Eurasian Union to replace the Commonwealth of Independent States).

<sup>113</sup> Org. for Econ. Coop. & Dev. [OECD], *Disinformation and Russia’s war of aggression against Ukraine* (Nov. 3, 2022), <https://www.oecd.org/ukraine-hub/policy-responses/disinformation-and-russia-s-war-of-aggression-against-ukraine-37186bde/> [hereinafter OECD, *Disinformation and Russia’s war of aggression against Ukraine*].

<sup>114</sup> Boris N. Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GER. L. J. 479, 493–94 (2015) (identifying a choreographed Russian propaganda machine

down on free speech and placed strict propaganda controls on what citizens see and hear about the brutal war in Ukraine.”<sup>115</sup> Beyond audiences in Russia and the Russian-speaking near-abroad,<sup>116</sup> Russia has also targeted foreign audiences, whether to dissuade other states from supporting U.S. and European-led efforts to back Ukraine or to undercut the case for continued military and economic aid to Ukraine within the United States, Europe, and other countries,<sup>117</sup> including in the Global South where Russia is competing with the West for allies.<sup>118</sup> In its effort to frame and reframe the narrative around its invasion of Ukraine, Russian disinformation serves “a legitimization game with both external and internal pitches,”<sup>119</sup> one increasingly waged online.<sup>120</sup>

Russia has sought to weaponize ICL both in constructing affirmative narratives about the war and propagating counter-narratives to deflect criticism of its actions. Initially, Putin explained to the Russian public (and to the world) that a Nazi junta had seized power in Kyiv and was terrorizing the people, particularly Russian-speakers.<sup>121</sup> Russia thus sought to justify its February 2022 invasion of Ukraine based on the false claims that Ukraine was committing genocide against Russian-speaking individuals in the Luhansk and Donetsk regions and that Ukraine was overrun with

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aimed at (i) a domestic audience; (ii) a Russian-speaking audience abroad; and (iii) foreign audiences).

<sup>115</sup> Nell Clark, *Here’s How Propaganda is Clouding Russians’ Understanding of the War in Ukraine*, NPR (Mar. 15, 2022), <https://www.npr.org/2022/03/15/1086705796/russian-propaganda-war-in-ukraine>.

<sup>116</sup> See Mamlyuk, *supra* note 114, at 493–94.

<sup>117</sup> See OECD, *Disinformation and Russia’s War of aggression against Ukraine*, *supra* note 113, at 9–10; see also *Surging falsehoods seek to dent Western aid to Ukraine*, JAPAN TIMES (Oct. 28, 2023), <https://www.japantimes.co.jp/news/2023/10/28/world/russia-ukraine-misinformation/> (explaining that Russia has engaged in targeted disinformation campaigns in the forms of “fake street art” and inauthentic “media reports” of Western countries to weaken Western support and aid for Ukraine); Vera Bergengruen, *Inside the Kremlin’s Year of Ukraine Propaganda*, TIME (Feb. 22, 2023, 3:49 PM), <https://time.com/6257372/russia-ukraine-war-disinformation/> (describing the use of deep-fakes and the barrage of other “disinformation, manipulated imagery, forged documents, and targeted propaganda [about the war] unleashed by Russia and pro-Kremlin activists that may have had a significant impact on audiences”).

<sup>118</sup> Zygur, *supra* note 112.

<sup>119</sup> Jens David Ohlin, *#Genocide: Atrocity as Pretext and Disinformation*, 63 VA. J. INT’L L. 101, 131 (2023).

<sup>120</sup> OECD, *Disinformation and Russia’s War of aggression against Ukraine*, *supra* note 113 (noting the increasing way in which this campaign is being waged online, compared to Russia’s occupation of Crimea and its intervention in the Donbas in 2014).

<sup>121</sup> Zygur, *supra* note 112.

Nazis.<sup>122</sup> Russia stated that its intervention—or “special military operation”—was intended not only to prevent genocide and de-Nazify Ukraine but also to “bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation.”<sup>123</sup> Russian state media never used the word “invasion” and avoided discussion of bombing cities.<sup>124</sup> Instead, it claimed that Russian forces were being welcomed as liberators while denying that there were any civilian casualties on the Ukrainian side.<sup>125</sup> Russia had previously relied on similar misrepresentations about the need to protect Russians as a pretext for its invasion and annexation of Crimea in 2014.<sup>126</sup> Following Russia’s failure

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<sup>122</sup> See Max Fisher, *Putin’s Case for War, Annotated*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html> (quoting President Putin’s claims of genocide in eastern Ukraine: “We had to stop [the] genocide of the millions of people who live [in the Donbas] and who pinned their hopes on Russia, on all of us . . . . The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime”); Ohlin, *supra* note 119, at 155 (noting Russia’s description of its goal as “#StopNaziUkraine”); see also Talita de Souza Dias, *Russia’s “genocide disinformation” and war propaganda are breaches of the International Convention Concerning the Use of Broadcasting in the Cause of Peace and fall Within the ICJ’s jurisdiction*, EUR. J. OF INT’L L. BLOG (Mar. 4, 2022), <https://www.ejiltalk.org/russias-genocide-disinformation-and-war-propaganda-are-breaches-of-the-international-convention-concerning-the-use-of-broadcasting-in-the-cause-of-peace-and-fall-within-the/> (arguing that Russia’s unfounded accusations of genocide against Ukraine constitute a breach of various provisions of the International Convention Concerning the Use of Broadcasting in the Cause of Peace).

<sup>123</sup> Vladimir Putin, President of Russia, Address by the President of the Russian Federation, KREMLIN (Feb. 24, 2022, 6:00 AM), <http://en.kremlin.ru/events/president/news/67843> [hereinafter Putin, Address on Ukraine (Feb. 24)]. Russia’s claims of genocide by Ukraine, in turn, provided the basis for Ukraine’s suit against Russia before the ICJ, where Ukraine argued (successfully) that the ICJ should exercise jurisdiction and issue provisional measures, including ordering Russia to immediately suspend military operations commenced on February 24, 2022, in the territory of Ukraine because Russia’s lying about the genocide—and using it as a pretext for invading Ukraine—violated the Genocide Convention. See ICJ Provisional Measures, *supra* note 12, ¶¶ 2(b)–(c), 5(a); *id.* ¶ 45 (discussing a divergence of views on whether alleged acts committed by Ukraine in the Luhansk and Donetsk regions amounted to genocide in violation of the Genocide Convention and whether Russia had a duty to prevent the alleged genocide as required by Article I of the Convention, and concluding that “the acts complained of by [Ukraine] appear to be capable of falling within the provisions of the Genocide Convention”); see also Ori Pomson, *The ICJ’s Provisional Measures Order: Unprecedented*, LIEBERT INST.: ARTICLES OF WAR (Mar. 17, 2022), <https://lieber.westpoint.edu/icj-provisional-measures-order-unprecedented/> (summarizing the ICJ decision).

<sup>124</sup> Clark, *supra* note 115.

<sup>125</sup> *Id.*

<sup>126</sup> See Irene Goudimiak, *Justifying War in Ukraine: An Analysis of Speeches, Excerpts and Interviews by Vladimir Putin* (2016) (M.A. thesis, Duquesne University),

to take Kyiv and other military's setbacks at the outset of the war, Russia shifted the narrative, claiming it was at war with NATO and even the United States, which were controlling Ukrainian proxy forces.<sup>127</sup> Russia also sought to reframe the conflict by portraying Ukrainians as "traitors who . . . deserved punishment, not compassion" for once again "betray[ing] Russia by conspiring with Russia's enemies and fighting for independence."<sup>128</sup>

Russia, moreover, has sought to defend its conduct of the war in Ukraine by propagating misinformation about its treatment of civilians,<sup>129</sup> which has included not only indiscriminate shelling and bombardment, but also attacks against civilians on the streets, and the deliberate use of rape, sexual violence, and torture as mechanisms of war.<sup>130</sup> Russia has thus sought to frame its actions in Ukraine to avoid any implication of aggression, war crimes, or other ICL violations by Russian forces,<sup>131</sup> while

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<https://dsc.duq.edu/etd/114> (quoting Vladimir Putin's speech to Federation council members on March 18, 2014, claiming residents of Crimea relied on Russia for help in defending their rights and lives).

<sup>127</sup> Zygar, *supra* note 112.

<sup>128</sup> *Id.*

<sup>129</sup> See Yonah Diamond et al., *An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent*, NEW LINES INST. & RAOUL WALLENBERG CTR. HUM. RTS. at 2–3 (May 2022), <https://newlinesinstitute.org/wp-content/uploads/English-Report-2.pdf> (describing Russia's propaganda labeling Ukrainian citizens as Nazis and thereby justifying its attacks on the Ukrainian civilian populations); see also Dan Baer, *Bucha Increases the Moral Pull for the West to Aid Ukraine*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 5, 2022), <https://carnegieendowment.org/2022/04/05/bucha-increases-moral-pull-for-west-to-aid-ukraine-pub-86815> (reporting on how Russia responded to allegations of war crimes in Bucha as fake news, claiming that videos showing the execution of civilians were staged).

<sup>130</sup> Ohlin, *supra* note 119, at 155; see Max Fisher, *Word by Word and Between the Lines: A Close Look at Putin's Speech*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/2022/02/23/world/europe/putin-speech-russia-ukraine.html> (quoting Vladimir Putin's speech describing a false Ukrainian military assault in Eastern Ukraine: "Now, almost every day, they are shelling settlements. They have amassed large troops. They are using vehicles and other heavy machinery. They are torturing people, children, women, elderly people. It does not stop. We have seen no end to it.").

<sup>131</sup> See Putin, Address on Ukraine (Feb. 24), *supra* note 123 (framing the invasion of Ukraine as necessary to defend Russia from terrorists and stop the "genocide of the millions of people who live [in the Donbas] and who pinned their hopes on Russia"); see also Clark, *supra* note 115; 'Smells of genocide': How Putin justifies Russia's war in Ukraine, AL JAZEERA (Mar. 9, 2022), <https://www.aljazeera.com/news/2022/3/9/smells-of-genocide-how-putin-justifies-russias-war-in-ukraine> (arguing that Russia has falsely accused Ukraine of committing a genocide against Russian speakers in its Donbas region to justify Russia's attack on Ukraine).

spreading falsehoods about war crimes committed by Ukrainian forces, which it seeks to prevent and punish.<sup>132</sup>

Meanwhile, Russian-backed separatists in the self-proclaimed Donetsk People's Republic in Eastern Ukraine have sought to prosecute Ukrainian and foreign soldiers for terrorism and fighting as mercenaries against the Russian invasion.<sup>133</sup> They have sought to use these prosecutions, however, not primarily to enforce compliance with IHL, but rather to delegitimize Ukrainian resistance as unlawful and to strengthen Russia's narrative of the war as seeking the "denazification" of Ukraine.<sup>134</sup>

Russia's defense of its invasion of Ukraine reflects a broader and ongoing attempt to undermine the prevailing U.S.-backed international legal order and to provide an alternative to it.<sup>135</sup> This alternative is pluralist in nature, consisting of various regional public orders, including ones centered in Russia and China, that "seek to turn back the Westphalian origins of the international legal system."<sup>136</sup> One example is the growth and expansion of BRICS, the informal groups of states—originally, Brazil, Russia, India, China, and South Africa—that seek to pose an economic counterweight to the G7.<sup>137</sup> In 2024, the group is expected to expand to include

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<sup>132</sup> See U.S. Dep't of State, Glob. Engagement Ctr., *Disinformation Roulette: The Kremlin's Year of Lies to Justify an Unjustifiable War* (2023), <https://www.state.gov/disarming-disinformation/disinformation-roulette-the-kremlins-year-of-lies-to-justify-an-unjustifiable-war/> (noting Russian disinformation frequently centers on debunked allegations of a Ukraine-run genocide in the Donbas).

<sup>133</sup> See Briefing, Ann Neville, *Russia's War on Ukraine: Investigating and Prosecuting International Crimes*, EUR. PARL. RSCH. SERV. BRIEFING (PE 733.525) (June 2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733525/EPRS\\_BRI\(2022\)733525\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733525/EPRS_BRI(2022)733525_EN.pdf) (discussing how Russian-backed separatist courts in Eastern Ukraine seek to use ICL to bolster Russia's narrative of denazification of Ukraine).

<sup>134</sup> See Maksym Vischyk, *Trial of Ukrainian Prisoners of War in Russia: Decay of the Combatants Immunity*, JUST SECURITY (Aug. 21, 2023), <https://www.justsecurity.org/87702/trials-of-ukrainian-prisoners-of-war-in-russia-decay-of-the-combatants-immunity/> (explaining how the trial of 22 Ukrainian citizens affiliated with the "Azov" Regiment of the Ukrainian Armed Forces appear to be based on "bogus pretexts," namely the denial of combatant immunity for acts in compliance with IHL based on the notion that any defense against the Russian invasion of Ukraine is illegitimate).

<sup>135</sup> William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L. J. 1, 50 (2015) (discussing Russia's preference for a more Westphalian version of sovereignty).

<sup>136</sup> Roy Allison, *Russia and the post-2014 International Legal Order: Revisionism and Realpolitik*, 93 INT'L AFFAIRS 519, 530 (2017).

<sup>137</sup> Gracelin Baskaran & Ben Cahill, *Six New BRICS: Implications for Energy Trade*, CTR. STRATEGIC & INT'L STUDS. (Aug. 25, 2023), <https://www.csis.org/analysis/six-new-brics-implications-energy-trade>.

Saudi Arabia, Iran, Ethiopia, Egypt, Argentina, and the United Arab Emirates (UAE).<sup>138</sup> Approximately twenty nations are on the waiting list.<sup>139</sup> While BRICS' two main initiatives, the New Development Bank and the Contingent Reserve Arrangement Economic, remain in their early stages, BRICS' expansion suggests a waning of U.S. influence and a sign of many countries' "dissatisfaction with the global order and of their ambition to improve their place within it."<sup>140</sup> That four of the eleven states that will constitute the expanded BRICS are democracies undercuts the familiar framing that divides the world into rule-abiding democracies and law-breaking autocracies<sup>141</sup>—a framing that the United States and allied nations have sought to rely on to resist Russia's invasion of Ukraine and hold Russia legally accountable for its crimes there.<sup>142</sup> Rather than isolate Russia, Western-led sanctions and opposition to Russia's war in Ukraine have altered Russia's relationship with other countries, including by increasing its economic ties with China, India, and Brazil; meanwhile, Russia's vast supplies of oil and natural gas have helped it avoid economic collapse.<sup>143</sup>

Accusations of selectivity are central to Russia's counter-narrative. At the same time Russia has defied international law, it has critiqued the United States and other countries for their inconsistent fidelity to it.<sup>144</sup> Russia, for example, has long criticized Western states for violating the rules of the international system, from Kosovo in 1999 to Libya in 2011.<sup>145</sup>

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<sup>138</sup> See Carien du Plessis et al., *BRICS Welcomes New Members in Push to Reshuffle World Order*, REUTERS (Aug. 24, 2023, 9:11 PM), [https://www.reuters.com/world/brics-poised-invite-new-members-join-bloc-sources-2023-08-24/#:~:text=JOHANNESBURG%2C%20Aug%2024%20\(Reuters\),order%20it%20sees%20as%20outdated](https://www.reuters.com/world/brics-poised-invite-new-members-join-bloc-sources-2023-08-24/#:~:text=JOHANNESBURG%2C%20Aug%2024%20(Reuters),order%20it%20sees%20as%20outdated).

<sup>139</sup> *Id.*; see Elena Teslova, *Nearly 20 Countries Want to Join BRICS, says Senior Russian Diplomat*, ANADOLU AGENCY (June 15, 2023), <https://www.aa.com.tr/en/politics/nearly-20-countries-want-to-join-brics-says-senior-russian-diplomat/2923079> (reporting on the increasing number of states seeking to joining BRICS).

<sup>140</sup> Sarang Shidore, *American Power Just Took a Big Hit*, N.Y. TIMES (Sept. 1, 2023), <https://www.nytimes.com/2023/09/01/opinion/brics-expansion-america.html>.

<sup>141</sup> *Id.*

<sup>142</sup> See Johan Hassel et al., *Why the United States Must Stay the Course on Ukraine*, CTR. FOR AM. PROGRESS (Feb. 22, 2023), <https://www.americanprogress.org/article/why-the-united-states-must-stay-the-course-on-ukraine/> ("A defeat in Ukraine would be a massive setback for democracy and usher in a more dangerous and unstable world. It could encourage Russian aggression against other neighboring democracies, threaten European allies, and perhaps further embolden China to take action against Taiwan.").

<sup>143</sup> Edward Wong & Michael Crowley, *U.S. Campaign to Isolate Russia Shows Limits After 2 Years of War*, N.Y. TIMES (Feb. 22, 2024), <https://www.nytimes.com/2024/02/22/us/politics/russia-war-anniversary-sanctions.html>.

<sup>144</sup> See Allison, *supra* note 136, at 520.

<sup>145</sup> *Id.*

Putin has also pointed to the U.S. led invasion of Iraq in 2003 and to the U.S. government's human rights failures at Guantanamo and in the "War on Terror."<sup>146</sup> More recently, Putin has sought to focus attention on the escalating war and mounting humanitarian crisis in Gaza not only to divert attention from Ukraine but also to highlight the commission of atrocities by Israel, a staunch ally of the United States.<sup>147</sup> By highlighting these and other inconsistencies in how other states have treated international law—including both in their failure to punish international crimes committed by others and their commission of such crimes themselves—Russia has sought to delegitimize attempts to attack it for aggression and war crimes in Ukraine and to breed cynicism about ICL more generally.

### III. SOME IMPLICATIONS OF NARRATIVE FOR THE FUTURE OF ICL

Focusing on ICL's role in shaping narratives about the Russia-Ukraine war has several broader implications for theory and practice. As described above, ICL's norms and institutions seek to subject aggression and atrocities to a legal framework of individual criminal responsibility that can affect how wars are framed, waged, and ultimately memorialized. Russia's invasion of Ukraine in February 2022 and its subsequent conduct of the war, including the widespread killing and harm to civilians, has helped propel and sustain support for the Western-led response across a range of areas, from the provision of military assistance to Ukraine to the imposition of economic sanctions against Russia.<sup>148</sup> While ICL's power to shape perceptions of and responses to the conflict is closely connected to the prospect of criminal trials,<sup>149</sup> it also operates separately from actual judicial determinations of legal responsibility and individual culpability which may well prove illusory. Even if Putin and other senior Russian

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<sup>146</sup> See *id.* at 527; see also Thomas Grove, *Russia condemns United States for human rights record*, REUTERS (Oct. 12, 2012, 2:12 PM), <https://www.reuters.com/article/us-russia-usa-humanrights/russia-condemns-united-states-for-human-rights-record-idUSBRE89L14O20121022>; Putin, Address on Ukraine (Feb. 24), *supra* note 123.

<sup>147</sup> See Zygur, *supra* note 112 (describing Putin's expressions of horror at mounting civilian casualties caused by Israeli strikes in Gaza and the mounting death toll of Palestinian civilians).

<sup>148</sup> See Garamone, *supra* note 105 (discussing the support other nations have toward Ukraine); see also Chachko, *supra* note 92, at 135 (discussing the sanctions imposed on Russia for their invasion into Ukraine).

<sup>149</sup> See Blum, *supra* note 63, at 145 ("For a variety of institutional and political reasons, only a handful of perpetrators ever stand trial for their crimes in any forum. Their true power, therefore, lies not in retribution or even prevention, but more in their symbolic articulation and affirmation of norms and the expressive power of their operation.").

officials are never put on trial, the notion that they should be—and that there is a widely accepted legal framework for doing so—can influence not only how the war is described but also how it is conducted.

This impact, however, should not be overstated. ICL “talk”—with its language of crimes, courts, and culpability—tends to be episodic. It spikes in response to particular events, from Russia’s initial invasion of Ukraine to specific atrocities committed during the war itself.<sup>150</sup> The Bucha massacre in April 2022, for example, quickly mobilized international action around the war.<sup>151</sup> In the days following Russia’s massacre of Ukrainian civilians and prisoners of war at Bucha, there was a significant uptick in the number of countries willing to provide military and economic support to Ukraine.<sup>152</sup> European countries in particular acknowledged the need for more sanctions against Russia.<sup>153</sup>

This impact, however, can diminish over time, especially as other goals, such as reaching a negotiated resolution of the conflict to avoid further death and destruction, gain traction.<sup>154</sup> It can also be diluted by intervening events that compete for media attention. Those events, moreover, can complicate attempts to establish a clear duality between rule-following and rule-breaking. This might include not only the commission of atrocities by the opposing side in the conflict at hand (*i.e.*, international law violations committed by Ukraine),<sup>155</sup> but also the inconsistent application of ICL in other conflicts. For example, the United States has been losing support in the Global South and elsewhere for the rules-based international legal order it has championed in helping resist Russian aggression in

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<sup>150</sup> See, e.g., *GoogleTrends Results: “Russian War Crimes,”* GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2022-02-21%202023-11-01&q=russian%20war%20crimes&hl=en> (last visited Apr. 29, 2024) (searching “Russian war crimes” and applying the following filters: “worldwide,” “Feb. 21, 2022 to present,” “all categories,” and “web search.” Then scrolling through the chart titled “Interest over time” and noting the spike of Internet searches about Russian war crimes).

<sup>151</sup> Simon Gardner, *Ukraine Accuses Russia of Civilian ‘Massacre’; Moscow Denies It*, REUTERS (Apr. 3, 2022), <https://www.reuters.com/world/europe/ukraine-claims-control-over-kyiv-region-russia-looks-east-2022-04-03/>.

<sup>152</sup> Baer, *supra* note 129.

<sup>153</sup> *Id.*

<sup>154</sup> See generally PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 169 (2002) (describing the willingness of diplomats to give up on justice and sacrifice prosecutions for mass atrocities in the face of the desire to resolve conflicts).

<sup>155</sup> Lesley Wexler, *Accountability for Ukrainian War Crimes Ought to Include Ukrainian War Crimes*, VERDICT (Mar. 16, 2023), <https://verdict.justia.com/2023/03/16/accountability-for-ukrainian-war-crimes-ought-to-include-ukrainian-war-crimes> (summarizing possible war crimes committed by Ukraine).



Ukraine due to its vigorous support of Israel's response to Hamas's October 7 massacre in the face of the growing number of civilian casualties in Gaza.<sup>156</sup>

ICL's reliance on narrative also underscores the importance of expanding the focus to other, non-court-centered actors and non-court-entered events. The key players in a court-centered view of ICL are lawyers, judges, and other legal and non-legal personnel connected with the creation and operation of tribunals and the prosecution of individual cases. The key moments are those connected to the judicial process, from investigation and indictment through to trial and judgment.<sup>157</sup> The ICC indictments of Putin and Lvova-Beleva for war crimes seeks to capitalize on ICL's power in shaping narratives around wars despite the fact that the prospect of actual trials remains a remote possibility.<sup>158</sup> But written and visual accounts of ICL violations recorded and disseminated by journalists, activists, and bystanders can play a similar role.<sup>159</sup> Viewing ICL from the more fluid and holistic perspective of narrative—where language and images matter as much as legal processes and outcomes—underscores how ICL and the moral value system underpinning it can inform and shape perceptions outside the courtroom. This impact is magnified by digital technologies and social media, which supply the means for the collection and propagation of information about ICL violations with unprecedented speed and magnitude,<sup>160</sup> along with the potential for the propagation of disinformation. ICL, in short, has a life in print and online that, in some sense, exists outside the formal mechanisms of the law. To be sure, some

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<sup>156</sup> See, e.g., H.A. Hellyer, *The West Is Losing the Global South Over Gaza*, TIME, Nov. 3, 2023, <https://time.com/6330746/global-south-ukraine-israel-gaza/>.

<sup>157</sup> *How the Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Dec. 27, 2023) (laying out the legal process for international criminal cases that fall under the ICC's jurisdiction).

<sup>158</sup> Stephen Pomper, *How Will the ICC's Arrest Warrant Play Out in Practice*, JUST SECURITY (Mar. 20, 2023), <https://www.justsecurity.org/85597/how-will-icc-arrest-warrant-for-putin-play-out/> (describing the various obstacles to the ICC's prosecution of Putin); *Considerable obstacles impede prosecuting Russia for war crimes*, LE MONDE (Dec. 5, 2022), [lemonde.fr/en/international/article/2022/12/05/considerable-obstacles-to-prosecuting-russian-war-crimes\\_6006576\\_4.html](https://www.lemonde.fr/en/international/article/2022/12/05/considerable-obstacles-to-prosecuting-russian-war-crimes_6006576_4.html) (same).

<sup>159</sup> Santiago Villa, *The Power of Documenting War Crimes—and How to Do It*, GLOB. INVESTIGATIVE JOURNALISM NETWORK (Sept. 22, 2023), <https://gijn.org/the-power-of-documenting-war-crimes-and-how-to-do-it/> (explaining how journalism is essential for accountability where visual evidence can serve as evidence for criminal court proceedings); Hyde, *supra* note 7 (describing the documentation of war crimes in Ukraine).

<sup>160</sup> OECD, *Disinformation and Russia's War of aggression against Ukraine*, *supra* note 113 (discussing the role of social media and internet coverage in documenting war crimes and spreading disinformation by the Russian government).

evidence compiled about mass atrocities—through a process that has itself been transformed by the ubiquitous nature of cellphones and other recording devices<sup>161</sup>—is intended to be preserved for use in future prosecutions, if and when an appropriate tribunal is established and obtains custody over suspects. Initiatives, such as the Berkeley Protocol on Digital Open Source Investigations, represent a recognition of the growing importance of this evidence and the corresponding need to develop “professional standards that should be applied in the identification, collection, preservation, analysis and presentation of digital open source information and its use in international criminal and human rights investigations.”<sup>162</sup> But the gathering and dissemination of information about ICL violations can also impact perceptions about wars and atrocities even if it is never produced in court or used in a formal investigation, not only as the conflict is being waged in real-time, but also in how it will later be remembered.

Focusing on the relationship between ICL and narrative offers another window into the longstanding debate referred to at the outset regarding the effect of international law. Some international relations scholars tend to view ICL—and international law more generally—as merely providing cover for the exercise of raw power.<sup>163</sup> Attention to ICL’s role in shaping narrative both complicates and enriches this picture. On the one hand, it underscores the limits of ICL and the gap between its goal of preventing impunity for atrocities through criminal trials and the practical realities and self-interested actions by states that often stand in the way. But it also suggests that ICL—and the language of crime and individual legal responsibility—embodies a powerful form of moral perception and judgment that can impact how states not only speak but also act, including on important matters like military assistance and economic sanctions.

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<sup>161</sup> See Jason Farago, *When Everyone Becomes a War Photographer*, N.Y. TIMES (Oct. 12, 2023), <https://www.nytimes.com/2023/10/12/arts/design/war-photos-israel-gaza.html>.

<sup>162</sup> U.C. BERKELEY SCH. OF L. & OFF. U.N. HUM. RTS. HIGH COMM’R & HUM. RTS. CTR., *Berkeley Protocol on Digital Open Source Investigations*, at 3, U.N. Doc HR/PUB/20/2, U.N. Sales No. E.20.XIV.4 (2022), [https://www.ohchr.org/sites/default/files/2022-04/OHCHR\\_BerkeleyProtocol.pdf](https://www.ohchr.org/sites/default/files/2022-04/OHCHR_BerkeleyProtocol.pdf).

<sup>163</sup> See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1837 (2002) (describing the view of some scholars that international law “has little or no independent impact on the behavior of states”); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 7 (1994) (suggesting that international law “matters only at the margins”); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 126 (2005) (expressing doubt about the ability of international tribunals to change state behavior); Sol Picciotto, *International Law: The Legitimation of Power in World Affairs*, in CRITICAL LAWYER’S HANDBOOK 2 13, 13 (1997) (explaining the perspective that international law is only a mechanism by which to rationalize the exercise of raw power).

Such language has multiple audiences, foreign and domestic. It can be directed at other states to help enlist their political, economic, and military support. In an increasingly multi-polar world, where the United States holds less sway and where competition for the allegiance and support of other states, particularly in the Global South, has intensified,<sup>164</sup> ICL, and the stories framed around it, can serve as a valuable shaper of public opinion. While Ukraine suggests how powerful countries seek to wield narratives rooted in ICL, particularly in responding to aggression by another world power, such narratives can be an even more important tool for smaller, less powerful states.<sup>165</sup> As Douglas Guilfoyle has demonstrated, smaller states often engage in international litigation, despite the limited prospect of enforcement, to inflict a “legitimacy penalty” on other states and mobilize support for their position by appealing to “international community values” and to a shared understanding that “compliance with international law is . . . a requirement for membership in the community of states.”<sup>166</sup> Such narratives also play to domestic audiences. In the case of Ukraine, references to Russian aggression and war crimes have been invoked to sustain significant economic sacrifices and to oppose a political backlash that has grown more intense in many places given the rise of populism and the fracturing of any consensus around the tenets of post-World War II international liberalism.

But just as the impact of ICL-based narratives should not be overstated, their risks should not be ignored. While such narratives can influence how conflicts are framed and waged even in the absence of criminal trials, the credibility and power of those narratives can diminish over time in the absence of trials. Further, high-stakes events like the ICC’s indictment of Putin, can end up exposing the weakness of the international legal system and breed cynicism. Further, trials—and courts more generally—play a critical function by applying legal norms to often contested facts in an adversarial legal process. Without that judicial adjudicative function, the potential for contestation over alleged ICL violations increases, especially given the growing role of digital technologies and social media. The Israel-Hamas war, for example, highlights the explosive potential for contestation over allegations of war crimes and other ICL violations, and the

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<sup>164</sup> See David L. Sloss & Laura A. Dickinson, *The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order*, 116 AM. J. INT’L L. 798 (2022) (questioning whether the United States’ hold on liberal international order still survives).

<sup>165</sup> See Guilfoyle, *supra* note 2, at 5.

<sup>166</sup> *Id.*

vital role that courts can play in resolving them.<sup>167</sup> The focus of international criminal courts may be highly selective and their judgments contested, particularly in post-conflict situations.<sup>168</sup> But accounts rendered through those judgments remain qualitatively different than labels assigned to states and their leaders based on NGO reports and media accounts, however credible these sources might be.

Finally, narrative suggests that ICL matters, but perhaps in different ways than normally anticipated. Tribunals and the architecture of legal accountability remain important. But trials are contingent on and subject to geopolitical forces, power dynamics, and structural defects within the post-World War II international legal system (the veto of the permanent members of the UN Security Council serving as perhaps the most notable example). At the same time, ICL's contribution to narratives—and the impact narratives can have—suggests its power to influence international relations even when prosecutions are not possible because of jurisdictional gaps, lack of enforcement capacity, or the pressure to sacrifice “justice” for “peace.” But for a narrative to remain cohesive and credible, especially in the face of the selective and self-serving way ICL has been applied in the past, those tendencies must be resisted. States that oppose accountability for their own conduct will inevitably point to the selective way in which international criminal justice has been administered in the past. The gap between crime and punishment, moreover, will always exist and remain particularly vulnerable to exploitation by the most powerful countries and those they support. The more this tendency can be resisted, the more coherent, persuasive, and impactful the narrative will be. Trials for mass atrocities may always be the exception rather than the rule; but better that the story of ICL be one in which the quest for accountability regrettably falls short due to circumstances beyond its supporters' control, rather than one in which ICL's ideals are compromised whenever inconvenient,

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<sup>167</sup> See, e.g., Michael N. Schmitt, *Israel-Hamas 2023 Symposium—The Legal Protection of Hospitals During Armed Conflict*, LIEBER INST., ARTICLES OF WAR (Dec. 29, 2023), <https://lieber.westpoint.edu/legal-protection-hospitals-during-armed-conflict/> (discussing the controversy over the legal protection of medical facilities and the importance of resolving factual disputes in determining any IHL violations by either or both sides).

<sup>168</sup> Compare Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE OF L. 87, 88–89 (2009) (discussing the limited effect of international criminal courts on the rule of law in post-conflict societies), with Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 8–9 (2001) (describing the “preventive potential” of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on their respective post-conflict situations).

especially by those countries that otherwise most often and loudly proclaim its virtues.