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Entrevista a Kevin Jon Heller

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From Moscow to The Hague: Unpacking International Criminal Law with Kevin Jon Heller

- Interviewers: Welcome everyone to another episode of Revista Argentina de Teoría Jurídica. Today we are honored to speak with Professor Kevin Jon Heller, a leading expert in international criminal law. He is Professor of International Law and Security at the University of Copenhagen and Distinguished Visiting Professor of Law at Universidad Torcuato Di Tella.

In addition to his scholarly work, Professor Heller has played key roles in major international legal proceedings — from advising on the ICC's crime of aggression, to working on the trial of Saddam Hussein, and serving on the defense team in the 9/11 Guantánamo case. He was Senior Advisor for International Criminal Law to the UN team investigating crimes committed by Da'esh and currently as Special Advisor to the ICC Prosecutor in the case concerning Russia and Ukraine.

In this interview, we explore with him the current challenges facing international criminal law, particularly in the Russia - Ukraine situation, including the effectiveness of the ICC, the tension between state sovereignty and international accountability and the impact of political pressure on the pursuit of global justice.

So, moving on to the first question, we will begin by discussing the steps taken and prior debates surrounding jurisdiction in the case concerning Ukraine and the crime of aggression. To provide some context: in 2022, Russia's invasion of Ukraine reignited a long-standing puzzle—how to prosecute the crime of aggression when the International Criminal Court (ICC) lacks jurisdiction over it.

An initial wave of proposals advocating for the creation of a one-off tribunal faced heavy criticism for lacking access to suspects, sufficient evidence, and political support. Against that backdrop, we now turn to the three issues below.

First, in 2022, you argued that establishing a one-off tribunal for Russia's crime of aggression was ill-advised, primarily because it would struggle to secure suspects, gather admissible evidence, and achieve international legitimacy. Fast forward to today: approximately forty governments, along with the European Union and the Council of Europe, have endorsed the creation of an internationalized court and are actively working on its legal blueprint. Why might this model outperform earlier ad hoc tribunals created prior to the establishment of the ICC?

- Kevin Heller: That is a very difficult question. I am tempted to give a somewhat facile answer and say that it will outperform an international tribunal simply because it exists—whereas a truly international one was never really going to be possible. I think that if we were to speak solely in terms of legal merits, an international tribunal would likely have been the better model, if only because it could have set aside the personal immunity of individuals such as President Putin and Foreign Minister Lavrov.

However, it is one thing to discuss what would be legally optimal, and quite another to generate the political will necessary to bring that option into existence. I was often criticized for being too negative or too pessimistic—and perhaps that criticism was fair—but from the very beginning, I believed it was a waste of time to pour energy into designing a tribunal that, in my view, was never going to secure the necessary political support to function effectively.

In hindsight, I think I have been somewhat vindicated. This Council of Europe-based internationalized or hybrid tribunal was certainly not the first choice for many, but its key advantage is precisely that it could actually be established. It now has the institutional backing of the Council of Europe, the support of more than forty States—many of which possess significant expertise in international criminal law—and access to funding. These elements at least provide the foundation for a tribunal that can function as a real court.

There are, of course, still many obstacles, and I would be happy to discuss those in more detail if you wish. But one unavoidable question remains: will there ever be a defendant in the dock at this tribunal? That uncertainty is not unique to this court—it is a challenge faced by any tribunal. That is precisely why some have argued, and I have some sympathy for this view, that rather than rushing to create a tribunal, we should focus first on establishing a center for investigating the crime of aggression, documenting crimes, and building comprehensive case files. In other words, think carefully about potential charges and likely suspects, and wait to establish a tribunal until there is a realistic prospect of an actual trial.

For whatever reason, the Council of Europe and the Group of Friends of Accountability decided to proceed with the establishment of a tribunal, and I think that is a defensible choice. Now, the key question will be how effectively the tribunal can get up and running.

- **Interviewers**: The jurisdiction question was sorted out through Ukraine's own territorial jurisdiction delegated upon it. Yet, you have questioned whether a treaty-based court, lacking Chapter seven of the security council resolution backing, can pierce the personal immunities of sitting heads of state. Given that the court will be treaty-based do you think precedents like Charles Taylor, al-Bashir, ICTY Miloševic case and the ICJ's Arrest Warrant dictum supply a firm legal footing—or is immunity likely to remain the tribunal's Achilles' heel?

- **Kevin Heller:** No, there is no argument that this tribunal can pierce the personal immunity of the Russian troika. And to be honest, the court would not have been created if it could. The G7, in particular, was strongly opposed to any court that could override personal immunity. But it is not only about powerful Western States. All African States—except, I believe, Burundi—have expressed on record that they do not believe any court has the authority to disregard personal immunity. Many of them reject even the notion that the International Criminal Court can pierce such immunity.

Thus, the reason this tribunal exists is because of a deliberate accommodation. While the final statute has not yet been published, it is widely understood what it will contain. Insofar as the

tribunal addresses individuals who hold personal immunity—primarily President Putin and Foreign Minister Lavrov—the Prosecutor may draw up an indictment to gather evidence and lay out the legal basis for potential charges. However, the court will not be able to confirm those charges. A judge would be required to dismiss the case pending the end of personal immunity—either through a waiver by Russia (which is highly unlikely), or through a change in leadership, whereby those individuals would no longer hold positions that confer personal immunity.

This arrangement reflects a certain legal creativity—an effort to allow limited procedural steps toward future prosecution—while remaining firmly within the bounds of international law as interpreted by the States supporting the tribunal. It is absolutely clear under the statute that the tribunal cannot prosecute any individual who, at the relevant time, enjoys personal immunity. As I noted, this limitation is a necessary condition for the support of many of the States backing the initiative.

This stands in stark contrast to situations involving the United Nations Security Council. No one seriously questions that the Security Council, acting under Chapter VII of the UN Charter, has the authority to lift personal immunity. The case of the International Criminal Court is more complex; there remains significant debate over the legal basis on which it claims the authority to prosecute individuals who would otherwise be protected by personal immunity.

The good news, for the purpose of this interview, is that this question does not arise in relation to the new tribunal: its statute makes clear that it will fully respect personal immunity.

- Interviewers: As you have pointed out in previous publications, the odds of having a discussion on personal immunity regarding putin is highly improbable, for it would require to have Putin captured and judged while in office or, in any case, in a trial in absentia. The more plausible discussion would rather emerge upon the functional ratione materiae immunity for acts in official capacity. Looking beyond the forum—Special Tribunal, ICC, or national courts—do you think doctrine from Nuremberg through Taylor and Germany's 2023 BGH ruling decisively strips aggression of that shield, or might judges still honour it and block the proceeding?

- Kevin Heller: Practically, there is no way that the Special Tribunal will recognize functional immunity. Why? Because doing so would render the tribunal inoperative. Everyone the tribunal seeks to prosecute would, in principle, be entitled to functional immunity. There may be some room for argument in the case of military officials, I suppose, but broadly speaking, recognizing functional immunity would make the court a nonstarter.

Nevertheless, the tribunal will proceed—and I am not exactly sure how it will justify this position legally—but I can say with absolute confidence that it will not recognize functional immunity. According to widely circulated public reports, the draft statute will explicitly state that there is no functional immunity for the crime of aggression. That is the practical answer.

Academically, the question is far more complex. I will not go into the full legal analysis here, but suffice it to say that whether functional immunity applies to the crime of aggression is a

difficult and unsettled question. At this stage in the development of international criminal law, there is strong consensus that functional immunity does not apply to war crimes, crimes against humanity, or genocide. But aggression presents a unique challenge. It is inherently an official act—by definition, it can only be committed by States through their senior political and military leadership.

There is an extensive body of literature, and a longstanding debate—particularly within the work of the International Law Commission—regarding the scope of functional immunity and whether it applies to aggression. States remain divided on the issue. My own view is that functional immunity probably does not apply to aggression. I am also not convinced that we must produce extensive State practice or opinio juris to support that position. In some sense, the nature of the question answers itself: prosecutions for aggression have been virtually nonexistent since the Second World War. The absence of precedent limits the evidentiary record but does not resolve the legal issue.

What I would say, then, is that there remains an open scholarly debate, and also a debate among States, as to whether functional immunity applies to aggression. But for the purposes of this tribunal, that question has already been resolved in practice. Whether or not it is legally settled, the tribunal will not recognize functional immunity.

Of course, one can imagine a scenario in which a future defendant before the tribunal raises the argument that they are protected by functional immunity. But I find it nearly impossible to believe that any panel of judges at this tribunal—whoever they may be—would accept that claim. Even so, it is essential to remain intellectually honest and acknowledge that the legal status of functional immunity for aggression remains contested.

- Interviewers: So you consider that this doctrine is still evolving, and we could say that could bring changes to this case?

- Kevin Heller: Well, again, I think we already know what this tribunal is going to say on the matter. Perhaps the fact that it affirms there is no functional immunity for aggression will be picked up and embraced by States. But as we know from basic doctrine, the judgments of international tribunals do not themselves constitute state practice or opinio juris.

What may ultimately be more significant is whether the statute itself clearly provides that there is no functional immunity for aggression—and whether forty or more States endorse that statute. Importantly, the Council of Europe has opened the possibility for endorsement beyond its membership. If a sufficient number of States are willing to affirm the statute, that could constitute state practice accompanied by opinio juris and contribute meaningfully to the erosion or elimination of functional immunity for the crime of aggression.

But we simply do not know yet. We do not have a functioning court. We do not know whether it will garner support beyond the Council of Europe. If only European States maintain the position that there is no functional immunity for aggression, can that alone be sufficient to establish a

customary norm? If one accepts that the removal of functional immunity must be grounded in customary international law, then the answer is likely no—European support alone would probably not be enough.

So once again, we are left with a deeply complex legal question. And many of these issues will have to be resolved over time. For now, we will simply have to wait and see.

- Interviewers: The first thing that struck to my mind discussing this and the possibility of including it into the convention was that per se being. It is part of the agreement between other States that would not change the reality of the law to be binding upon Russia in the case in hand. So in the end the discussion is a formation of custom, and if internationally it can be taken that specific step which is quite complicated, given the short period of time. Yet you consider it could be possible, during the formation even of the special tribunal that could justify later the possibility of a change in law, to make it lawful. The trial, in a way.

- Kevin Heller: I mean, absolutely—but the problem is that this is not a tribunal being established with the consent of Russia. Nor is it a tribunal being created by the United Nations Security Council acting under its Chapter VII authority. The treaty establishing the tribunal cannot, in itself, bind Russia. The court may be created by consenting States for the purpose of applying existing international law to Russia, but it cannot extend beyond what international law currently provides.

If we accept that customary international law still affords functional immunity for the crime of aggression, then this tribunal would have no authority to set that rule aside. To do so would constitute a violation of international law—applying a legal norm that does not exist to a non-consenting State. In that sense, we cannot avoid addressing the question of custom.

As I have already indicated, the difficulty lies in the fact that there is no easy or definitive answer to that question. Whether customary international law recognizes or denies functional immunity for aggression depends heavily on one's methodological approach. It raises a host of complex and contested issues about the identification and formation of custom in international law.

It is crucial to emphasize that the mere fact that a group of States agree to conclude a treaty does not mean they can apply its provisions to other States not party to it. They may do so only insofar as those provisions reflect general international law. But that, in this case, is very much an open question. If that makes sense.

- Interviewers: Yes, it does. Thank you. And so we are moving on with the interview. Having discussed the question of jurisdiction with still being a problem in the case of jurisdiction to be justified for the new tribunal, we can move on upon what has been achieved. They already issued the rest warrants. for in a way, the same events, but a different law to be applied to the case in a historic move. In March 17, th 2023, the International Criminal Court announced Arrest warrants

for Russian President, Vladimir Putin and Russia's Children's Rights. Commissioner Maria Lovalova. They are accused of war crimes involving the forcible transfer and deportation of Ukrainian children from occupied areas, acts identified as unlawful deportation of civilians under the Geneva conventions. This marks only the second time the ICC has sought to induct a sitting head of state. The first was Sudan, Zomar Al-bashir in 2009 and, as you have expressed, is arguably the Court most dramatic moment in the Court decade even put its status as a great power leader.

- **Kevin Heller:** Even beyond that the warrants for Netanyahu and Gallant. I am not so sure but.

- **Interviewers:** That is even more recent in line. But it could be those three instances, the most historical.

- **Kevin Heller:** I agree. It is a momentous development for the court and for international criminal law. Sorry, please continue.

- **Interviewers:** In an effort to demonstrate the ICC weakness, President Putin traveled to Mongolia last year for political and commercial purposes. Although Mongolia is a State party to the Rome statue it did not comply with the rest warrant issued by the ICC. So to what extent does Mongolia's failure to act affect the Icc legitimacy in the context of Russia's situation. It could be said that Putin succeeded in this objective?

- **Kevin Heller:** Well, I mean, is it a great diplomatic coup for a Russian President to be able to go to Mongolia? I am not so sure. Okay, but more seriously, the Court depends for its success on the cooperation of states. It is altruism to say that the court does not have its own police force, but non-state parties do not have an obligation to cooperate. So if a wanted war criminal wants to go to the United States, or they want to go to India or to China. Obviously the ICC would love those States to voluntarily cooperate with it. But they are not doing anything wrong, they do not have a legal obligation. That is obviously not the case with State parties. All State parties are obligated to execute any duly issued arrest warrant, that is from the ICC. That is what an obligation they assume when they ratify the Rome statute. So it is definitely problematic when someone who is facing a valid, active arrest warrant goes to the territory of a State party, and there are no consequences. So, of course, in that sense it hurts the legitimacy of the court.

All one can really say is, this is not exactly a new problem, you can go all the way back to Omar Al-bashir when he was still the President of Sudan. He is facing genocide charges, and yet I do not know the exact number, but he went at least to a dozen state parties and was never arrested. So this compliance issue, which definitely does hurt the legitimacy of the court, is a longstanding one, and we are seeing it again of course, in the Gaza situation, where you know

Netanyahu and Gallant are able to go, not only to parties that are members of the court or States that are not members of the court and not face consequences. It is a problem.

The court is aware of this, the court has referred Mongolia to the Assembly of States parties for potential discipline. I am quite sure they will do the same with Hungary. The fact they may already have. You know, anytime it happens they try to impose consequences on them.

There is not all that much that you can do. If a State party just refuses to live up to its again, it voluntarily assumed obligations. States do not have to join the court. States should not be joining the court. If they are going to say "Oh, we are only going to execute the arrest warrants that we approve of" that is not the way a mature international criminal tribunal can function. So yeah, it is bad. We all would prefer states to comply. But nobody is completely shocked by Putin going to a Mongolia, or you know, another warrant warranty going anywhere else.

- **Interviewers:** Well, this is another one of the major problems that the ICC is facing nowadays. Yet there is another possibility of trouble, I would say, for the coordinate institution in the horizon, which is the already discussed creation of the Council of Europe. Ukraine special tribunal in the end, could that dual track architecture yield productive complementarity? Or does it risk jurisdictional friction, sequencing, for example, medicine, idm, or evidence sharing that might hinder a coherent accountability in the end? Under international criminal law.

- **Kevin Heller:** I mean, it is a difficult question to answer now, because we do not know what the statute of the Special Tribunal looks like. I am assuming there are provisions in it that deal with what happens if the special tribunal wants the same suspect that is already facing, or will in the future face an arrest warrant from the Court. I suppose the good news is that I really do not think it is going to be a major problem in practice. I am sure that if we are lucky enough to have a suspect in custody who is wanted by both the ICC and the special tribunal that the States that are supporters of both. And obviously there is a tremendous amount of overlap, because essentially everyone in the Council of Europe is an ICC member that they will work it out. They will talk to the various officials of the two tribunals, and they will decide on who gets priority.

How would that actually play out? I do not know. If it is not Putin but it is the Minister of Defense, who is wanted for terrible crimes at the ICC and also wanted for aggression, I do not know who States think should get or what court should get priority there, but I am confident that there will be a very civil discussion, and they will work it out. So I am pretty sure that, insofar as these courts are lucky enough to have actual suspects. They will complement each other and not really, rub up against each other and create friction.

- **Interviewers:** Well, and this leads us to the next section, which is the ICC as an agent in international law and its powers and effects as an institution itself in its inner workings that you well understand. Nowadays the spotlight is put upon it and the ICC promises universal accountability. Yet it is still realized on states that often push back against the very idea. So this

section passes on the institution itself, its claim that office confers no immunity and its dependence on national cooperation and the Reform debates. First question, the ICC establishes that (and I quote) "no one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC". Given that the vast majority of States (including the Netherlands) have expressed opposition to this criteria, how does such resistance impact the mandate of the ICC?

- Kevin Heller: The Court's position is very clear. No personal immunity, no functional immunity. There are a lot of States who are not particularly happy with that position. As I mentioned earlier, the entire African Union has taken the position that they do not believe that personal immunity does not apply at the ICC. It is a problem.

Behind some States' unwillingness to exercise arrest warrants is the fact that they believe personal immunity applies, and they are not willing to arrest a head of State. I do not think most States have any issue with functional immunity. It is still, again, really about personal immunity.

If you ask the Court, the Court would say: "We have said it does not apply. You have to listen to us, as well as you are violating your cooperation obligation if you do not execute the warrants." It is easy from their perspective.

If you are a State that—let us imagine—really is not trying to shield someone from accountability, but really has a genuine belief that the personal immunity does apply before a court like the ICC, you are kind of in a pickle. You have to choose. Which international obligation are you going to violate? There is no option not to violate one. It is just which one you are going to choose.

Are you going to violate your obligation to the Court, which you have assumed because you have ratified a treaty? Or are you going to violate general international law by putting aside personal immunity in order to cooperate with the Court? I am not a high-ranking diplomat. I would not want to make that decision.

But all I can really say is that for the Court, it is a non-issue. It is the Court's cooperation obligation that is prior. But again, they cannot force States to honor that. So it is a problem, and it will always be a problem.

Because I am a Special Advisor, I have to go with what the Court says. Yet I do not think we should demonize every State that is concerned about the personal immunity question. Some of them are definitely self-interested or cynical. They just do not want certain high-ranking heads of State to be held accountable. But others really just believe that this is not the kind of Court that can set aside personal immunity, and that personal immunity is a really fundamental principle of international law.

So I have at least some sympathy for States in that category, because they are in a very difficult position.

- Interviewers: And this leads to another question, to what extent can the ICC be considered effective if the enforcement of its decisions relies on the cooperation of national security forces in States that refuse to comply, invoking immunities as a basis for non-execution?

- Kevin Heller: Frankly, your guess is as good as mine. I believe many of the Court's cooperation issues do not actually stem from personal immunity. States fail to cooperate for a wide range of reasons, not solely that one. It remains a significant problem. The Court struggles to secure the presence of defendants. In fact, it is nearly out of individuals to prosecute. From that perspective, it is a major development that former President Duterte is now in The Hague, as the Court was approaching a point at which it had no active suspects in custody.

This is unquestionably one of the most pressing challenges facing the Court. It is not inconceivable that the Court could, at some point, find itself with no individuals physically present to prosecute. And unlike other tribunals—such as the proposed Special Tribunal for the crime of aggression—the ICC is not permitted to conduct trials in absentia. The Rome Statute prohibits such proceedings.

All that can really be said is that this situation was neither surprising nor unforeseen. When one creates a court by treaty that relies heavily on the cooperation of States Parties, one must expect that, in some circumstances, States will fail to do what they are legally obligated to do.

Yes, the efficiency of the ICC should be subject to scrutiny. However, such scrutiny must be tempered by a realistic understanding of the structural constraints under which the Court operates. No one expected perfect compliance from all States Parties. No serious observer believed that every State would fully and automatically comply with every request or arrest warrant issued by the Court. To assume otherwise would reflect a deeply naive view of international politics.

Therefore, while it is fair to criticize the ICC for inefficiencies and operational weaknesses, such criticisms must also reflect the inherent limitations of treaty-based justice. The difficulties the Court now faces were foreseeable, and in fact, they were anticipated from the outset.

- Interviewers: In your article "The Shadow side of complementarity: the effect of article 17 of the Rome Statue on national due process", you argued that the Rome Statute should be amended to incorporate the lack of due process in favor of the accused within the State exercising criminal jurisdiction as a basis for the ICC to assume its jurisdiction. Given that the ICC would be intervening in their domestic legal systems to assess whether their norms comply with due process: What political or doctrinal objections do you foresee from States Parties that could stall or reshape the reform?

- Kevin Heller: I do not believe that States are ever going to support my proposal. They would support it only insofar as they do not anticipate their own prosecution. In that context, it would be

acceptable to impose such obligations on other States, but not on themselves. In that sense, it is somewhat of a utopian proposal, is it not?

Many people argue—and this is precisely the argument I responded to in my article—that the Rome Statute already requires due process at the national level, and that if a defendant receives an unfair trial, the Court should be empowered to intervene. I wrote the article specifically to explain that, as a matter of law, this interpretation is simply incorrect. I then concluded the article by arguing that it should be correct—but acknowledging that, at present, it is not.

Accordingly, I do not believe we are ever going to see an amendment to the Rome Statute along these lines. For better or for worse, the Appeals Chamber has already addressed this issue. It has articulated the general rule that due process violations are not, in and of themselves, a ground for admissibility. That is, a case does not become admissible before the Court simply because a defendant is subjected to a trial that fails to meet the full standards of international due process.

The Appeals Chamber has been quite clear on this point and, somewhat self-interestedly or self-aggrandizingly, even cited my article in its decision. That said, the Chamber did not go as far as I would have preferred. It acknowledged that due process is not ordinarily a ground for admissibility, but noted that one could imagine a domestic trial so fundamentally lacking in the basic indicia of a fair process that the Court might be justified in intervening.

I am not entirely sure what the Appeals Chamber had in mind. The distinction between a serious due process violation and a total lack of due process is a slippery slope. It is difficult to draw a principled line between ordinary procedural flaws and something so egregious that it warrants ICC intervention. My best guess is that they were thinking of extreme cases—something akin to the show trials in the Soviet Union after World War II, where there was no evidence, no prosecutor, no defense counsel, and the accused was merely told they were guilty before being allowed to beg not to be executed. That may technically be a "trial," but it is not a trial in any meaningful legal sense.

So my expectation is that only a truly, truly egregious and manifestly unfair trial would justify intervention by the Court. As I wrote in the article, and as the Appeals Chamber likewise stated in its decision, the ICC is not meant to function as a global monitor of domestic judicial systems. That is not its institutional role.

Perhaps the minimal threshold articulated by the Appeals Chamber is an appropriate one. Of course, we all want defendants to receive fair trials, but expecting the ICC to routinely pass judgment on domestic proceedings may be asking too much. As you can probably tell, I am ambivalent about this. On the one hand, I believe my legal analysis in the article is sound. On the other, having spent much of my career on the defense side—both domestically and internationally—it troubles me that a State's effort to convict someone may be enough, even if that effort is not carried out fairly. That does not seem like a situation in which the Court should remain passive.

All of which is to say: insofar as we recognize the absence of due process as a genuine problem—and I do—I believe the correct solution lies in amending the Statute, not in creatively reinterpreting it to produce a result that States have explicitly declined to adopt.

If States wish to open up a space in which the Court may assess the fairness of domestic trials, they are free to do so through amendment. But I do not believe they ever will. As I noted in the article, Italy once proposed an amendment to Article 17 that would have expressly made the absence of due process a ground for admissibility. States rejected that proposal. I do not believe much has changed in the intervening twenty-five years to suggest they would be any more receptive today.

This is, ultimately, a law review article proposal. It is not, at least for now, a real-world proposal.

- Interviewers: And what additional tweaks to the Rome Statute would you pair with it to make the reform workable?

- Kevin Heller: It is an easy and somewhat disheartening answer, is it not? The Rome Statute is extraordinarily difficult to amend. It is one thing to secure approval for an amendment by States, and even then, such approval is often only symbolic. That symbolic value exists because the text of the Statute changes—but the substantive legal effect of those amendments is conditional: they do not apply to any State unless the amendment procedures are fully satisfied.

For example, if one wishes to create a new crime—such as the crime of aggression—or to expand the scope of an existing one, such as making the use of biological and chemical weapons applicable in non-international armed conflicts as well as international ones, those amendments have no effect unless individual States expressly ratify them.

And that is, in fact, the more flexible of the two amendment provisions. If the proposed amendment relates to procedure—such as expanding the jurisdiction of the Court—then, under Article 121(4), it has no effect unless ratified by seven-eighths of the States Parties. It is extraordinarily difficult to imagine one hundred and nine States ever agreeing on such a procedural amendment to the Rome Statute.

To date, the most successful amendment effort has been the Kampala amendments on the crime of aggression. More than a decade has passed since their adoption, and still only forty-eight—or perhaps forty-nine—States have ratified them. That is not insignificant, particularly as the amendment relates to Article 5 and does apply to those States that have ratified it. But approximately seventy-seven States have not done so, meaning the overall percentage remains quite low.

The notion that we might achieve a functional jurisdictional or procedural amendment under Article 121(4) is, for all practical purposes, implausible. As for the crime-based amendments, some progress has been made, albeit limited. For instance, only twenty-five States have ratified

the amendments concerning biological and chemical weapons, and even fewer have ratified the amendment making the starvation war crime applicable in non-international armed conflict.

It is simply very difficult to persuade States to ratify such amendments. Therefore, insofar as we recognize problems in the design or substance of the Rome Statute, relying on the formal amendment process to resolve those problems is not, realistically, a viable strategy.

- Interviewers: Structure tells only part of the story; the rest lives in the hands of those who argue, teach, and apply the law. We close by turning to that personal vantage point, your own practitioner's perspective. Does international criminal law effectively fulfill its role in delivering justice and deterring serious international crimes?

- Kevin Heller: That is an easy question, at least on the surface. There is certainly evidence that the threat of prosecution carries some deterrent value for certain perpetrators. In situations where actors are rational, they may take into account the possibility of being prosecuted.

However, we should not place undue reliance on deterrence. There are tens of thousands of perpetrators around the world responsible for the most serious international crimes. How many of them will ever find themselves in a courtroom? Five, six, seven, ten? The likelihood that someone who commits an international crime will eventually stand trial in The Hague is extremely low. That said, the existence and threat of prosecution do influence behavior to some degree. It likely contributes to conflicts being somewhat less violent when the International Criminal Court (ICC) is involved than when it is not. That does not mean it ends the violence, and we should not expect international criminal law to accomplish that.

One of the greatest challenges in this field, I believe, is the disconnect between expectations and reality. People often expect international criminal law to achieve outcomes that it is simply not designed to deliver. It will never bring peace. It will never deliver social reconciliation. It will never fundamentally deter criminal behavior. If that is our expectation, we are bound to be disappointed. The law will inevitably fall short of such ambitions. But that does not mean it serves no purpose.

It remains critically important, in some cases, to affirm: this individual, in this conflict situation, represents a serious problem. They have committed egregious crimes. They must be prosecuted and removed from the situation. Scholars often refer to such individuals as "conflict entrepreneurs." We are probably better off because Slobodan Milosevic was prosecuted. We are probably better off because Charles Taylor was prosecuted. We are probably better off because senior German officials were prosecuted after the Second World War.

This does not guarantee peace or reconciliation, but it does create space for others to pursue those processes—especially once the individuals most responsible for fueling the conflict are removed. It is undoubtedly a positive development that Omar al-Bashir is no longer in power. It is a positive development that Charles Taylor is in prison.

This is the role international criminal justice can play. It can, on occasion, bring high-level offenders—individuals whose continued presence poses a grave obstacle to peace—into the courtroom. And that is a good thing.

Of course, there are also moments when the Court wishes to prosecute such individuals but cannot obtain custody. We see this across the globe. Consider President Putin. Consider Prime Minister Netanyahu. The existence of an international arrest warrant does not mean those individuals will be apprehended any time soon. But that does not render such warrants pointless or symbolic.

On the contrary, it is absolutely true that the geographical and diplomatic space available to individuals like Putin and Netanyahu has significantly narrowed. While they may still travel on occasion—even to some States Parties—they will never again enjoy full global mobility. There are entire regions of the world they will likely never visit for the remainder of their lives. Arrest warrants do not expire. President Putin will not be appearing in Western Europe. Prime Minister Netanyahu is unlikely to travel anywhere in Europe outside perhaps Hungary.

Ideally, we would like to see such individuals face justice. But even in the absence of prosecution, the formal acknowledgment of their alleged crimes—supported by a sufficient evidentiary standard as established by the ICC—serves an important purpose. It makes their lives more constrained and their capacity to govern more difficult.

This is where I cautiously invoke a well-known but overused phrase: "The arc of the moral universe is long, but it bends toward justice." I hesitate to offer this as a platitude. And yet, there is a kernel of truth in it. We should not expect rapid transformation. Success in this field cannot be measured in one-year, five-year, or even ten-year cycles. It may take decades.

Few believed Milosevic or Taylor would ever appear in court. But they did. We must adopt modest expectations of what international criminal law can realistically accomplish—and equally modest expectations about the timeline for those achievements. If we are realistic, we can acknowledge that none of these tribunals has been an unequivocal success. But we can also recognize that the world is likely better off with international criminal law than without it.

In the end, that may be the only question that truly matters.

I do not accept the critiques that claim we would be better off without international criminal law. I do not accept the argument that its overall impact has been negative. Of course, it has had its shortcomings. But I find that perspective overly pessimistic. What we need is not despair—but a sense of proportion. We must remain reasonable in our expectations.

- **Interviewers:** During your work at the ICC—and in your parallel lives as scholar and teacher—you must sometimes feel your moral instincts reaching a little farther than international criminal law's deliberately narrow reach. When that tension arises, how do you relate to it?

- **Kevin Heller:** I would like to think that I have never done or supported anything that I believed to be fundamentally immoral. There are certain constraints that come with holding a

particular professional role. As a Special Advisor to the Prosecutor of the International Criminal Court, I cannot make the kinds of statements I could when I was a criminal defense attorney for Carditch. But even then, there were things I could not say. That is simply part of the role. One must be willing to accept the limitations inherent in the position one holds.

Now, I work to help bring people to justice. Previously, I worked to keep people out of jail. But I believe both roles are necessary for the integrity and balance of the legal system.

The more difficult question is this: what does one do when asked to do something that one believes is fundamentally immoral? I have never found myself in that situation, but I would like to think that if I ever were, I would resign rather than comply.

Of course, I say this from a place of privilege: from the security of a permanent professorship and after a career filled with meaningful accomplishments. I no longer pursue opportunities for the sake of building a résumé, nor do I require the recognition that comes from holding an advisory position at the International Criminal Court. While those things are gratifying, they are not my motivation. I do this work because I care about it and because I believe it matters.

So I would like to think that, if confronted with an immoral request, I would simply say: "No, I am not doing that." And if the request persisted, I would leave the position. I do not need the role badly enough to compromise my principles.

But again, I recognize that such clarity is a luxury. I believe this is one of the most difficult aspects of being a lawyer—particularly in the international sphere, and even more so in international criminal law—where one must constantly balance the demands of career advancement against the imperative to act ethically. I would like to think that most people will, in the end, choose to do what is right. But it is not always easy.

It is difficult when there are real consequences—when walking away from a job means not knowing where your next paycheck will come from. It is difficult when reporting misconduct or refusing to follow an unethical order could damage your reputation, label you as "difficult," or even result in being blacklisted from future opportunities. There is no way to know how those choices will play out. That is not something I personally have to worry about anymore, but it is something that affects many people.

Ultimately, how one resolves that tension is deeply personal. I would like to say that everyone should remain morally uncompromised and never do something they find troubling just to keep a paycheck. But that is not always realistic. If you have three children to feed, it may not be so easy to take the moral high ground every time.

That said, I would hope that everyone has certain red lines. There is a significant difference between doing something that makes you mildly uncomfortable and participating in something you find deeply, morally abhorrent. For example, I would not participate in prosecuting someone whom I genuinely believe to be innocent, no matter what professional accolades might follow. And I would hope that even young attorneys would draw the same line: that regardless of how difficult it may make their lives, they would not take part in a process they believe to be fundamentally unjust.

But again, these are deeply personal decisions. There is no universal answer—only individual judgment, shaped by circumstances, values, and lived experience.

- Interviewers: To close on a practical note: Revista Argentina de Teoría Jurídica is a student-edited and largely student-coordinated project. For readers who hope to build a career in international criminal—or broader public—law despite the field's well-known hurdles, what single piece of advice would you offer?

- Kevin Heller: There is no one-size-fits-all advice for aspiring international lawyers. However, in my view, there is truly no substitute for domestic legal experience—unless, of course, one intends to pursue purely academic or theoretical legal analysis. For any professional role beyond that, I strongly recommend gaining substantive, hands-on experience in a domestic legal setting.

Learning how to actually practice law—and to practice it well—is an indispensable part of becoming a competent international lawyer. The best international lawyers I know began their careers as public defenders, private defense attorneys, State prosecutors, or Federal prosecutors. These professionals understand how a courtroom functions. They know what it means to conduct litigation, not merely to reflect on it academically or write about it theoretically.

Anyone who aspires to work on actual international cases—whether in litigation, investigation, or prosecution—needs that practical foundation. It is exceptionally difficult to acquire that background through international work alone. It is equally difficult to obtain interesting and meaningful international legal roles—especially those involving litigation—without a working knowledge of how litigation operates in practice.

Most young lawyers, particularly those trained at institutions like Universidad Torcuato Di Tella (and I am familiar enough with Di Tella to say this with confidence), are in a strong position to gain access to highly sophisticated and complex domestic legal work. That work will, in turn, give them a deep understanding of legal process and advocacy.

If that experience is in criminal law, so much the better—especially for those interested in international criminal law. But even experience in civil litigation is highly valuable. Knowing how to navigate a courtroom, how to construct a theory of a case, how to conduct a direct examination, how to cross-examine a witness—these are critical skills. Even if you never argue a case before an international tribunal, you may still work as a legal officer in a chamber or serve as a situation analyst in the Office of the Prosecutor. In those roles, you will still need a solid understanding of how cases are built, litigated, and resolved.

So, if I had to offer one piece of advice, it would be this: unless you plan to pursue a Ph.D. and remain in academia, acquire real legal experience. Learn how to be a lawyer first. Then pursue international work. You will be far more effective for having done so.

- Interviewers: Well with that phenomenal remark, thank you, Kevin, this concludes today's episode, until next time, for the viewers.