

Proceedings of the Fourteenth International Humanitarian Law Roundtable

August 28-30, 2022, Chautauqua Institution

Edited by Michael D. Cooper and David M. Crane



American Society
of International Law

**Proceedings of the Fourteenth
International Humanitarian Law Roundtable**

*August 28–30, 2022
The Chautauqua Institution*

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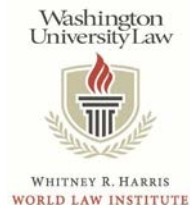
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Fourteenth International Humanitarian Law Roundtable

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ASIL’s 3,500 members come from more than one hundred nations with nearly 40 percent residing outside the United States. Its members include scholars, jurists, practitioners, government officials, leaders in international and nongovernmental organizations, students, and others interested in international law. Through its many publications, conferences, briefings, and educational events, ASIL seeks to serve the needs of its diverse membership and to advance understanding of international law among policymakers and the public.

ASIL is a volunteer-led organization governed by a sixty-member Executive Council elected by its membership. In partnership with the elected leadership, ASIL is led by an executive director and supported by a professional staff.

Dedicated to Benjamin B. Ferencz
1920 – 2023

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Prosecutors at the Fourteenth International Humanitarian Law Roundtable



*Left to right: Mathias Marcussen, James Johnson,
Nazhat Shameem Khan, Robert Petit, Stephen Rapp,
Fatou Bensouda, Andrew Cayley*

Participants of the Fourteenth International Humanitarian Law Roundtable



Foreword

Foreword

Michael D. Cooper*

The American Society of International Law was delighted to see the resumption of the International Humanitarian Law Roundtable in 2022, after having been postponed twice because of the COVID-19 pandemic. In the three years since the Thirteenth Roundtable was held, the international community suffered a global pandemic, the International Criminal Court (ICC) found itself under attack by then-President of the United States Donald J. Trump, who imposed sanctions on the Court and two of its prosecutors, and last, but certainly not least, the Russian Federation launched a brutal war against Ukraine—attracting calls from international organizations and U.N. member states to create a special tribunal to investigate and adjudicate the crime of aggression as evidenced by the recent acts of Russian political and military leaders.

These, and other developments, underscore the continued need for those working in the field of international criminal law to gather together and share their knowledge and experience. For fourteen years, the Society has been a proud sponsor of the International Humanitarian Law Roundtable, working together with other leading organizations in the field, to support this vital endeavor.

The Fourteenth Roundtable, held at the Chautauqua Institution on August 28-30, 2022, was organized around the theme “Standing Up to Aggression: From Nuremberg to Kyiv.” Participants explored pressing questions, including whether the current international legal framework is sufficient to deal with the crime of aggression and whether the use of non-traditional combatants is valid and lawful. The Roundtable featured an impressive array of speakers, including **Beth Van Schaack**, Ambassador-at-Large for Global Criminal Justice in the U.S. Department of State’s Office of Global Criminal

* Executive Director, American Society of International Law.

Justice, **Brenda J. Hollis**, ICC Office of the Prosecutor, **Nazhat Shameem Khan**, ICC Deputy Prosecutor, and **Valerie Oosterveld**, University of Western Ontario Faculty of Law. The Roundtable was chaired by **Fatou Bensouda**, former ICC Prosecutor and currently the Ambassador of The Gambia to the United Kingdom. This convening also included the Inaugural Magnitsky Lecture, delivered by **Anna Ogrenchuk**, President of the Ukrainian Bar Association.

The 2022 Joshua Heintz Award for Humanitarian Achievement was presented to Ambassador Hans Corell for, among other achievements, his work in establishing the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

We dedicate this volume of the Proceedings to Benjamin Ferencz, a long-time supporter and friend of the Roundtable, who we lost in 2023. We are fortunate to be able to include in this volume a transcription of a recording of Ben commemorating the 75th anniversary of the London Agreement, a recording originally intended for presentation at the Roundtable in 2020, but delayed because of the COVID-19 pandemic. Ben reminds us that we cannot establish a more humane and peaceful world without first securing universal support for an international tribunal and establishing clear definitions of crimes such as aggression.

On behalf of the Society, I would like to express my gratitude to David Crane for his leadership in the important work of this Roundtable, to our host, Case Western Reserve University School of Law, and to all of our cosponsors for their support.

Finally, I wish to thank former Deputy Executive Director Wes Rist, who enthusiastically represented the Society at many of these Roundtables; and to Justine Stefanelli, the Society's Director of Publications and Research, and Managing Editor of these *Proceedings*.

Lectures and Commentary

Keynote Address

Ambassador Beth Van Schaack*

Introduction

It's a deep honor and a pleasure to address you today as the 6th Ambassador-at-Large for Global Criminal Justice. I was sworn in on March 17th of this year, amidst an extraordinary time of challenges and opportunities in the field of international justice. My job and the mission of my office is to advise the U.S. government and engage in international diplomacy and programming to help prevent, mitigate, and redress atrocities through justice and accountability.

I've been asked today to speak about the crime of aggression in the context of proposals to address this crime as it pertains to Russia's unjust and brutal invasion of Ukraine. Allow me to briefly recount a history of the crime, a topic I wrote extensively about in my previous role as a legal scholar, and which I have previous experience engaging on as an academic advisor to the U.S. delegation to the International Criminal Court Review Conference in 2010 in Kampala, Uganda. I should note at the outset that my remarks are intended to inform a robust discussion on the proposals for an international tribunal to address the crime of aggression, in the spirit of critical inquiry, and should not be understood as a formal position of the U.S. government on the proposals.

A Short History of the Crime of Aggression

The idea of prosecuting those who launch unjust wars has deep roots, although it was not until the post-World War II era that the

* U.S. Department of State. The above is a reproduction of the Ambassador's official remarks, also available at <https://www.state.gov/ambassador-van-schaacks-chautauqua-keynote-speech-building-blocks/>.

international community identified the launching of an aggressive war as a criminal act. In the lexicon of the era, this was deemed a “crime against the peace.” Indeed, it was this crime—rather than genocide—that became the centerpiece of the Nuremberg trial, which was to be the “trial to end all wars.” This pride of place reflected the reasoning, set forth in the Judgment of the International Military Tribunal convened at Nuremberg, that a war of aggression was the proximate cause of all of World War II’s atrocities:

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

A. Post World War II to Kampala

Defining and prosecuting a war of aggression, although not uncontroversial, proved relatively easy following the complete defeat of the Axis states in WWII who were responsible for acts of aggression in World War II. However, when the international community turned its attention to building what would eventually be known as the International Criminal Court, controversies emerged to stymie efforts to codify the crime for more general application in the future. The International Law Commission, the first body to undertake the effort, was unable to agree on a definition of the crime of aggression; this indecision ultimately delayed progress on the ICC project for years. Starting in 1967, the U.N. General Assembly tasked several special committees to define aggression. This effort eventually led to a consensus definition in General Assembly Resolution 3314 (1974) that was meant to guide the Security Council in implementing its peace and security mandate for “act[s] of aggression” under Article 39 of the U.N. Charter. After a period of Cold War quiescence, the ICC idea was revived and states again sought to define the crime. While influential, the definition of aggression in Resolution 3314 did not easily lend

itself to a penal context, so other options were explored. Delegates attending six sessions of Preparatory Committees in 1996–1998 and the 1998 Rome Conference, where the ICC Statute was finally opened for signature, were again unable to agree on the definition of aggression or on a jurisdictional regime to govern the crime’s prosecution. And so, almost everyone agreed to list the crime within the court’s jurisdiction at the last minute, while delaying consideration of the remaining details to a mandatory Review Conference to be convened in seven years. The only guidance the negotiators in Rome offered their successors was the cryptic declaration in Article 5(2) of the ICC Statute that any preconditions for the exercise of jurisdiction over the crime of aggression should be “consistent with the relevant provisions of the Charter of the United Nations.” A series of Preparatory Commissions (1999–2002), Special Working Groups (2003–2009) and informal gatherings held at Princeton University (2004–2007) then took up the task in the period leading up to the planned 2010 Review Conference in Kampala, Uganda. Despite years of multilateral negotiations pre- and post-Rome, delegates arrived at the Review Conference with the most contentious issues still undecided, although the definition of the crime enjoyed a shaky consensus. The perennial difficulty of reaching consensus on when and how to prosecute the crime of aggression stemmed from the recognition that the crime by its nature involves both state action and individual conduct. From virtually the beginning of the negotiations, it was argued that an aggression prosecution should not go forward absent some definitive showing that a state had committed a predicate act of aggression. Where delegations diverged was in deciding which body should be empowered to make this determination: the Security Council, in keeping with its role under the U.N. Charter as the guarantor of peace and security, or a different body, including perhaps the Court itself. Because state action was a central element of an aggression prosecution, delegates also raised the question of whether it was necessary for some state—the putative aggressor state(s), the victim state(s) or all of the above states—to have consented to the court’s

jurisdiction before a prosecution could proceed. Although these two issues—the role of the Security Council and state consent—were present in Rome, they emerged in starker relief in Kampala.

Indeed, the negotiating dynamics in Kampala were considerably more complex than they had been in Rome, as has been set out at length in various scholarly articles by many of the U.S. participants, including then State Department Legal Adviser Harold Koh, then Assistant Legal Adviser Todd Buchwald, and myself.

To a certain degree, the story of the aggression negotiations in Kampala is a story about jurisdiction rather than definition. Although all elements of the aggression provisions were open to negotiation in Kampala, the definition of the crime had strong support. Even France and the United Kingdom had ceased their efforts to revise the definition under consideration, although they later argued that their silence should not be construed to indicate support for the text. Accordingly, the negotiations up to and during the Review Conference focused almost exclusively on the jurisdictional regime to govern the crime, although the United States did seek some interpretative understandings to the definition.

Essentially, the substantive outcome put in place two conditions, under the regime of state consent—a provision allowing for states parties to “opt out” of jurisdiction; and the complete exclusion of the nationals of non-party states absent Security Council referral.

Once the amendments entered into force, many wondered whether adding the crime to the Rome Statute was purely a symbolic exercise—completing unfinished business dating from World War II, and whether the crime of aggression would ever be prosecuted. I would observe that one theory underlying the regime of state consent adopted at Kampala, rests on the observation that the crime of aggression implicates *state sovereignty* more than any of the other three crimes,

because a state's aggression serves as a predicate for the prosecution of an individual for the crime of aggression. None of the other ICC crimes is so dependent on state action. The perceived exceptionality of the crime of aggression as a function of state action supported arguments in favor of premising jurisdiction on state consent.

B. The Russian Invasion of Ukraine

It was against this legal backdrop that Russia relaunched its invasion of Ukraine on February 24, 2022, a date that should live in infamy. It was unequivocally aggression in manifest violation of the U.N. Charter. Unlike other contemporary conflicts, this conflict mirrors the archetypal international armed conflict without the complications posed by modern coalition warfare, a splintered opposition, or the participation of transnational terrorist organizations, although Russia has used private military contractors. We are now six months following the full-scale invasion of Ukraine, and President Putin's war on Ukraine continues to result in climbing costs—thousands of civilians killed or wounded, 13 million Ukrainians forced to flee their homes, historic cities literally pounded to rubble, food shortages, skyrocketing food prices around the world—all because President Putin was determined to conquer another country. Russia's premeditated and unprovoked war is a manifest violation of the U.N. Charter. The international community has repeatedly condemned the Russian Federation's flagrant disregard for international peace and security. Furthermore, Russia's aggression has been accompanied by war crimes, and there continues to be mounting evidence of war crimes committed in every region where Russia's forces are deployed. The horrifying litany of atrocities continues to grow: credible reports of Ukrainian citizens killed execution-style with their hands bound; bodies showing signs of torture; video showing civilians being shot in the back without justification; reports of detainee abuse and mutilation, including a video of a POW being castrated; and horrific accounts of gender-based violence, including sexual violence against women and

children. Bombardments hitting densely populated cities, including residential areas, causing thousands of civilian deaths and destroying civilian infrastructure, such as railway stations, rail lines and roads used for evacuations. Dozens of men, women, and children crushed under a residential building and ripped apart in a recreation center hit by Russian X-22 missiles in Odesa Oblast. Scores of shoppers in Kremenchuk incinerated by another X-22 missile launched from a Russian long-range bomber. A seven-year-old girl pulled from the rubble of a Kyiv apartment block, destroyed by a Russian missile as she slept. Her mother trapped under the building's rubble for three more hours as rescuers desperately sought to save her. Three-year-old twins wounded as a Russian missile slammed into their home outside Odesa. Russian missiles struck a music school in Zaporizhzhya; a Moldovan children's rehabilitation Center on the Black Sea coast; multi-story apartment blocks in Chernihiv, Dnipro, and Kharkiv; a recreation area and residential area in Mykolayiv; a car service center in Rivne, a hospital, cultural center, library, and school in Sumy; a subway station in Kharkiv; and a lakeside beach in Donetsk. We also have information to suggest that Russian Federation officials are taking steps to conceal Russia's role in the death of detainees, likely as a result of violent interrogation methods. There is a growing body of credible evidence that Russia's forces in Ukraine are torturing and summarily executing Ukraine's military personnel and noncombatants. The images, videos, and reports compiling witness accounts suggest these atrocities are not the acts of rogue units; they are part of a deeply disturbing pattern of reports of abuse across all areas where Russia's forces are engaged. And they are consistent with what we have seen from Russia's military engagements preceding the Kremlin's further invasion and full-scale war against Ukraine.

C. Efforts Towards Accountability

Following a careful review of available information from public and intelligence sources, the United States assessed that members

of Russia's forces have committed war crimes in Ukraine. This was announced in a statement by Secretary Blinken, and in my first week as Ambassador-at-Large for War Crimes, I stepped to the podium of the State Department Press Briefing room to expound on this assessment. The international community, with a strong leadership role by the United States, has swiftly activated a range of accountability mechanisms in the global system of international justice. The United States supports all such international efforts to investigate and examine atrocities in Ukraine, including the investigation by the International Criminal Court (ICC), the establishment of the U.N. Commission of Inquiry on Ukraine, the OSCE's "Moscow Mechanism," the U.N. Human Rights Monitoring Mission in Ukraine, and the Joint Investigative Team coordinated through Eurojust. We also welcome proceedings before the International Court of Justice (ICJ) and are tracking Ukraine's case against Russia before the European Court of Human Rights. And there's more to report on: recent amendments to Eurojust regulations allowing it to be a repository of evidence of core international crimes; the opening of national investigations in 14 states (and growing), evidencing the deepening state practice regarding the use of universal jurisdiction; the massive collective state referral to the ICC, evidencing enormous international political will; and Ukraine's adept use of a broad range of legal forums to press its claims under the principle of state responsibility, including two cases at the ICJ (one under CERD and the Convention on Terrorist Financing, and the other under the Genocide Convention), as well as cases before the European Court of Human Rights. All this plus active documentation efforts by international mechanisms and civil society—Ukraine may overtake Syria as the most documented crime base in human history. In addition to supporting these international efforts, my office has deepened and expanded our pre-existing partnership with the Ukrainian Office of the Prosecutor General (OPG). Through a project led by former U.S. War Crimes Ambassador Clint Williamson, we have deployed teams of international investigators and prosecutors to assist the Ukrainian Prosecutor General in documenting, preserving,

and preparing war crimes cases for prosecution. This work is part of a multilateral initiative, the Atrocity Crimes Advisory Group for Ukraine (ACA), launched with the European Union and the United Kingdom to coordinate support and provide strategic advice and operational assistance to the OPG.

The ACA consists of a multi-national team of experienced international prosecutors and other war crimes experts deployed now to the region. The initiative consists of two distinct components: the Advisory Board that provides direct advice and counsel to the OPG on international humanitarian law, building case files and prosecuting crimes, and the Mobile Justice Teams that will provide assistance and advice to Ukraine's investigative and prosecutorial teams on the ground. The ACA is designed to ensure that we deploy our financial means wisely, avoid duplicating our efforts and recruit the best experts in the world to assist the OPG in its challenging, but crucial work as the sole domestic accountability mechanism for grave crimes.

The Prosecutor General has already identified thousands of incidents that may constitute war crimes—and this without complete knowledge of what is unfolding in areas still under Russia's control. We expect that evidence of more atrocities will continue to emerge. International courts and multilateral institutions are complementary to national proceedings. Ukraine's OPG is therefore playing a crucial role in ensuring that those responsible for war crimes and other atrocities are held accountable through both its own efforts and in its coordination with multi-lateral institutions.

The United States is using all of the tools at our disposal to further accountability in a broad sense. To impose costs and promote accountability for malign actors, we have used our sanctions authorities to designate a wide range of individuals and entities; and we have steadily declassified an unprecedented range of information to inform the world of Russia's actions and counter intense Russian

disinformation campaigns. This includes the release of a report by the [ODNI] on Russia's horrifying "filtration" system—a benign-seeming term that masks a systemic effort that reportedly involves interrogating, abusing, and sometimes deporting, indefinitely detaining, or killing, people who Russia and its proxies perceive as opposed to their control. The ODNI report assessed that "Russia with the help of proxy groups almost certainly is using so-called filtration operations to conduct the detention and forced deportation of Ukrainian civilians to Russia." Secretary of State Blinken released a similar statement on filtration noting that "Estimates from a variety of sources, including the Russian government, indicate that Russian authorities have interrogated, detained, and forcibly deported between 900,000 and 1.6 million Ukrainian citizens, including 260,000 children, from their homes to Russia—often to isolated regions in the Far East." In addition to detaining and reportedly torturing some of these individuals, there are reports that "some individuals targeted for "filtration" have been summarily executed..." We have unsuccessfully called on Russia to immediately halt its systematic "filtration" operations and forced deportations in Russian-controlled and held areas of Ukraine.

The State Department, led by GCJ's sibling bureau, the Conflict and Stabilization Office, has established a "Conflict Observatory," to leverage open-source data, including satellite imagery and social media, to document atrocities committed by Russia's forces and harm to civilian infrastructure, including to Ukraine's cultural heritage. The Conflict Observatory shines a light on atrocities and is intended to contribute to eventual prosecutions in Ukraine's domestic courts, courts in third-party countries, and other relevant tribunals.

The Conflict Observatory recently released a new report detailing Russia's methodical and far-flung "filtration" operations and reported forced transfers and deportations in Russian-controlled areas of Ukraine. The unlawful transfer and deportation of protected

persons is a grave breach of the Fourth Geneva Convention on the protection of civilians.

Given the justice and accountability imperatives Ukraine is facing, the U.S. government is investing in multiple lines of effort. Beyond those outlined above, these include: training and technical assistance for civil society efforts to gather, document, and report on violations of international humanitarian law; expanding access to justice for victims and survivors of atrocities and other abuses; data collection, reporting, and information sharing on human rights abuses and atrocities including through analysis of satellite imagery and other data feeds; forensic assistance focused on the missing and disappeared, laying the foundation for restorative justice; and enhancing the ability of civil society, journalists, and other partners to safely and securely share information.

Our Department of Justice has also undertaken important accountability efforts. In June 2022, I traveled with Attorney General Garland to the Polish-Ukrainian border, where, during a meeting with the erstwhile Ukrainian Prosecutor General, the Attorney General announced the launch of a War Crimes Accountability Team to centralize and strengthen the Justice Department's ongoing work to hold accountable those who have committed war crimes and other atrocities in Ukraine. The Attorney General has appointed Eli Rosenbaum to lead this initiative as Counselor for War Crimes Accountability, a formidable choice given Eli's long and storied career in identifying, denaturalizing, and deporting Nazi war criminals from the United States.

A plethora of international NGOs, media, and private citizens are documenting accounts of violations and abuses. Great courage and determination are being demonstrated in Ukraine on a daily basis and in many ways by such groups, and the challenges they face in their evidence-gathering and preservation activities in the midst of the

brutal war of aggression launched by Russia are formidable. These groups play an important role, but their work also carries risks—namely, evidence spoliation and the re-traumatization of victims through well-meaning but less than rigorous methodologies.

I cannot underscore enough the importance of sustaining international alliances and partnerships and solidarity for the success of these accountability initiatives. All of you in this room know from experience the painstaking work, financial resources, institutional support, challenging legal waters, and diplomatic leadership required to ensure that accountability institutions are effective at delivering on the core mandate of justice. In July, the United States co-sponsored the Ukraine Accountability Conference in The Hague. This was a key moment for the international community to reinforce our collective efforts toward accountability for serious international crimes that have been committed in other parts of the world. Representatives from 45 countries signed a Political Declaration strongly condemning the acts of aggression of the Russian Federation against Ukraine. The statement notes that Russia's blatant violations of the Charter of the United Nations threaten international peace and security, gravely damage the rules-based international order, and undermine democratic values.

We are highly focused on supporting the mechanisms most likely to be effective in bringing perpetrators to justice. Just as the Allies at the end of the Second World War advanced the imperative of justice and ushered in a new era of accountability for the worst imaginable crimes, it falls to us to ensure that those responsible for war crimes and other atrocities in Ukraine be held to account. Jurists from the Soviet Union contributed to the very legal architecture used to prosecute those responsible for the gravest crimes at Nuremburg. Tragically, President Putin has turned his back on this history and on Russia's international and domestic legal obligations, including under the U.N. Charter and the Geneva Conventions. Today, we must work together

to ensure that the principles of justice and accountability championed at Nuremburg are maintained and strengthened.

Moscow has taken aim not only at Ukraine, but at the principles of respect for sovereign equality and territorial integrity undergirding peace and security that were enshrined in the U.N. Charter in the wake of two World Wars. In keeping with those principles, a country cannot change the borders of another by force, subjugate another sovereign country to its will, or dictate another country's choices or policies.

The rapidity, scope, and scale of the accountability response is truly unprecedented—and immense work lies ahead in making sure these mechanisms and initiatives are 'inter-operable' and maximally effective. Yet despite this, many contend that a juridical gap remains unfilled: [Ukraine's ICJ case puts Russia's aggression in issue, but] no international court has jurisdiction over the *crime* of aggression. This gives rise to a normative question: would atrocity crimes prosecutions be enough to capture the world's opprobrium? Bearing in mind the expressive function of the law, could atrocity crimes charges alone redress the fundamental breach of international law occasioned by Russia's blatant war of aggression?

A Tribunal for Aggression?

Which brings us to the various proposals to create a stand-alone international tribunal on aggression. Many of you in this room have contributed to such proposals, draft resolutions, and sample statutes, drawing on your considerable experience and knowledge of potential models. The government of Ukraine has asked the international community to establish such a tribunal on multiple occasions, including in its intervention at the Dutch-led Ukraine Accountability Conference in July.

Turning to the question of how to create such a tribunal, norm entrepreneurs (yes, even legal academics can be entrepreneurs)—are exploring a number of modalities for the creation of such an institution, including: a multilateral treaty that would pool national jurisdiction; an agreement with a regional body such as the EU or the Council of Europe; or an agreement with the U.N., particularly given that action at the Security Council is foreclosed by Russia’s veto power. While precedents exist for some of these arrangements—including the Special Court for Sierra Leone, and the Extraordinary African Chambers of Senegal—many outstanding questions and issues remain in this context. These include foundational questions regarding the authorities such mechanisms could wield, their envisioned efficacy given any limitations in authority, and the sequencing of institutional development. They also include pragmatic considerations, like funding sources (e.g., voluntary vs. assessed contributions), and challenging legal questions such as the definition of the crime (and whether to include a leadership clause and how to interpret such a clause), the extent of immunities, or whether there should be pendent jurisdiction over other related crimes (such as an act of transnational bombardment that may constitute a war crime itself).

But there is also the essential predicate question of whether this is a necessary and valuable initiative. There is no consensus at this point in the international community on the merits of a new international tribunal. A tribunal on aggression would likely focus on political leaders and other decisionmakers, although it is important to note that most of these individuals are located in Russia and unlikely to appear before such a tribunal. Accordingly, there may be certain limits on what a tribunal can achieve in this context, including with regard to enhancing normative principles of justice.

In addition, there are practical and financial considerations. Right now, our focus has been on maximizing the effectiveness of existing accountability mechanisms. We are mindful that establishing a new

tribunal would require significant resources, and could divert from support to other existing mechanisms, such as the ICC.

I also feel that it is important to recognize the growing perception by many States, especially from the Global South, that the concerted response to accountability for atrocities in Ukraine stands as a stark exception to an inconsistent and uneven response to atrocities in many other parts of the world. My role as Ambassador-at-Large in the office of Global Criminal Justice—emphasis on the *global*—is to promote justice and accountability around the world, and as such, I must engage seriously with these perceptions of bias, double standards, and selective justice. To paraphrase my predecessor, Stephen Rapp, when it comes to international crimes, there is only some justice in some places for some people some of the time. All of us here have dedicated our careers to rectifying that reality, recognizing that there must be greater equality in the global distribution of accountability for international crimes.

In addition to the growing perception of bias that undermines the international political unity necessary to ensure the *existing* accountability mechanisms can successfully deliver, we also need to consider the priorities and needs of victims. This is not a new dilemma for justice advocates. Stephen often recounted that during his time as prosecutor in Sierra Leone he regularly encountered victims with amputated limbs and empty bellies, who supported retributive justice while also noting they could not “eat a court judgment.” We will not shy away from the imperative of justice, but sequencing and prioritization are also important elements. The government of Ukraine, while stating a desire for a mechanism to address Russia’s aggression, has also identified as a priority the need for war reparations and an international claims mechanism for Ukraine.

There are many gaps—including one on reparations and claims—and we must consider our resources and priorities.

It is timely for Ukraine and its partners to be thinking about claims and compensation resulting from Russia's war against Ukraine. Overall, we believe that starting to think about setting up some mechanism for registering claims as an initial first step makes sense. However, there are a number of questions about the goals and practical elements of such a process that would need to be discussed and sorted out.

How do we prioritize efforts to establish a tribunal for aggression alongside other pressing needs? Have we sufficiently listened to victims about their priorities?

Concluding Remarks and Directives to the Assembled Group

I raise these issues in the spirit of inquisitive neutrality, and a recognition that we must grapple with the complex political, legal, and normative questions around such a proposal. The danger, of course, is that Russia will wait us out; we saw it in Syria and we risk seeing it in Ukraine. Time is Putin's greatest weapon, and there is an urgent need to ensure the existing accountability mechanisms deliver on the promise of justice—for the victims and survivors, for the integrity of our cherished values, norms and principles, and for Ukraine.

As I said at the beginning of my remarks, I am not relaying a formal position of the U.S. Government. The United States is examining these proposals and will continue to discuss them with Ukraine, other states and the international community. I look forward to a robust dialogue on this topic.

In closing, I “charge” the participants in the Dialogue to examine these issues and questions, report back on the results of their discussion. I look forward to your thoughtful engagement and the discussions that lie ahead.

Katherine B. Fite Lecture

Brenda J. Hollis*

I am honored to be asked to present the Katherine B. Fite Lecture at this year's 14th IHL Roundtable, and to see, if only remotely, colleagues whom I have known for more years than we would like to remember.

The thoughts I share with you today are my personal views, based on my years of experience as a career prosecutor. They do not represent the official position of any Court or Prosecutor's office. As a career prosecutor, my comments will focus on investigation and prosecution.

Throughout the world, we are reminded today of the evil that men—and women—do—from the ongoing genocide in occupied Tibet to the Russian invasion of Ukraine to the rise of fascist domestic terrorists and their inciters and enablers in the U.S. and worldwide.

This evil is done first and foremost by those who abuse their *de facto* and *de jure* positions of authority and power to sow discord, hatred, fear—all to secure or maintain a grip on power and associated corrupt affluence.

Those for whom truth is to be spoken only when it favors their evil agenda, to be discarded, ignored, when it does not. And by those who are incited to violence by these influential evil doers.

We are also reminded that evil prevails when good men and women do nothing, and that too often good men and women indeed do nothing.

What can we do in the face of such evil, evil which assigns accountability not on conduct—the essence of justice—but on the identity of the actor! Believe like me, look like me, do what you wish with impunity.

* The Extraordinary Chambers in the Courts of Cambodia; The Special Court for Sierra Leone.

What can we do? As Edward Everett Hale so rightly said—I am only one, but I am one. I cannot do everything, but I can do something.

Together—and individually—good men and women can and must do something! Together—and individually—we must insist on a rule of law based on equality and fairness, a rule of law which imposes accountability based on conduct, not on the identity of the actor.

And we must take care not to allow law to be perverted to serve anti-democratic, authoritarian purposes. For remember the rule of law can itself be twisted to serve evil—we need only recall that the Nazis had laws which advanced their evil agenda, and we must remember those in the judiciary who enforced those laws.

Individually and collectively we can also combat this evil in other ways—including by speaking out against those who promote fear, divisiveness, and hatred, and against proposed laws which exploit these emotions. This can be a frightening, even dangerous undertaking. But we can also act through the ballot box, by denying evil doers and their sycophants the power and deference of elected office.

And, as Katherine B. Fite did, we can act by bringing to a fair and impartial criminal reckoning those evil doers and their followers where sufficient evidence exists to prove their criminality. Regardless who they are—their age, gender, social and economic standing, position of de facto or de jure authority. Bring them to a reckoning based on conduct, not on the identity, beliefs, or position of the actor.

That task is not easy, but it is made less difficult by the work that has already been done—the law and procedures established at Nuremberg and Tokyo, by the enactment of the Geneva Conventions, the Torture Convention, the Convention on Civil and Political Rights, and the corresponding evolution of customary law, by the work of

the ICTY and ICTR, the hybrid courts such as the SCSL the Special Tribunal for Lebanon, and the ECCC.

These developments, these courts, have helped flesh out the law and procedures applicable in international courts investigating and trying international crimes. They have given us lessons learned that we must apply to effectively carry out investigations and trials, to most efficiently spend other people's money and use limited resources as we carry out these duties.

But, given the complexity of investigating, prosecuting international crimes, how do we actually go about it? We do it the way we eat the elephant—one bite at a time.

No matter how large or small the furor over—or support for—the criminal conduct, the media attention or lack thereof, the world's focus on the conduct, we bring individuals to account through the same systematic, informed decision making at each step of the process.

Remembering that it is as important to say no where we do not have a case as it is to say yes and move forward when we do have a case.

We carry out the investigation and make decisions as to what crimes if any, and what persons if any, we charge, the same way we would if we were faced with a single, one day event. That is, by considering not what we think we know, not what we know, but what we can prove.

How do we know what we can prove? Let's take a few moments and consider this question.

Regardless how notorious or largely unknown, how keen the international and domestic audiences are to act, how complex or relatively straightforward the circumstances, whether committed on the international stage or domestically, we determine what we can

prove by focusing on the three basic components of the process: the elements of crimes and forms of liability, the credibility of the evidence relevant to these elements, inculpatory and exculpatory, and the admissibility of that evidence. This is the critical and fundamental focus for all investigations and prosecutions.

In turn, we apply the KNOW GOA approach to this focus:

KNOW the mandate, law, i.e., elements of crimes and modes of liability, the procedures, judicial decisions of the forum in which we practice, including how the judges define the elements, assign credibility and determine admissibility. That gives us the framework in which we must operate.

Then GATHER all relevant information, defined broadly, be it potentially incriminating or exculpatory. This is the part of the process we are very good at—collecting information. The urge is to collect, deposit, collect, deposit, resulting in a lot of visible activity—which the donors like. But without concurrent O and A, this is a lot of inefficient activity which can undermine timely, informed decision-making regarding crimes and forms of liability to charge. If we do not know the import of what we have, we do not know what we need!! Which leads us to O and A.

As we gather the information, we must organize it by elements of the crimes and forms of liability within the jurisdiction of the forum in which we operate—we put that information into the relevant elements boxes.

We must also analyze this evidence by credibility and admissibility as we organize.

An elements-focused, user-friendly data base is critical to our ability to organize, analyze the vast amount of information available regarding potential international crimes.

A database that is put in place at the very beginning, with the ability to retrieve information based on several criteria—relevance to the elements being first and foremost, but also including data points allowing us to retrieve the information based on events, locations, named perpetrators, etc. Only in this way can we most efficiently and effectively determine what crimes we can prove and against whom.

And, at the international court level, we carry out this exercise always with a view to moving as high up the ladder as we can, based on the law applied to the facts.

For it is states who have the primary responsibility for bringing lower-level perpetrators to justice, or dealing with their criminal accountability in other ways such as Truth and Reconciliation Commissions, depending on the relative seriousness of the individual's culpability. Though these lower-level perpetrators become very important in proving the cases against higher level accused.

Those of us who have been privileged to investigate the evils being perpetrated today and bring perpetrators to account where the facts and the law so dictate, have a sobering duty. One that must be carried out objectively, in full accord with the law and procedures of the forum in which we operate.

As with most aspects of life, the judicial process is ultimately a system of human interaction. The success of the system depends on the integrity and honor of all participants. As criminal investigators and prosecutors, we must always hold ourselves to the highest standards of integrity. Prosecutors have a duty to respect the entire process, including the rights it affords to suspects and accused persons.

We must zealously prosecute accused persons for crimes proven by sufficient evidence, but must always proceed only where our actions have a good faith basis in law and fact.

Only in this way can the rule of law be upheld impartially and independently, fairly to those victimized and to those accused of that victimization.

I have focused on the prosecutorial function, but it is equally true that for the rule of law to be upheld impartially, independently and fairly, the forum in which we operate must have qualified defense counsel of integrity who zealously defend those accused of crimes. And judges who act impartially and independently, bound only by the law and the facts.

The evil that men and women do seems to be on the rise today. That evil must be vigorously opposed, condemned, investigated and prosecuted at all levels. All good men and women—who are the majority of Earth’s inhabitants—play a role—from the ballot box to the crime scenes to the courtroom. Together, we can hold high the rule of law, and protect the right each of us has to be free to live our lives in peace and to fully exercise our fundamental rights.

Thank you.

Clara Barton Lecture

Nazhat Shameem Khan*

Friends and colleagues, it is a real pleasure to be here, and I'm sorry, most after dinner speeches are supposed to be light and amusing. This is not going to be light and amusing, I apologize in advance. First of all, I am honored to speak on behalf of the ICC Office of the Prosecutor at this gathering of current and former Chief Prosecutors from the International Criminal Courts and Tribunals, and other eminent legal experts. Following my inauguration as a Deputy Prosecutor of the ICC in March of this year, my presence here is a first, and I want to thank the organizers, notably Michael Scharf and David Crane who is, of course, not here, for inviting me. I am especially honored to have been asked to deliver this year's Clara Barton Lecture, which I understand has become an institution of this forum and invites us to reflect on the beginnings of international humanitarian law and its perennial purpose: to limit the suffering caused by warfare, and to alleviate its effects on human life. Before I begin my substantive remarks, I wish to recognize and extend my greetings also to the Chairperson of this year's Roundtable, former ICC Prosecutor Fatou Bensouda. I admire your efforts throughout your rich professional career and during your tenure at The Hague, in particular those relating to the development of policies on sexual and gender-based crimes, and crimes against children. These are themes which are very close to my heart, and of course to the vision of the Prosecutor, Karim A.A. Khan, Q.C., and I will revert on this matter during these remarks.

This year's theme of the roundtable reminds us of the past atrocities that lead to the establishment of International Criminal Courts and Tribunals, and the wider contemporary effort of the international community to address atrocity crimes. Current events harrowingly demonstrate the need to cling to the law and apply it in a practical

* The International Criminal Court.

and effective way as an anchor for stability and security in the world. Unfortunately, too many children, women and men, young and old, are living in terror in different parts of the world. We see on a daily basis the suffering of citizenry. In such a time, as the Prosecutor has said, the law cannot be a spectator. The law is meant to protect and uphold principles that are essential for humanity. But I believe that there is hope because whilst we see the devastation of people's hopes and futures, events in Ukraine and elsewhere have also brought into stark relief that we need to have a reawakening or reinvigoration of the law.

I would like to take this moment to reflect on the evolution of the ICC and the rule of law more broadly, recognize the progress that we have made, and shine a light on the present challenges that we have to overcome in the everlasting pursuit of justice. On the 1st of July this year, the International Criminal Court commemorated the 20th anniversary of the entry into force of its founding treaty, The Rome Statute. The establishment of the world's first permanent international criminal court with jurisdiction to prosecute individuals responsible for the most serious crimes under international law is an important achievement for the international community and an incredible milestone in the global fight against impunity. As I have heard Fatou Bensouda say on several occasions, "One of humanity's proudest moments must surely be the creation of the International Criminal Court against all odds." The ICC is a dreadful testament to the horrors of mankind and our collective will to give concrete expression to the maxim of "Never again." Yet, that commitment must not ring hollow to haunt the memories of victims of the past or to abandon the victims of tomorrow. The Holocaust, The Killing Fields of Cambodia, the years of Apartheid, and the genocide in the Former Yugoslavia and Rwanda are not just evils of the past, but atrocious examples of what human beings are unfortunately capable of at any moment if the international community does not interfere. We must remember that the International Criminal Justice System as we know it today was hard earned, not given. No matter how far we

advance on our path toward accountability and universality, justice will only be as strong as its advocates, and the Rome Statute and the ICC are testaments to what we can achieve through multilateralism and a shared global abhorrence for crimes against humanity.

Clara Barton and her work, which we are honoring today, are legacies of this important, global determination. During the American Civil War, instead of being a bystander Clara Barton petitioned leaders to gain access to the battlefield in order to provide care and supplies to wounded soldiers and those in need. The pain and suffering that she witnesses galvanized her to action. In 1881, she founded the American National Red Cross and successfully advocated for the ratification of the First Geneva Convention by the United States. I would like to take this moment to acknowledge the important and effective work of the American Red Cross, and of the International Red Cross and Red Crescent Societies. The work, especially of national societies including the American Red Cross, demonstrates the importance of international humanitarian initiatives and work on the ground with affected communities in conflict zones. Indeed, when the First Geneva Convention was adopted, its strength was its focus on protecting those who are victims of conflict who must never be the target of war and who look to humanitarian action as their only resource and recourse. The Geneva Conventions continue to be relevant and pivotal in humanitarian action during conflict, violence, and war. The Red Cross and Red Crescent serve, without judgment, the most vulnerable and protect them from the worst human rights violations.

Following the historical developments relevant to the body of IHL and ICL as we have come to know it, today it is again time for a growth spurt of international law. Every single one of us can and needs to participate in this common cause to resist intolerance and unrestrained violence. Across continents, we must individually and collectively endeavor with renewed commitment to view the suffering of our brothers and sisters and of children as if it were, God forbid, the

suffering of our own families or those we love. The tears and the pain that they suffer should galvanize us to action.

Let me turn to the Office of the Prosecutor. In addition to the Twentieth Anniversary of the entry into force of the Rome Statute, our office has just completed its first year under the leadership of Prosecutor Karim Khan, Q.C. It has been a busy period during which the office has worked hard to implement the Prosecutor's strategic vision for the office's functioning. We are working under a new structure with, as a critical feature, the allocation of situations and resources to two central pillars under the responsibility of the two Deputy Prosecutors: Deputy Prosecutor Niang and myself. Under the Prosecutor's overall guidance, we directly oversee the work of the officers' unified teams working on the various preliminary examinations, investigations, and cases while benefiting from the support provided by different specialized units, such as Forensics, Security, Gender and Children, and External Affairs. We are also working to enhance the officers' capability in financial investigations and the tracking of assets. The purpose of the restructuring is improved efficiency in investigative and prosecutorial activities; however, it is also to ensure that the work we do is conducted in a safe and respectful environment. We are already a diverse team in the Office of the Prosecutor, but there is always a need for greater geographical representation. Having staff of all genders, from all regions of the world, we inject even greater linguistic, cultural, and substantive expertise into the work of the office, bring many benefits at the investigative and trial stages of proceedings and underline the common heritage and common ownership of the law that we apply. The Court and its organs are stronger if there is a strong sense of identity with all parties and all regions. In turn, all parties, regions, and legal systems will have the ability to shape the jurisprudence and character of the Court and its decisions. Diversity and participation must continue to be one of our greatest strengths.

As a national from Fiji, I should add here that the Court does face a challenge in receiving an equitable number of applications for job openings from certain regions, in particular the GRULAC and the Asia-Pacific regions. In the same way, we can observe also a need to enhance the universality of the Rome Statute and encourage more accessions from states, for instance in the Asia-Pacific region in particular. Within the limits of my function, I am committed to promoting the Rome Statute's reach and your ideas in this regard would be welcome.

As another key feature of the office today, the Prosecutor is committed to effective implementation of both policies on SGBC and on children, knowing that this is the only way that we can institutionalize effective responses to pleas for justice of the most vulnerable victims of crimes of atrocity. An ongoing challenge that is foreseen in both policies is a need for building capacity in speaking to victims of such crimes and presenting the evidence in court without retraumatization. This continues to be a work in progress and is the focus of training and capacity building at the office this year. Avoiding retraumatization of victims and survivors by prioritizing their interests and needs was, amongst others, an important topic of conversation at the conference organized by the Netherlands in cooperation with the European Commission and our office on the 14th of July 2022. The Ukraine Accountability Conference was more broadly aimed to deepen the coordination process in the ongoing investigations of the international crimes committed in Ukraine and to develop more effective mechanisms as a blueprint for the future and other situations.

This brings me to the issue of complementarity. The office is focused on the effective discharge of its mandate under the Rome Statute, and collaborates and coordinates closely with other accountability actors at the domestic and regional levels to ensure that there is no impunity for Rome Statute crimes. We recognize that the most powerful and compelling way to show what has happened to victims

and survivors is ensuring that their voices can be effectively heard through a justice process that caters for their needs and respects their environment. It is for this reason that the Prosecutor has emphasized the strategic need to work closer to affected communities. Already, through visits to situation countries, the office has made efforts to meet with government representatives and to talk to victims and civil society representatives. The best way of effectively communicating the meaning and the purpose of the law is in the field, and with the stakeholders. We are enhancing our regional engagement and seeking to increase field presence to build more meaningful dialogue, to assess developments, to collect evidence, and to solidify cooperation at the domestic and regional levels. For the Office of the Prosecutor, it does not matter whether crimes of atrocity are prosecuted domestically or at the ICC; Indeed, domestic prosecutions are often preferable. Such prosecutions are owned by the state and its judicial system, provide support to national law enforcement and judicial institutions, and increase understanding of Rome Statute offenses by people on the ground. The dialogue between the Prosecutor and the situation country is in itself part of a valuable journey to strengthen the universal values underlying the Rome Statute. In my own previous position as President of the Human Rights Council and as the Fijian Ambassador to the United Nations in Geneva, I saw the value of an inclusive, consultative, and respectful engagement with all countries in delivering positive human rights outcomes within national jurisdictions. A classic example of such engagement is the Human Rights Council Universal Periodic Review Mechanism. This mechanism enables a review of the human rights journey of every member state of the United Nations in a peer review process through recommendations and scrutiny by every other country. The engagement is intended to make changes on the ground, and has had that effect because the review is cyclic and the countries must deliver on the undertakings that they make to their peers.

The approach adopted by the prosecutor to increase dialogue with all countries, including situation countries, is based on the conviction that to build a universal respect for international criminal justice and the Rome Statute, we must engage more whilst maintaining and strengthening the mandate of the Office of the Prosecutor. An example of a situation where the office has worked closely with national authorities and with relevant U.N. bodies already since the days of Prosecutor Bensouda is the Central African Republic. In addition to the regular cooperation that the office has been receiving for its own investigations and prosecutions, it has also been contributing to the important mission of the CAR Special Criminal Court. Since the SCC started operations, our office has received from it a number of requests for cooperation to share information and documents that we collected for our own investigations, we have held working visits with magistrates of that court, and we continue to assist in responding to their judicial needs. We endeavor to emulate such collaborative efforts in other situations.

The announcement by the Prosecutor on the 3rd of November to proceed with investigations in relation to the situation in Venezuela was coupled with a joint signing of a memorandum of understanding with the government of Venezuela, strengthening the basis for dialogue and cooperation. Since then, the office has sought to explore modalities to strengthen cooperation with the Venezuelan authorities and to facilitate technical assistance under the framework of the MOU while progressing its independent, mandated activities. This included a second official visit by the Prosecutor to Venezuela in March 2022, during which agreement was reached for the establishment of an office in Venezuela in support of cooperation under the framework of the MOU. The office is already engaged with other relevant actors working in the region in the field of the rule of law and capacity building, including from the U.N.

A final example I will provide showing the value of enhanced partnerships is the situation in Ukraine. The gravity of the situation means that all actors, national, regional, and international, are strengthened in their individual efforts when they work together. Allied with enhanced presence on the ground, our office is seeking to make tangible progress in the near term, mindful that our evidence collection efforts must have a purpose not to gather dust on shelves for historical interest, but to uphold the rights of individuals and their right to be protected from atrocity crimes. The office is also engaged in close coordination with the Prosecutor General's Office in Ukraine and a variety of international, regional, and domestic actors that are also active in relation to the collection of information and evidence.

Innovation serves as an important accelerator to activities in the field. For the first time, the office's participating in a joint investigation team under the auspices of Eurojust to more effectively share information with domestic prosecution authorities. The office is working with states on deployment of forensic missions through a rotational model of mobile teams using the cooperation with The Netherlands as a blueprint. The office is investing in modern technology in partnership with Microsoft and with generous financial support of other partners to enhance our evidence gathering and analysis capacity and to make available more effective information to all other accountability actors. The office has developed guidelines with Eurojust for civil society and for domestic authorities in relation to the gathering of information to avoid over-documentation and unnecessary retraumatization of victims and witnesses. These are all lessons we have learned from the past, whether drawn from Cox's Bazar, from Iraq, or from Syria. These efforts and strategies will enable the Rome Statute System to effectively become a two-way street, allowing the office to act as a hub in the center of international criminal justice as opposed to a detached apex, because universality can only be achieved in cooperation.

Before bringing my remarks to a conclusion, I wish to emphasize that the law has a crucial role to play in addressing and preventing atrocity crimes, not in isolation but with other measures: diplomatic, political, economic, or otherwise. The law cannot be idle nor relegated to a secondary position. We must maintain the new momentum that we have created building on our collaborative spirit to deliver a measure of accountability in Ukraine and in other dire situations that demand our attention and where we must inject a similar focus and urgency. The lives of those that look up to us must be vindicated by concrete action the world over. I thank you all for your attention, and I look forward to engaging in dialogue with you. Thank you very much indeed.

Year in Review Lecture

Three Years of International Criminal Law in Review: 2019-2022

Valerie Oosterveld*

Welcome, and thank you for coming to this session on a year of international criminal law (ICL) in review. But really, it is actually three years in review as I had originally been slated to give this talk in 2020, then 2021, and now we are here in person, together—thankfully.

It is difficult to summarize three years of ICL developments in 20-30 minutes, so I will selectively mention only a handful. At the end of my presentation, I will call on you to supplement that with your views on top developments over the past three years—so please make a mental note if I miss something you were hoping to hear.

I will begin with the subject of our Roundtable this year: the Russian aggression in Ukraine.

A number of the speakers at this Roundtable have already provided detailed commentary on the efforts of Ukraine and the response of many states in the international community. They have noted the unprecedented level of accountability-related engagement, from

- The ICC (and the referring states parties—I counted 43 on the ICC’s website, one-third of the 123 ICC states parties);
- Domestic investigations and prosecutions in Ukraine;
- The work of the Joint Investigation Team and Eurojust;
- The OSCE Moscow Mechanism;
- The U.N. Independent International Commission of Inquiry on Ukraine;

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- Countries such as my own which have indicated they are investigating under universal jurisdiction—Ambassador van Schaack referred to these as structural investigations deepening state practice on UJ;
- The efforts of many Ukrainian and international civil society organizations to document atrocities or otherwise assist;
- Discussions around an accountability mechanism for aggression; and
- Ukraine’s utilization of the European Court of Human Rights and the International Court of Justice.

I do not wish to repeat what you have already heard, so I will only mention two themes, with short digressions to another situation—that of the Rohingya from Myanmar—because it has interlinking aspects.

The first theme is the case brought by Ukraine against Russia at the ICJ. While a case of state, as opposed to individual, criminal responsibility—this case should certainly be watched with interest by those in ICL, both because it is part of what some have called the “accountability matrix,” and because it involves the interpretation of the Genocide Convention.

As you know, Ukraine filed its application against Russia at the ICJ in February with a request for the indication of provisional measures—its second case against Russia before the ICJ for intervention on Ukrainian territory (first case filed in 2017 under the terrorist financing convention). The hearings for provisional measures took place on March 7, with Russia not appearing before the court. However, it did submit correspondence objecting to the court’s jurisdiction. The court then rendered its order indicating provisional measures in favor of Ukraine on March 16, 2022, including an order to Russia to immediately suspend its military operations in the territory of Ukraine. As is clearly evident, Russia is in breach of this order, given its prolongation and exacerbation of the conflict since then. This case is now at the Memorial submissions stage at the ICJ.

I want to also raise an interesting procedural issue: I mentioned a moment ago that over 40 ICC states parties have referred the situation of Ukraine to the ICC. In July, 43 states—including the United Kingdom, the United States, European Union states, and the EU itself, Australia, Canada and others—issued a joint statement reiterating their political support for Ukraine’s case against Russia before the ICJ under the Genocide Convention.

In addition, a number of countries and organizations have indicated that they are more formally intervening or providing information to the ICJ under Article 34(2) of the ICJ Statute and/or Article 69(2) of the Rules of Court. This list includes the UK, New Zealand, Lithuania, Latvia, and most recently, the EU just over a week ago. I suspect that this list will continue to increase. Article 63 grants a right to states to intervene in a contentious case when they are party to a multilateral treaty that will be interpreted in the Court’s judgment. Some have pointed out that it is unclear at the moment as to whether states can intervene in a case pursuant to Article 63 before the Court has concluded that it has jurisdiction to proceed to the merits, though a number of the interveners have addressed this head-on, arguing that they are indeed permitted to do so.¹

While such intervention is certainly not unprecedented—with Canada, the Netherlands, and the Maldives indicating similar intent in the Gambia’s case against Myanmar regarding genocide against the Rohingya—it seems to indicate a significant shift toward viewing the ICJ as a valuable adjudicative body in cases of mass atrocity, in other words as another important and crucial tool in the toolbox

1 Juliette McIntyre, *The New Wave of Article 63 Interventions at the International Court of Justice*, EJILTALK! (AUG. 16, 2023), https://www.ejiltalk.org/the-new-wave-of-article-63-interventions-at-the-international-court-of-justice/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2.

of accountability for genocide, crimes against humanity, and war crimes. This was not always the case in recent years.

And, since I mentioned Gambia's case against Myanmar and its interplay with the Ukraine v Russia ICJ case, let me update you on its current status. This case was instituted by The Gambia in November 2019, with provisional measures hearings in December of that year, and with an order by the Court indicating provisional measures in January 2020. In July of this year, the ICJ issued its ruling rejecting all four of Myanmar's preliminary objections, so now the case has proceeded such that Myanmar's counter-Memorial is due April 24, 2023.

I will turn now to the second theme I wish to raise under the discussion of the Ukraine situation and its interplay with the Rohingya situation: a number of speakers yesterday noted the large numbers of accountability and humanitarian actors currently operating in Ukraine, as well as outside of Ukraine, with respect to the Ukraine conflict. This has created certain challenges.

I will give you an example, but to do this I need to refer back to the Rohingya situation. As you know, in August 2017, the Myanmar army launched a systematic, brutal, and organized attack on the Rohingya population living in northern Rakhine State, forcing huge numbers of Rohingya to flee Myanmar in response to this state-sponsored violence. Since then, many actors—including media, aid agencies, NGOs, various branches of the U.N., ICC investigators, academics, and others have travelled to Cox's Bazaar in Bangladesh to gather information about and document conflict-related sexual violence such as rape.

Many of these actors have recorded incidents of how rape and other forms of sexual violence have been used by the Myanmar military as a widespread and systematic weapon of war in order to instill terror and humiliate women and girls and their families. They documented gang rape of very young girls through to elderly women, sometimes

with implements including knives, often committed in public and in front of family members for maximum psychological impact.

These actors have also documented that these effects did not end when Rohingya refugees crossed the international border into Bangladesh. In exile, refugees faced stigma, shame, and pregnancies from rape. They also faced ongoing risks of sexual and gender-based violence (SGBV), including human trafficking, sexual assault, domestic violence, and rape in the refugee camps.

Most importantly for the purposes of my comments today, U.N. Women and others have indicated serious reservations about the viability and practices of these documentation processes.

For example, in 2017, U.N. Women noted that the stories of victims were being taken in a seemingly haphazard and uncoordinated manner, with no method to ensure that the victims were not interviewed multiple times (with some reportedly interviewed 10+ times), raising the possibility and the actuality of the creation of prior inconsistent statements, and creating potential problems for the use of such information by the ICC and other criminal justice mechanisms. As well, there was an overall failure by many actors to adhere to good evidence collective practices—especially the key ethical principles at the heart of documentation of SGBV, “Do No Harm” and only document when honestly necessary or, as the Murad Code puts it “Add Value or don’t do it.”

As U.N. Women remarked about the situation in Cox’s Bazar: “At a more fundamental level, there is substantial confusion about the purpose for which organizations are collecting survivors’ stories. It is unclear whether the purpose is to raise global awareness of the issues or to achieve criminal accountability.... This not only raises the expectations of victims unfairly, but makes huge assumptions regarding what justice means for this particular group.”

Fast forward to Ukraine in March, April, and onwards in 2022. As someone with a keen interest in accountability for SGBV, I watched in concern as a similar, initially uncoordinated rush to document SGBV took place, first by media and then by others, including through electronic portals

However, as time went on, I also saw something different: recognition by many civil society organizations within and outside Ukraine, and within the U.N., ICC, and governments, of the need to avoid a repeat of Cox's Bazaar.

While there is still some cause for concern that the mistakes made in Bangladesh with respect to Rohingya victims of SGBV are still happening again in Ukraine, there is also much more understanding of the need to ensure that any documentation of SGBV be done in a coordinated, trauma-informed, and victim-centered manner.

This increased knowledge in the understanding of best practices can be linked, in part, to past efforts such as the ICC Office of the Prosecutor's Policy Paper on SGBV, and the dissemination best practices codes, including the issuance earlier this year in a U.N. Security Council meeting chaired by the UK of the Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-related Sexual Violence known as the Murad Code, after Nobel Peace Prize winner Nadia Murad. The need for effective coordination of SGBV documentation was also highlighted in the outcome document of the July Ukraine Accountability Conference, hosted by the ICC and Government of the Netherlands. The issue, of course, is ensuring that this understanding is effectively implemented across all actors in and regarding Ukraine.

My next main point in this Three-Years-in-Review relates to jurisprudential, procedural, and political milestones.

For the ICC: there was quite a bit of activity, particularly as Prosecutor Bensouda's mandate came to a close and Prosecutor Khan's mandate began. One of the most important trial decisions of the ICC—in Prosecutor and Domenic Ongwen—was issued in February 2021, resulting in convictions on 61 crimes against humanity and war crimes charges, which included, notably, the first convictions before the ICC on the crime against humanity of forced marriage as an inhumane act and forced pregnancy. Ongwen was sentenced in May 2021 to 25 years imprisonment with time in detention deducted. In sentencing, the Trial Chamber indicated that it balanced Ongwen's abduction as a child and childhood experiences within the Lord's Resistance Army as mitigating factors, as well as his culpable behavior as an adult.

The defense appealed the convictions, and that appeal was heard in February 2022. The Appeals Chamber followed its prior practice in selected other cases by inviting submissions of *amicus curiae*. The Appeals Chamber has identified some areas in this appeal on which, "because of the novelty and/or complex nature of the issues, *amici curiae*'s observations would be beneficial for the proper determination of the case", including on:

- Grounds for excluding criminal responsibility; evidentiary issues relating to mental disease or defect; and the burden of proof when asserting a ground for excluding criminal responsibility.
- Forced pregnancy and forced marriage; and
- Cumulative convictions.

Nineteen *amici curiae* submitted briefs. Of these, ten were selected to present oral submissions—Michael Scharf indicated that he appeared on behalf of the Public International Law & Policy Group; and I appeared on behalf of a group of international experts on forced marriage. This process was quite fascinating, not least because of the interplay between the Prosecution, Victims counsel, defense counsel, and *amicus curiae*, and the judges' questions, which indicated that the

judges were grappling with precedent-setting complex legal issues including—on the forced marriage issue—the place or role of cultural approaches to conjugal relationships. The appeals judgment is likely to be issued in the coming months.

Other significant jurisprudential developments at the ICC from the last three years include, but are not limited to:

- The March 2021 Appeals Chamber judgment in *Prosecutor v. Ntaganda*, confirming Ntaganda’s convictions on 18 counts of war crimes and crimes against humanity committed in the Democratic Republic of the Congo, and confirmed his 30 year sentence.
- The opening of the trial in the Al-Hassan case in July 2020 and is still ongoing—this is the first case before the ICC in which persecution on grounds of gender is being considered.
- The March 2021 Appeals Chamber decision confirming acquittals of Laurent Gbagbo and Ble Goude in the Cote D’Ivoire situation.
- The 2021 confirmation of charges and trial since April 2022 of Abd-Al-Rahman in the Darfur situation. This is the first ICC case in which crimes committed exclusively against men and boys have been expressly charged as gender-based crimes (specifically, as persecution on intersecting political, ethnic and gender grounds). I would also recognize the improved cooperation of Sudan in the Darfur investigation and cases—with the Prosecutor presenting his most recent report on the Darfur situation to the U.N. Security Council from Sudan just a few days ago, something that would have been unheard of not too long ago. And, overall, the beauty of the permanent ICC is that it can wait for changes that allow for individuals to be turned over or surrender themselves many years after the events and indictments.
- The December 2020 decision in Lubanga approving the implementation of collective service-based reparations for victims.

- The Prosecutor has expanded the geographical scope of investigations to, for example, Georgia, Afghanistan, Palestine, the Philippines, Ukraine, and Venezuela.
- And, I should mention, in June 2020, then-President Trump imposed economic sanctions and visa restrictions against ICC officials (including Fatou) in response to the Afghanistan investigation. In 2021, the U.S. revoked the sanctions.

You heard a number of important jurisprudential developments yesterday with respect to the International Residual Mechanism for International Tribunals, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia, so I will not repeat them here. I will add, however, that there have been developments in terms of important cooperation between the International, Impartial, and Independent Mechanism for Syria and national authorities, including in Germany, leading to domestic prosecutions and convictions of individuals for crimes committed in the Syrian conflict.

My final focus in this Three-Years-in-Review survey relates to the funding of international criminal justice.

These past three years have shown that there are very real struggles both within tribunals funded by assessed contributions, and those voluntarily funded.

Let's start with voluntarily-funded tribunals.

The RSCSL's 8th annual report in 2021 noted a number of activities—e.g., on the Prosecution and Registry side, responding to requests for assistance from a number of national authorities, continuing witness protection, monitoring the convicted individuals, maintenance of archives, and conducting outreach—and a common refrain: in fiscal year 2021, the U.N. provided a subvention of \$2.5 million “as a bridging financial mechanism” and that the Residual Special

Court for Sierra Leone's (RSCSL) Oversight Committee, and Court principals, undertook ongoing efforts to fundraise for the court. This was necessary, as the direct appeals by the U.N. Secretary-General to all U.N. member states, and the Government of Sierra Leone to the African Group of states, seeking voluntary contributions for the financing of the Residual Special Court were unsuccessful. Special Court principals, in particular the Prosecutor and Registrar and staff, held 74 bilateral fundraising meetings with countries to ask for their support to vote in favor of the subvention in the U.N.'s 5th Committee.

In 2021, the Special Tribunal for Lebanon (STL) was in the news because the Registrar published a report that June indicating that the exhaustion of the STL's funds was imminent due to a shortfall in expected voluntary contributions, threatening the viability of an appeal hearing in *Prosecutor v. Merhi and Oneissi* and cancelling the commencement of a second trial at the STL. The drawdown of the STL was initiated, and some states providing voluntary contributions indicated that their funds could only be used for the STL's orderly drawdown and completion.

The STL's 13th annual report for 2021-22 indicates that U.N. subventions helped to keep the tribunal alive, but that the 2022 budget—also funded by U.N. subvention and some donor funds—was 80 percent less than the 2021 planned budget, enough to get the court through the appeal I mentioned and to a transition to a residual phase.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) has also required U.N. subventions since 2014. The most recent subvention is for \$7 million, to which voluntary funds are added. Here is why subventions are required: for the ECCC, voluntary contributions for the international component of its budget have steadily declined: from \$17.7 million in 2015; to \$13.1 million in 2016; \$9.4 million in 2017; \$8.4 million in 2018; \$6.2 million in 2019; \$4.4 million in 2020; and \$3.9 million for 2021. So the percentage of voluntary contributions

vis-à-vis the approved budget declined from 65 percent in 2017 to 38 percent in 2020. This is due to donor fatigue and was affected by the COVID-19 pandemic requiring governments to divert funds elsewhere. On a positive note, the smaller contribution by Cambodia, and partners supporting Cambodia, for the national component of the budget has remained steady or increased.

The ECCC will soon transition to its residual functions, after the release of the final appeals judgment by the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia in Case 002 on September 22, 2022. At this time the court will shrink dramatically, as will its budget, to an estimated \$3 million.

These realities of the RSCSL, the STL and the ECCC demonstrate why a court created to be funded by voluntary contributions is not, in my view, a reliable or sustainable model.

These struggles for adequate funding, however, are not fully solved within courts set up on an assessed contributions model, such as the ICC. During the last three years, the ICC has also faced financial crises.

Why? Because some states are not paying their assessed contributions. The Committee on Budget and Finance of the Assembly of States Parties' most recent report indicates that, as of the end of March 2022, there were €55 million in outstanding assessed contributions, or 36.54 percent of the budget. Only 49 out of the 123 states parties had fully paid their assessed contribution as at March 31.

The Committee noted that the liquidity situation of the Court remains challenging. In 2020 and 2021, the Court had to rely on the willingness of some states parties being prepared to pay their 2022 contributions two months early in order to keep the Court funded. Without those early payments, the Court would have faced a liquidity shortfall of about €9.9 million by the end of December 2021.

However, while that kept the ICC operational, it means that there is likely to be a liquidity crisis later in 2022, with a predicted liquidity shortfall of about €4.7 million by December. Consequently, the Committee has encouraged the Assembly states parties to consider strong action: suspending voting rights of delinquent states parties and not waiving those suspensions; and indicating that delinquent states should not be able to present candidates for elected positions.

To close, I have touched on certain developments since the last Roundtable with respect to the Ukraine and Rohingya situations, jurisprudential steps forward, and budgetary challenges in international criminal law. There are many other developments—not least the shift to virtual justice during the COVID pandemic and various debates over international criminal law interpretation—that I did not have time to discuss. I am throwing it now to you: what have I not mentioned that should have been mentioned?

The Inaugural Magnitsky Lecture

Anna Ogrenchuk*

It is an absolute honor for me to participate in the 14th International Humanitarian Law Roundtable here at the gorgeous Chautauqua Institute.

I would like to thank the organizers and sponsors of this event.

On behalf of the Ukrainian Bar Association (UBA), I would also like to express our gratitude to David Crane, who is unfortunately absent today, Jim Jackson, and the whole team of the Global Accountability Network for their support and encouragement in our darkest hour, and for their help in forming a strong legal front to oppose Russian aggression.

Never before, being a commercial litigation lawyer in Ukraine, did I expect to be surrounded by so many international prosecutors. But now, this brings me hope and joy.

Speaking here in front of honorable prosecutors of international tribunals, celebrated experts in international law, and outstanding scholars, provides me with a chance to speak directly to the hearts and minds of the leaders of the world's legal community and to pursue the agenda of accountability mechanisms for the crimes committed in Ukraine. I can simply admire your devotion to promoting the rule of law in the world.

It is symbolic that I am addressing you today in the format of a Magnitsky lecture. In 2009, Russian lawyer Sergei Magnitsky died in

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a Moscow prison after investigating fraud involving Russian officials. His unfortunate death gave birth to the Global Magnitsky Act (2016) authorizing the U.S. Government to sanction foreign government officials worldwide who are deemed to be human rights offenders and freeze their assets. The Magnitsky Act establishes a direct link between human rights violations and financial sanctions. The modern system of accountability should build on this approach and strengthen international legal mechanisms. Bigger threats should come paired with a stronger response from the democratic world. Now we all are facing not only fraud by the Russian government but a disaster comparable only to the Second World War and Holocaust.

Before my remarks, I will show you a short video. I do hope it will give more perspective on the horrible situation in our country.

The sound you've heard was the sound of an air siren. Now, it is part of our daily reality.

If you connect your phone to the electronic alarm system in Kharkiv, Mykolaiv, or Zaporizhzhia, even for a day, you will hear the darkness and horror that overwhelm those cities every day.

Our kids are no longer enjoying their childhood. They are trying in vain to save injured adults and bury their parents.

On Ukraine's Independence Day, the 24th of August, a six-year-old boy was burned to death inside a train car after a series of Russian rocket strikes on the railway station in the central part of Ukraine. He is among another 400 kids whom we lost due to this unfair and aggressive war.

For the first time since the beginning of the war I returned to Kyiv, my home, in May, but what I found was not the place I left. I also visited Bucha which had once been a modern and comfortable

outskirt of Kyiv. Now it is a crime scene and memorial to crimes committed by the Russian Federation.

Even war, under international law, is governed by rules. But, obviously, Russia plays by its own rules.

Unbelievably, the Russian Federation is cynically alleging that all these crimes are justified by the norms of international law. Their decision to launch a full-scale invasion is based on Article 51 of the U.N. Charter, which grants the right to self-defense, and thus, in their minds, absolves them of guilt.

Russia was unashamedly initiating a resolution before the U.N.'s Council on overcoming the humanitarian crisis in Ukraine, despite being the sole and immediate cause of this disaster. Just a couple of weeks ago, it initiated a U.N. Security Council meeting to discuss the safety issues related to the Zaporizhzhia nuclear power station, currently occupied by Russia, and shift the blame for the possible nuclear hazard to Ukraine.

Jurisprudence is being turned upside down: the whole country shamelessly names this aggressive war as “collective security and special operation,” and genocide—as “measures of demilitarization and denazification.”

Anyone who has read George Orwell is not surprised: “War is peace. Freedom is slavery. Ignorance is strength.”

Both international law and the international legal order face unprecedented challenges.

I strongly believe that the future of not only Ukraine but also of Western civilization depends on how we manage to overcome these challenges.

The UBA, together with the international community, as well as numerous legal organizations like NYSBA, IBA, ABA, GAN, and others, have consolidated the response of the Ukrainian and international legal communities. We pledge to employ all international legal mechanisms in this regard and if there are no such tools, simply create them to achieve the following results:

1. End of war on the ground
2. Punishment of those responsible
3. Full compensation of all damages caused by the Russian Federation

Regarding Mechanisms to Stop the War

Currently, Ukraine has employed most of the available legal mechanisms which international law provides for ceasing war actions by Russia.

On March 2 this year, the U.N. General Assembly adopted a resolution which denounced Russia's invasion of Ukraine and demanded a full withdrawal of Russian forces. One-hundred-forty-one countries voted in favor of this resolution.

Later, both the ICJ and the European Court of Human Rights issued respective injunctions ordering the Russian Federation to stop war actions in Ukraine. However, Russia has profoundly and repeatedly ignored them, and the U.N. Security Council was unable to act due to Russia's veto.

This is an absurd and dangerous situation. While remaining a permanent member of a body that was created for the exact purpose of preventing acts of war, the aggressor state retains the right to veto, while simultaneously committing war crimes and crimes against humanity.

Our goals include:

- Depriving Russia of membership in the U.N. Security Council
- Suspending Russia's membership in the U.N.
- The U.N. Charter declares its determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of nations large and small".
- Now, almost 80 years on, this statement remains as far from affirmation as ever.
- The U.N., as the guarantor of peace, must finally uphold its responsibilities to "cease acts of aggression and other violations of peace." Otherwise, we must work together on creating a new, transparent, and genuine structure of rules and institutions to protect the peace.

Sanctions

We truly appreciate the unprecedented number of sanctions being imposed by numerous countries on the Research Forum, as they are of great help to the Ukrainian cause.

However, no sanctions are efficient enough while the aggression continues. The Research Forum did not stop the onslaught, but instead arrogantly announced the second phase of the war aiming to take eastern and southern parts of Ukraine.

According to *Bloomberg Economics*, Russia is still taking in billions from sales of oil, gas, and other commodities. This year Russia's oil-and-gas revenue will be about \$285 billion which exceeds last year's figure. We insist on full economic isolation of the Russian Federation and a full oil and gas embargo. It's the only alternative to a very long and damaging war in Ukraine, affecting the world in many ways.

Although sanctions can be effective instruments of pressure, they do not provide a remedy.

Compensation of all losses caused by Russian aggression

Therefore, full compensation of all losses suffered by Ukrainians, Ukrainian and international businesses, government institutions, and the environment must be the inevitable consequence of the aggression.

Ukraine has already put in a claim before the ICJ for reparations for losses caused by the aggression. However, we understand that the only body capable of enforcing such potential ICJ decisions is the U.N. Security Council where Russia has veto rights. Consequently, the international legal community should establish an international mechanism for damages using best legal practices.

Simultaneously, the following legal actions must be taken as soon as possible to ensure accountability of further damage compensation procedures:

- Conducting a thorough audit of all property of the Russian Federation, state-owned companies, and individuals who are part of the conspiracy of the Russian Federation.
- Identifying and freezing all assets of the aggressors. We truly praise the establishment in many countries of freeze and seize task forces.
- Developing tools for turning sanctions into real confiscations, and their integration into national legislation.
- Developing a mechanism to overcome the sovereign immunity of the Russian Federation, due to the war of aggression, on a national level.

The concepts of functional or restrictive immunity were developed after the Second World War and were aimed at ensuring friendly, respectful, and peaceful relations between the states. Even the functional immunity concept assists to provide a balance between states

if they act not as sovereigns but as parties to commercial relations. So, the purpose of states' immunity is to keep peace in the world when states respect the sovereignty and territorial integrity of each other.

Now it is discussed that the European Convention on State Immunity of 1972 and the U.N. Convention on Jurisdictional Immunities of States and Their Property of 2004 have become the real hurdle to holding the Russian Federation responsible for all losses and sufferings inflicted by its military aggression against Ukraine.

However, I am of the view that we need to emphasize the issue of significant importance that is often skipped. Despite the tort exceptions provided by Article 12 of the U.N. Convention and Article 11 of the European Convention, the claims for recovery of damages caused during the armed conflict by the military actions of the foreign state cannot be seen as damages inflicted during a peaceful time. Neither the U.N. Convention nor the European Convention govern situations which may arise in the event of an armed conflict. This was stressed in the explanatory note and commentaries to these treaties.

From my perspective, now it is the right moment to reassess the rules of international law and to fix the new ones to not allow any state-aggressor or state that is financing terrorism to escape liability for damages on the basis of its sovereign immunity.

Moreover, we can even point out the tendency of an increasing number of countries that are ready to consider the possibility to restrict the sovereign immunity of a state-aggressor or a state-sponsor of terrorism. I appreciate the significant role of the U.S. in that process, which not only implemented such an approach in national laws but has applied it as well. Ukraine is poised to follow it too.

However, in order to overcome the sovereign immunity of the state-aggressor we find it necessary to enter into a new international treaty

with those states which stand with Ukraine and are willing to oppose any act of aggression and terrorism in the world. Such a treaty has to establish a clear and undeniable rule that a state cannot invoke immunity from the jurisdiction of another state if it has breached the sovereignty and the territorial integrity of the second one.

Additionally, such an international treaty must govern the issue of freezing and seizure of assets of the state-aggressor and its residents on a unified basis for all its member-states. These sanctions are to be the response to a state committing any act of aggression or breach of the sovereignty and the territorial integrity of the foreign country without waiting for the end of the war.

New realities in the international order require new rules in international relations.

All aforementioned actions are strictly in line with the Resolution of the Parliamentary Assembly of the Council of Europe (PACE) adopted on April 28th. Namely, to use the assets of Russian citizens, subject to targeted sanctions, for their responsibilities in the war of aggression launched against Ukraine by the Russian Federation. Once they are confiscated definitively, they can be used to compensate Ukraine and its citizens for any damage caused by the Russian Federation's war of aggression.

The main goal of our assembly today is to ensure liability and punishment for each and every perpetrator guilty of crimes.

The world security system turned out to be powerless and unable to prevent and stop the largest war in Europe since 1945.

One of the reasons is that Russia has not had to account for atrocities committed during earlier conflicts over the last 30 years

starting from Chechnya, Georgia, Syria through the recent cases in Crimea and Donbas.

It's our duty as lawyers, attorneys, and prosecutors, to ensure the accountability of Russian Federation officials such as Putin, Shoygu, Lavrov, as well as the officers and soldiers for their crimes committed in Ukraine.

Those are primarily:

1. War crimes and crimes against humanity
2. The crime of aggression
3. Genocide

War Crimes and Crimes Against Humanity

It is common knowledge now that the Russian military commits war crimes and crimes against humanity in Ukraine. National and international experts and organizations have documented and analyzed the most common actions by Russian combatants, including mass killings, tortures, and rapes of civilians, targeting of medical facilities, indiscriminate use of cluster munitions, willful causing of the great suffering of civilians, murder, abduction, and detainment of government officials and taking of hostages, targeting of journalists and members of the press, bombing of evacuation and humanitarian routes, and forced deportation of Ukrainian citizens.

In addition to “classic” war crimes, new criminal acts have started emerging in the course of the war, for example, the crime of starvation—the deprivation of essential civilian resources as a means of war. Starvation appears to have been a deliberate part of the Russian strategy in Mariupol, a city that has been under siege for months. Russian forces shelled humanitarian corridors and cut off the

electricity supply. As a result, countless civilians were killed due to no access to food, shelter, and water.

According to recent news by the U.S. State Department and Yale University, there is evidence of the establishment and usage of 21 (!) sites in the occupied part of Donetsk that are used to detain, interrogate, or deport civilians and POWs in ways that gravely violate international humanitarian law. Nearby mass graves hint at the fate of persons held there.

We have all heard about the intentional murder of more than 50 and the injury of another 70 POWs from the Azov battalion who surrendered to the Russian army and were held in a prison in Olenivka. The Olenivka massacre is one of the most brutal crimes committed by the Russian Federation.

The above crimes committed in Ukraine are being investigated by the ICC, Ukrainian law-enforcement authorities, and joint investigative efforts. The Office of the Prosecutor General informed that since February 24, 30,097 war crimes were registered and are being investigated in Ukraine. In addition, at least eighteen countries of Europe started their own investigations based on the universal jurisdiction rules.

The ICC is the key institution to qualify the actions of the Russian military. Ukraine recognized ICC jurisdiction back in 2014, thus the ICC Prosecutor was able to start an investigation as soon as a full-fledged war began. The working group between the Court and Ukrainian Prosecutor General has been established, and mobile groups launched to preserve and collect the evidence. This situation is unique since investigations were commenced “with the speed of light,” while military actions still continue.

As Deputy prosecutor Nazhat Khan mentioned yesterday, the scale and effectiveness of cooperation between the ICC and the Prosecutor General's Office of Ukraine reached an unprecedented level. We express our immense gratitude to Karim Khan QC, Nazhat Khan, Branda Hollis, Fatou Bensouda, and the whole ICC team.

However, there are certain risks and imperfections which still need to be improved, in particular:

- Despite the unlimited jurisdiction of the ICC in the territory of Ukraine, the Government of Ukraine has to ratify the Rome Statute to secure and demonstrate Ukraine's status as a developed democracy. The ratification should be supported by the adoption of national legislation explicitly acknowledging universal jurisdiction in Ukraine.
- Increased transparency of investigations and coordination with the professional legal community and civil society would prevent duplication of effort and would enhance the efficiency of the overall response of the justice system of Ukraine to challenges posed by the war.
- As the ECHR repeated in a number of its judgments, "justice delayed is justice denied." In this case of blatant and cynical violation of international law and order, expedited proceedings are of utmost importance. Warrant orders and other tools at the disposal of the ICC and national justice mechanisms would strip President Putin of his support and would prevent further massive recruitment of soldiers.
- Judicial proceedings at the national level, although speedy, should comply with all guarantees of the right to a fair trial. The UBA previously suggested the presence of international observers in Ukraine in order to guarantee the balance between the speed and quality of proceedings. Ukrainian courts delivered the first verdict to a Russian soldier for the murder of a peaceful civilian. Further review of this verdict will create a precedent that will have an impact on all other cases.

Justice must be served, and it must be served quickly and efficiently. We believe that, as Ambassador Beth Van Schaack said yesterday, Russia's greatest weapon is time and stronger actions are needed urgently.

Russian atrocities in Ukraine—their ubiquity, speed, and the apparent ease with which they are committed—present the world with the same problem: Russian troops seem to believe that this is just how war works. The challenge facing prosecutors and investigators is to break the iron bubble that has long shielded Russia and to end a chain of crimes and a chain of impunity.

Crime of Aggression

Eight years ago, in February 2014, Ukraine became the victim of acts of aggression committed by Russia's President Putin in a blatant violation of the foundational principle of the prohibition of the use of force against the political independence and territorial integrity of another state. On February 24, 2022, Putin's Russia launched a large-scale war of aggression against Ukraine.

Whilst international criminal justice has important achievements in addressing crimes against humanity and war crimes, progress concerning the crime of aggression, or crimes against peace as it was labeled during the Nuremberg Tribunal, has been very limited. Unlike other core international crimes, the ICC faces objective difficulties in gaining jurisdiction over the crime of aggression.

Now the time has come to complete the architecture of international criminal justice initiated by the 1942 London Declaration. We need to fill in the gap and establish a special tribunal that would have specific jurisdiction over the Crime of Aggression against Ukraine (Special Tribunal).

The establishment of a special tribunal for the Crime of Aggression against Ukraine is necessary, as currently there is no international or domestic court or tribunal that could try Russia's top political and military leadership for committing the crime of aggression against Ukraine. The creation of a special tribunal closes this gap.

Such a tribunal will not in any way impede operations by the ICC but will rather complement its important work. Furthermore, the tribunal should be based on the norms and approaches applied by the ICC and set out in the Rome Statute.

International organizations and governments increasingly support the establishment of the tribunal. Resolutions of the Parliamentary Assembly of the Council of Europe 2433 (2022) and 2436 (2022), of the European Parliament 2022/2655 (RSP), and the declaration "Standing with Ukraine" of the NATO Parliamentary Assembly, are prominent examples of the need to act.

The tribunal can be established on the basis of a multilateral treaty between states or on the basis of an agreement with international organizations, like the U.N., European Union, or Council of Europe.

The Government of Ukraine acknowledges complications in securing votes of the General Assembly. The U.N.-based tribunal seems to be the best route; however, it should be accompanied by advocacy efforts on all levels as we have to be sure that, first of all, the necessary number of votes is secured and, secondly, that key states like the U.S., UK, France, and Germany support the initiative. In view of this, various routes for the tribunal establishment are being explored. Regardless of which platform will become the basis for the creation of the tribunal, one thing is certain: the crime of aggression should be prosecuted. Otherwise, we will give birth to the precedent of having potential consequences for the next generations.

A few practical considerations might be important. In order to focus the tribunal's jurisdiction, it should only be aimed at the crime of aggression by the highest political and military leadership of the RF and the Republic of Belarus. A narrow and clear objective of the tribunal would also mean a reasonable budget as the tribunal would not have to review cases of hundreds of middle-level officials.

The tribunal should not be established in one day. As soon as Ukraine and its allies agree on a possible model of the tribunal, its creation might commence in stages, the first one being the appointment of a prosecutor and establishment of their office and appointment of one presiding judge followed by the establishment of an initial registry.

Finally, I believe that the temporary jurisdiction of the special tribunal should cover all events since February 2014.

Genocide

For the final part of my speech, I would like to focus your attention on the unspeakably evil, yet extremely important, a matter of the crime of genocide.

The evidence we have at our disposal shows that all aforementioned actions are being systematically committed by the Russian state, ranging from Russian politicians denying Ukrainian nationhood to Russian soldiers raping Ukrainian woman. This war is not a war, but rather an attempted annihilation fueled by fury and hatred against everything Ukrainian.

A number of countries, namely Canada, Poland, Latvia, Lithuania, Estonia, the Czech Republic, Ireland, and others, have already recognized the Russian actions as the genocide of the Ukrainian people.

However, our task as a law-abiding society remains much more challenging. It is to legally prove the intention to destroy the Ukrainian nation and Ukrainian identity. We do understand that international courts have set a very high threshold for proving that.

According to the recently published, An independent legal Analysis of the Russian Federation’s breaches of the genocide convention in Ukraine and the duty to prevent, conducted by the New Lines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights, there are:

1. Reasonable grounds to conclude Russia is responsible for (i) direct and public incitement to commit genocide, and (ii) a pattern of atrocities from which an inference of intent to destroy the Ukrainian national group in part can be drawn; and
2. The existence of a serious risk of genocide in Ukraine, triggering the legal obligation of all states to prevent genocide.

We believe that today there is ample evidence that Russian policy is aimed at destroying the Ukrainian nation, which is visible in statements, documents and decisions of Russian state officials. In addition, all the following genocidal acts are being systematically committed on Ukrainian soil:

- Killing and causing serious harm—the evidence in Bucha and other cities are self-explanatory. The Russian soldiers’ most common killing methods are hands tied, tortured, and shot in the head from close proximity.
- Deliberately inflicting physically destructive conditions of life are seen in Russian “filtration camps” for Ukrainians, months-long sieges of Ukrainian cities, and deliberate attacks on shelters, evacuation routes, and healthcare facilities, destruction of vital infrastructure, indiscriminate shelling of residential areas, etc.
- Imposing birth prevention measures include mass rape and inhuman treatment of women and children.

- Forcibly transferring children of the group: Ukrainian children are being separated from their parents with a view to having them adopted by Russian families.

Public speeches of Putin and all Russian elite rhetoric are another clear indicator of genocidal intent.

For those who may be wondering why it is so important to hold Russian officials accountable, in particular for the genocide of the Ukrainian people, the answer is both simple and horrifying: these genocidal practices are the not an invention of this new war.

The Russian Federation's predecessor, the Soviet Union, employed the same tools of mass murder, deportation, and forced labor, exile, and starvation against the Ukrainian people for more than 100 years.

Many prominent politicians and experts voiced the necessity to recognize this in the past, starting with 1920 when the first famine was inflicted upon the Ukrainian people by the Soviet state. However, the second starvation-driven genocide attempt by the Soviet Union was far deadlier; between 1932 and 1934, 5 million Ukrainians were starved to death.

I do believe that now, seeing Russia employ the same deadly technique (starvation as a weapon) it is very much the fault of the cowardice of past generations when they failed to act to ensure global condemnation.

Those and many other acts of Russian genocide against the Ukrainian people are described, with painful accuracy, in the article "Soviet Genocide in Ukraine" by the distinguished Polish-American scholar, Dr. Raphael Lemkin, who first coined the term "genocide" in 1943 and who championed the Genocide Convention.

I would like to finish my speech with his quote:

"For the Ukrainian is not and has never been, a Russian, Ukrainian culture, language, religion—all are different."

Not only these qualities, but also our desire to live in a democratic society, governed by the rule of law and based on Western values, are primary reasons for our fight. For this, we are paying an immense price. The words “never again” should not just be a phrase, but a call for action.

The international legal community should join together to survive in these dark times.

We will be faced with a Third World War the moment we forget the lessons of the Second. Let's be wiser than that.

As ambassador Hans Corell proclaimed, we need to restore the rule of law. This is the least we could do for the next generation.

Glory to Ukraine, glory to the Ukrainian army, glory to all Ukrainians, and to everyone who stands with Ukraine!

Thank you!

Panels

Benjamin B. Ferencz on the 75th Anniversary of the London Agreement

A recording of Benjamin Ferencz, originally intended for the 2020 Roundtable, was played to the attendees prior to the Ferencz Prosecutors' Commentary and Update, which follows below. It marked the 75th anniversary of the London Agreement. The below is a lightly-edited transcript of the recording.

Greetings to you all. My name is Benjamin Ferencz, and I'm speaking you from Delray Beach, Florida, on the 22nd October, 2019. I want to thank the sponsors of your event for having invited me to share some thoughts briefly with you regarding the topic I understand you're discussing, and that is the legacy of the London Charter.

My own experience with the issue of trying to create a more humane and peaceful world goes back to my earliest days as a student at the Harvard Law School when I did the research for a book by a professor on war crimes.

My experience during the war, once the war broke out, was as a combat soldier who landed on the beaches of Normandy and went through all the battles from the Maginot Line, the Siegfried Line, and the final battle of the war, at the end of which I was an investigator in the army looking for evidence of war crimes, and I entered many concentration camps liberated by the army of General Patton, who was my commanding officer, and I saw the horrors of war first-hand, with the dead bodies lying on the ground begging with their eyes, with anything, for a little help—a horror which is indescribable and incredible to a rational human mind, and which of course has never left me. I have spent the rest of my life trying to create a more humane and peaceful world and now since I am soon entering my 100th year, I am

trying to limit my traveling, and I ask to be excused for not joining with you, but just to give you my observations of the overall picture today.

The London Charter was a very serious effort to create a rule of law which would govern the conduct of states and individuals to prevent any future recurrence of the type of atrocities that I personally witnessed in World War II. You will recall from the excellent biography of Justice Jackson by John Barrett that Jackson was a principle mover in shaping the London Charter. His goal, of course, was to establish a permanent rule of law which would in future prevent the type of atrocities which had occurred during the Nazi period. I was much influenced by Jackson's opening remarks, as well as the conduct of the trial. I left Germany at about that time—I was still in the army when the trials began.

When I got home, I soon found that my wartime experiences were not of any value for a beginning lawyer. I passed the bar and finished my Harvard degree just when the war broke out. I was invited to go back to the Pentagon—they wanted to recruit me to be a war crimes investigator of the twelve additional trials which were planned after the Jackson trial (as I call the International Military Tribunal). It was in that capacity where I personally witnessed all the horrors of World War II. Incredible, unforgettable pictures of dead bodies lying all over the ground, pleading for help, their eyes, crematoria, surrounded by mounds of bones packed up like hardwood waiting to be burned. The absolute starvation of the inmates and all of that had a tremendous effect on me. I didn't quite realize it until in retrospect I looked back at my life and I see that everything I've been trying to do since that time has been to create a more humane rule of law which would protect people, regardless of their race or creed, with fundamental human rights, enforceable by an independent international tribunal. That was my theme when I was a chief prosecutor in the Einsatzgruppen trial which convicted 22 defendants of killing over a million people as members of extermination squads.

That, of course had a great traumatic effect on me, and I've written many books—all of which are available free on my website, benferencz.org—and I recommend that you read them or see the latest movie, which is a Netflix picture called *Prosecuting Evil: The Extraordinary World of Ben Ferencz*.

But, the bottom line of all of this is, of course, we have failed miserably—*miserably*—in our attempt to create a more humane and peaceful world. Most of the nations of the world signed on, but big powers were reluctant. The United States has been lead in opposing—*opposing*—any effective international criminal tribunal. The hope of Justice Jackson that the United States would lead the world in showing that it was possible to create the rule of law for people who committed war crimes and crimes against humanity—I'm sorry dear Justice Jackson, we haven't done very well.

We've made some significant progress: we do have an international criminal court, which was very difficult to create. I was invited to do some opening remarks when the court was being debated in Rome before the statute was accepted. I was invited to do some closing remarks when the first trial came to an end. I did all of that in no official capacity whatsoever—nobody can fire me because nobody hired me, and I am not for sale. I call the shots as I see them, and I am ashamed—*ashamed*—of the position taken by the United States not following Jackson's urging and tradition. It has been not only the current administration, where you have a John Bolton who says we don't need an international court and there is no such thing as international law, we have the power, we should use the power, and if anybody disagrees, we just show them that they can't push us around—that has been the position of a lot of people in the United States, which has encouraged politicians to be very cautious in supporting any new tribunal which might try Americans for crimes. We live in a time when it has not yet become a reality, despite all my efforts to have the world change and recognize that war is no longer

a useful asset in international relations. President Eisenhower had recognized that. He was the Supreme Commander in World War II, and he said, in a very real sense, the world can no longer rely on first. If a civilization is to survive, it must rely on the rule of law. That was an echo of Justice Jackson's argument and your Roundtable, which is considering what happened to the London Charter, which set forth these principles in some detail—always leaving a few loopholes to make it acceptable, and the loopholes were seized upon: everything is being fought in self-defense because self-defense is an inherent right. Aggression is another example. You can't punish somebody for aggression if you haven't defined the crime. The United States fought against that definition no matter what came forth. I sat through all the readings; hundreds of diplomats arguing to try to define one word, and they always came up with some kind of excuse. The United States never put on the table an acceptable definition.

Finally, I came to the conclusion personally that we have to go for condemning crimes against humanity. Nothing is more inhumane than war itself. All wars are genocidal. Those are the things I condemned as a prosecutor. I wish they were being followed everywhere. There are a lot of young people who agree with me all around the world. I am overwhelmed by their letters of approval. But the guiding powers, particularly now in the United States. John Bolton has been kicked out, fortunately, but there are echoes of the people who believe in his point of view, and they must be respected if you can't agree with them. I don't agree with them, but they are entitled to be heard in a democracy. When will the world wake up in a time when we now have the capacity from cyber space to cut off the electrical grid on planet earth, meaning everybody will be killed on this planet. The Russians can do it, the Chinese can do it, the Americans can do it, and who knows who else? As long as you have that possibility, you have to be very careful not to use it because the moment you use it, it's goodbye, kids. I'm not concerned with my life—I'm on the verge of reaching 100 years now—I'm concerned with the lives of the young

people in the future. They've got to say, "hell no, we won't go. We're not wasting more money to build armaments to kill more people when we need that money to help more people whose desperation leads them to do acts of what we call terrorism." That's the world in which I live, the world in which you live, and if you don't change it, I don't think you'll live to be a hundred. I don't know if I will either, but I think I'll probably make it.

I wish you all the best of luck and regret that I can't be with you. Goodbye.

Benjamin B. Ferencz Prosecutors' Commentary and Update

This panel was convened at 10:45 a.m., Monday, August 29, 2022, by its moderator, Michael Scharf, Dean and Joseph C. Hostetler–BakerHostetler Professor of Law at Case Western Reserve University School of Law.

MICHAEL SCHARF: Good morning everybody. For those of you who do not know me, I am Michael Scharf. For the last nine years, I've been the Dean at Case Western Reserve University School of Law, and, like Leila, I've been coming to this and participating since its very origins. Before we brought Jim Johnson, "Jimmy," into our academic family, I was running our war crimes research office. Jim is now the Director of the appropriately named Henry King War Crimes Research Office. Now, this is the Prosecutors Round Table and, other than the keynote address which we heard, this is often the highlight of the conference, and this year we are taking advantage of technology; We have two of our prosecutors zooming in from across the world. You see already that Norman Farrell is there from his cabin in Canada and Brenda Hollis will be joining us from overseas as soon as she gets out of a meeting in a few minutes.

Let me start by introducing the prosecutors. We don't need long introductions because they are world famous, they are the reason you all come to this conference year after year. We'll start and we will go in the order that the Tribunals were created. Let's start with Mathias Marcussen, the Senior Legal Officer of the Office of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, that is the IRMCT. There you are. Before we even begin, I use the old word, the old name, for that, and Mathias told me there is a whole story behind the naming of this, the renaming of the Tribunal. Do you want to just tell us real quickly?

MATHIAS MARCUSSEN: Thank you very much for the kind introduction and, I'm standing in for Prosecutor Brammertz, unfortunately he could not make it, so I am here today. He passes regards to all of you. The story about our thing is, we are of course an organization that was taken over after the Yugoslavia and Rwanda Tribunals. We were initially called the MICT, for political reasons we had to rebrand to our new name, which is really not a good institutional thing, actually, when you have to rebrand, because people don't know who you are, but we have adopted that we call ourselves the "Mechanics" when we talk about ourselves as the "Mechanism." The Mechanisms. Then some other people made some other mechanisms and now that is also confusing.

MICHAEL SCHARF: Some people call them the new Coke, some people call them the Mechanism. It's all about rebranding.

Next we have Jim Johnson. Now you all know Jim Johnson, but he mentioned that he forgot to introduce himself as one of the Chief Prosecutors. Jim, like the other Chief Prosecutors, has a brick out front at the Jackson Center and he started out as a Senior Trial Attorney and then Chief of Prosecutions with the SCSL, and now the Chief Prosecutor for the Residual Special Court for Sierra Leone.

All right, in a minute, Brenda Hollis is going to join us, and I will tease her about the number of bricks that she is costing the Jackson Center, because she has been a Chief Prosecutor now at three different tribunals, she holds the history record around the world for the number of tribunals somebody can be Chief Prosecutor. She is the last Chief Prosecutor of the extraordinary chambers in the Courts of Cambodia, that now is closing down and there will be a P3 taking over her position. In U.N. parlance that means a lower-level person.

Then that good looking gentleman on TV there—that's Norman Farrell, the Chief Prosecutor of the Special Tribunal for Lebanon. Norman, thanks for being with us.

Next, Nazhat Kahn, the Deputy Prosecutor of the International Criminal Court and this is her first time with us at Chautauqua. I have to tease Fatou a little bit because every time we have done this panel, it's been Fatou representing the International Criminal Court, and now she's ambassador and she's investigating the Tigre atrocities and doing all kinds of other exciting things. But thank you for chairing the entire round table conference this year.

We're going to start out with three types of questions and then, if there is time, we will have questions from the audience. The three types of questions are, first, questions related to recent developments at each of the tribunals, and I had my team back at Case Western helping me research these things, so I'll ask specific questions about that. Then we are going to ask questions about how the experience and precedence of each of the tribunals relate to the crisis in the Ukraine, and I think that's probably the most interesting portion. Then finally, we will talk about what's coming up in the future of each of the tribunals.

Going in order, we'll begin with Mathias. Even though the Yugoslavia Tribunal and the Rwanda Tribunal have now shut down, there are still some important International Tribunal cases being tried by your mechanism. For example, can you tell us about the case of Félicien Kabuga the Founder of Radio RTLM?

MATHIAS MARCUSSEN: Thank you, yes, I think we heard some very important aspirations about justice being delivered and the Kabuga case is one that shows that, ultimately, there is hope that justice will be delivered even if it may take time. Kabuga got, as you may know, arrested in Paris in 2020 after having been a fugitive for 26 years. I think it is a case that gives us some hope that, with persistence

and with effort, justice can be done. Of course, we hope justice will be done much quicker, but it is important to have the will and the tenacity to stick to it and ultimately bring justice. It is possible and that is a hopeful lesson that we can draw from this case.

But, very quickly about the case. Kabuga was the Founder, one of the Founders, of Radio RTLM, the “genocide radio” in Rwanda. He also was a wealthy businessman, in addition to founding RTLM. The RTLM was really instrumental in the preparation of the genocide in spreading hate and, ultimately, very operational in sending out broadcasts about very specific individuals moving around to be intercepted and killed. That radio station was important. He also used his wealth to finance and train and arm the Interahamwe Militia, which was really one of the big killing machines in the genocide in Rwanda. As the genocide government got pushed out of Rwanda and things got difficult, he was instrumental in fundraising efforts to be able to procure arms and weapons that were distributed up until the very end of the genocide. He’s charged with Genocide, the Incitement to Genocide, Conspiracy to Commit Genocide, and then with a range of Crimes Against Humanity. We will start this trial soon. A lot of people know about the RTLM; but in Rwanda, the RTLM is really important and it has really had a prominent role in people’s perception of the genocide and how it developed. I really think it is difficult to underestimate the importance of being able to try Kabuga. The case starts in opening statements in precisely a month from today with opening statements.

There are some important challenges in the case that I think we need to also mention when we talk about the aspirations of being able to bring justice eventually, and that is obviously that 30 years have passed. Finding witnesses still able to come and testify is a massive challenge, and as it is with time people get older and there are health issues that have to be dealt with. At the moment, we are in a situation when Kabuga is fit to stand trial but in order to accommodate his health situation, the court will only be able to sit three days a week for two

hours. Now, anybody who's been involved with these kinds of cases will think "but then we will be done potentially in, 2035?" But we have tried to limit the indictment and we have sought the admission of a lot of evidence in written form. It is now expected that we can do the prosecution presentation of evidence in 46 hours, which is record breaking, I think, for these kinds of trials. But still, with the schedule, we will still be going on until March or April. There are some real challenges, but we should hold our hopes high and be glad that we are able to start the case, and hope that we can finish it.

MICHAEL SCHARF: Okay, thank you. You know, the takeaway is, I think, that most of you out there thought that the Rwanda Tribunal was no more, that all of the cases were done, that if there were any leftover cases that they'd be prosecuted using Universal Jurisdiction at domestic courts, but in fact the Mechanism continues the legacy and this would have been one of the bigger cases if it had been tried during the Rwanda Tribunal's existence. It's still happening, there'll be news about this as the trial unfolds starting next month.

Let me ask you another question; Let's go from the world of Rwanda, because your mechanism covers two tribunals, to the world of the former Yugoslavia and there are two Serbs. Stanišić and Simatovic, who were prosecuted before the mechanism for their involvement in a joint criminal enterprise which aimed to remove non-Serbs from areas of Croatian Bosnia. In 2021, the mechanism found them guilty, but on a really narrow basis, and I understand that both sides have appealed. What happened? What are the main issues on appeal? Let's try to keep this short though so we can move on to the others.

MATHIAS MARCUSSEN: Once again, I think that it is important to underline the importance of the case. Stanišić was the chief of the Serbian State Security Service during the war in the former Yugoslavia and Simatovic was his deputy. We are talking about really high-profile accused. Actually, they were first tried by the Yugoslav Tribunal and

acquitted. Then, on appeal, we managed to get the acquittal overturned and a retrial was ordered and that ended up in the Mechanism. The case, you're right, is about a joint criminal enterprise to basically commit, to keep it short, the ethnic cleansing campaign in Croatia and Bosnia. So, a massive, massive case; there is a presentation of a big volume of evidence about crimes Milosevic and high-level leadership was alleged to be involved in of the joint criminal enterprise. We got a conviction in the retrial, but only on the basis of the aiding and abetting crimes committed by some of their men in Bosanski Samac, a village in Bosnia. A massive case, with—frankly—a really disappointing and narrow conviction. We are appealing and the most important part of our appeal is that we are appealing the finding that they only aided and abetted but were not members of the joint criminal enterprise. That said, there was a finding in the judgment which is of really important historical value. Namely, there is a finding that there was in fact a joint criminal enterprise which involved Milosevic and the Serbian leadership in Belgrade, the Bosnian Serb leaders and the Croatian Serb leaders. That is super important. The finding is just that these accused, though they contributed to the forces who committed the crimes, were not members of the joint criminal enterprise. What it comes down to, really, is a question of how you evaluate evidence. I really hope we will be able to succeed in the appeal. It's a hugely important case. It's a case that is important for future leadership cases and on how to assess evidence in such cases.

We're at the state now where we have completed the written part of the appeal. There will be oral arguments later in the year and a judgment probably next year.

MICHAEL SCHARF: When you hear about joint criminal enterprise, we haven't heard that term for a little while now. That was one of the legal theories of the Yugoslavia Tribunal, at the Rwanda Tribunal, the Cambodia Tribunal had a slightly restricted version of that theory. The International Criminal Court has departed from that, they don't

call their liability joint criminal enterprise and, when people talk about if Ukraine is going to be prosecuting domestically or via Universal Jurisdiction in other countries the crimes of Russia, they're talking about resurrecting the joint criminal enterprise doctrine because it really makes it easier to get at the entire enterprise of perpetration.

Let's go talk to Jim, Jim is the Chief Prosecutor of another Mechanism, the first—the Residual Special Court for Sierra Leone. I mentioned Charles Taylor, he didn't really go away. I mean, he is locked away but he is still pestering your tribunal and, as I understand it, he requested in a motion to be transferred to a safe, third country prison last year. He had this theory that the UK prison where he is at was not COVID friendly and he didn't want to die from the pandemic, he wanted to go somewhere else. Tell us about the outcome of that, what was the rationale and what's the precedent because I'm sure that there are people all over the world who were just chomping at the bit to use his argument if it had been successful.

JAMES JOHNSON: Yes, shortly after the pandemic hit we had a motion from Charles Taylor, basically saying that he was afraid that he would catch COVID in the UK prison where he is serving his sentence and that he should be moved to somewhere that is, indeed, safer. He didn't specify a particular location although he has in the past, this is not the first time that he has tried to get his place of confinement changed. Previously, he tried to get his place of confinement changed to Rwanda with the other prisoners or somewhere else in Africa, but he did request that he be moved. This was a filing to the President of the Court since the President has the authority to determine where he would indeed serve his sentence. Basically, the President, in the end, pretty much agreed with Prosecution that it's called a pandemic for a reason and that, indeed, you're safe where you are in a UK prison, which was taking every precaution that they had available to them to ensure that their inmates did not come down with COVID, and you are going to, quite frankly, stay right where you're at.

The second part of your question was...?

MICHAEL SCHARF: What do you think that precedent will mean for people who are in prisons around the world?

JAMES JOHNSON: Well I hope that that's clear! You're going to stay exactly where you are at.

MICHAEL SCHARF: I do have another question for you, and there's some background here. In the 1990s, there were opinion polls taken in Germany to find out what the German people, at that point, remembered or knew about the Holocaust and, it turned out was that what was taught through the Nuremberg Tribunal was not what they remembered. Rather, the stuff that was fictional from the mini-series that was highly watched both in the U.S. and throughout Europe called the Holocaust with Jane Seymour and other actors. What it indicated to the authors of that study was that, if you have a tribunal and you think you're educating the public, or as Beth mentioned the "expressive function" of these tribunals, it doesn't happen from just watching the hearings or the proceedings. Maybe it takes fictional television and movies to make it really set in, but I want to ask you, in March of this year, your tribunal completed preserving the public archives of the Special Court for Sierra Leone. They are now available at the Sierra Leone Peace Museum. I want to ask you Jim, if you think that this is the best way to ensure that the lessons from the Special Court for Sierra Leone are learned by the population of Sierra Leone and whether there should be other steps including what I was talking about, with documentaries, television, to try to teach the next generation about what happened and avoid these things happening again.

JAMES JOHNSON: That's a very interesting question, and maybe first I should start off with some of the things that we have done and that we are doing, and possibly just say that more can always be done, because, if you've been watching the news, a couple of weeks ago

there were some significant demonstrations in Sierra Leone. You very much start worrying about whether you are seeing the conditions return that led to the conflict initially in Sierra Leone, and how do you get on top of that? There has been concern by many that maybe the government response to these recent demonstrations was a little more forceful than maybe it should have been. I think the last number I've seen is that there were 26 killed in those demonstrations, four or six of those were government security forces, the remainder were those who were demonstrating in Sierra Leone. I guess the point is that you have to be doing something.

We have indeed finished the Peace Museum in Freetown, Binta Mansaray, our Registrar has just done a phenomenal job in collecting non-core funding to allow her to make the public archives available. Included with the Peace Museum is a Memorial Garden in Freetown. We have school groups visiting the Peace Museum several times a week. As I mentioned, the Registrar has obtained non-core funding from several interested states, to help us put together an outreach program. We have a new generation of young people in Sierra Leone that were never a part of the conflict, they don't know what happened, they don't appreciate what happened and it's not taught in schools. We are trying our best we can to fill that void, but then lastly, would other things help? I am sure that they would. The problem from our perspective is we're simply not funded for it. Our statutory mandate is clear. We have very specific mandates that we are funded to perform and, quite frankly, an outreach function is not part of that. That's why it's been so helpful that Binta's been able to raise money to do what we have done. But more needs to be done and I think that's clear.

MICHAEL SCHARF: We do have Norman next. Norman Farrell, as I mentioned, is and has been the Chief Prosecutor of the Special Tribunal for Lebanon. Norman, of the four defendants that were tried in your tribunal, originally one was found guilty but three were found not guilty and then, one of the things that is different in the United

States is, at these tribunals, the prosecution can appeal. We don't have prosecution appeals of acquittals in the US. You appealed, and the Appeals Chamber, in March of this year, reversed the three acquittals. You're now four for four, and I want to know if you characterize this as a big win, and what has been the effect in Lebanon, the reception in Lebanon for the success of your cases?

NORMAN FARRELL: Thank you very much, and thank you for the invitation. My best to everyone present and my colleagues who I've had the pleasure of working with over the years. First of all, we did succeed on the appeal of all persons we appealed, but we appealed two of the three, just to be clear. First of all, the judgment was a success in many ways. First of all, the Trial Chamber, in our submission, incorrectly applied the standard of proof of beyond a reasonable doubt. They applied it to approximately 56 facts, which made it almost impossible to get a conviction as individual facts had to be proven to a beyond a reasonable doubt standard. We were successful in changing the way that the Court looked at the facts.

Secondly, I think it was a win for a certain population of the Lebanese, considering the amount of money spent on the Tribunal, with only one conviction and no clear understanding of how the assassination took place and who was responsible. It is important to note that the Appeals Chamber also made a finding in relation to the role of a senior commander of Hezbollah, who was charged, but who had died during the trial. That person was found on appeal to have played a role and was co-conspirator. The Trial Chamber's decision in this regard was somewhat incomprehensible. Understanding who was involved in the assassination would mean, as far as I have been told, a lot to the Lebanese.

Thirdly, it was a very interesting case where the court accepted technical evidence. As you can imagine, when you are prosecuting a terrorist case at the international level, and in this case the perpetrators

were found to be associated with Hezbollah, it is difficult to have insider testimony or evidence about the structure or the workings of the different terrorist cells. We proved the whole case based primarily on technical evidence—that is, telecommunications data, telephone subscriber details, cell sites, cell tower locations, those sorts of things. The Court’s reliance on this evidence, both at trial, and then more conclusively on appeal, demonstrates its utility as evidence. The results were also important because it involved events in the Middle East. The ability to work in the Middle East, and I can speak about that later, and dealing with the situation in the Middle East was, I think, important in relation to cooperation, obtaining evidence, and being able to present that on appeal to a panel of international and Lebanese judges.

The one thing that I’d say was not as successful for the Prosecution was the Appeal Court’s conclusion on how to apply the standard of proof beyond a reasonable doubt. In my professional view, international tribunals have completely confused the application of reasonable doubt. We appealed the standard of proof used, and we lost. But to be honest, I still am at a loss as to how the standard was arrived at. The proof of beyond reasonable doubt applies to the factual and legal elements of the case. In other words, you have to prove beyond reasonable doubt the requirements which make the act a crime and the responsibility of an accused for those acts (called mode of liability). Those elements are essentially what needs to be proved in common law jurisdictions that apply it. At the international level, courts have held that you also have to prove beyond a reasonable doubt any facts that the court considers are “indispensable” to a conviction. It would be helpful if the judges could please tell us, objectively, what fact is considered indispensable that is not the elements of the crime and is not the mode of participation. If they could objectively define it, I’d be happy to withdraw my concern. It’s a mystery to many of us prosecuting. The general response of the courts is that it depends on the case, the evidence called, or the factual findings; essentially this means that the Judges cannot objectively define it before the

case, but that the Judges will know it when they see it. Well, what the Prosecution has to prove, and what the Defense has to defend, must be known before the case starts. That is why no domestic jurisdiction in the world that I know of, applies the standard of proof beyond a reasonable doubt to some unknown facts which are considered indispensable once the evidence is completed and after the case is over. I think that the elements of the crimes and things to be proved beyond reasonable doubt should be known beforehand so we can at least put them in the indictment. That's the one concern I have, that the court didn't accept our arguments in that regard. Thank you, Michael.

MICHAEL SCHARF: Norman, I do have a follow up. Beth mentioned that your tribunal prosecuted these people in absentia, you didn't have custody over them, they're still at large, one of them is dead. What are the prospects of them ever falling into custody? What would happen then?

NORMAN FARRELL: It's an interesting way you characterized it as "falling into custody." I think that's a good and apt description of the prospects of an arrest. If it happens, that's an interesting question as our tribunal is closing. If a convicted person is arrested, he or she has an automatic right to a retrial according to our Statute. The question will become what will happen if these convicted persons are arrested, where will they be retried? The evidence is being retained in different places as we close down, some in Lebanon and some in the UN. It would be an onerous task to put it back together if it was to be tried internationally. I think that there is another question, which is if they're ever arrested, could they be retried in Lebanon. There may be some restrictions, at least from the prosecution's point of view, because a lot of the information received was restricted in its use and who it could be shared with. That would be problematic, but they do have the right to retrial and there would have to be some mechanism, a court established to do so, or retried in Lebanon with support. Thank you.

MICHAEL SCHARF: Thank you and Nazhat has just joined us but, as I threatened, I do have a question, it's a softball question I think you guys can answer but, Brenda's not the only Chief Prosecutor of the Cambodia Tribunal, we have two standing right in front of me so I do want to ask you guys a question, and I'll just throw you a microphone to answer it. The question is this: case 001, Duch, and case 002, which was Samphan and Chea, resulted in convictions. Now 002 is on appeal and we'll find out the outcome of that in about a month, but case 003 and case 004 were dismissed last December, and I just want to know because I know you guys both worked on those cases, and I've heard Robert say—here, I believe—that if the founders of a tribunal were to design a tribunal statute to guarantee failure, they could not do a better job than the people who designed the tribunal statute for Cambodia, you did say that. I think that what you had in mind was what happened with 003 and 004. Do you want to say just a little bit about that? The question is what is the significance to the legacy of the Cambodia Tribunal that cases 003 and 004 were dismissed last December?

ROBERT PETIT: Well, to make it clear, the cases were dismissed on, and these were the four additional individuals that I believe, to my interpretation of the facts and the law, who I thought bore the criteria of being the most responsible, who had some of the same involvement and were actually directly responsible for a lot more crimes than some of the political figures that were prosecuted. However, my colleague at the time, also Andrew's colleague, and all the Cambodian judges differed and, basically, were of the same opinion that was quite openly expressed by the political leadership of the country, that only the ones, the five initial accused, were to be prosecuted. I guess if you want to only see the fact that they were not convicted, eventually, then that can be seen as a failure, if you want.

MICHAEL SCHARF: Is the glass half full, that they were indicted?

ROBERT PETIT: It depends how you define the glass, it depends what your container is. Is the process only about eventual verdict—I'm not saying conviction because it's about a verdict that's fair based on the law—or, in these cases of transitional justice, there are other benefits that may not rest only with the verdicts. For example, establishing the truth in a narrative that is invoked in open court. For literally every Cambodian born after 1980, what happened during the Khmer Rouge period was a blank, because it was not taught in school, it was actually actively ignored by the government and, indeed, the Prime Minister was on record saying, "I want the past to be buried." What the court did, for all of its failings, was to establish quite clearly beyond a reasonable doubt, as far as I'm concerned, what happened during that period. That's up to the Cambodian people and the rest of the actors to see what they can do with that. That, I think, even in the beginning was clear and was probably the ultimate legacy that could have been established and, I think, for that it succeeded. Literally thousands and thousands of people were in court and watched the verdicts, the trials, and if the archives and the residual process is well handled, will be there for generations to establish what happened.

MICHAEL SCHARF: That's a really encouraging answer, I appreciate that. Do you want to add anything to that?

ANDREW CAYLEY: Very briefly. I completely agree with Robert Petit that the individuals that he transmitted for full investigation to the Co-Investigating Magistrates were individuals who fell squarely within the jurisdiction of the court. I mean, if you take Meas Muth as an example of one of the uncharged/unprosecuted cases. Here you are looking at a man responsible for upwards of two hundred thousand dead, so it was a very serious case. I'm not going to be quite so upbeat as Robert. I think many of the positive comments that he makes are true, that it did create a national narrative for events that didn't exist because nobody talked about these events, there was a level of public engagement in the court which I think was more

significant than at any other of the international tribunals. You know, as Robert said, literally hundreds of people every day watching proceedings. I remember doing trials at the ICTY where there were a lot of people in the public gallery at the beginning and then as the months went by there was an empty courtroom, you know, even in the big trials, but there was a level of interest in Cambodia which was sustained throughout the proceedings. As I've also said, I think cases 001 and 002 met international standards, there were problems in those cases, but they did meet international standards. I think where the problem with the court will lie, in terms of legacy, is in the fact that there was no due process in cases 003 and 004, you can dress it up anyway you want but the reality is that, even if the cases has gone through to an effective closing order which didn't happen, closing order being an indictment, those indictments would never have been tried because they would have been able to establish a Trial Chamber because the Cambodian judges simply wouldn't have shown up. I think, unfortunately, the procedural mazes the Cambodians forced us into to stop Cases 003 and 004 damages the overall legacy of that court. It's a shame because the ECCC did a lot of good things in the county, I do share the view of many that if one is looking at setting up a hybrid court again for Ukraine, do not ever rely on the model from Cambodia. Dismiss that. An international prosecutor needs to be given full authority to take those cases on which fall within the jurisdiction of the court and to avoid the corrupting effects of political control we experienced in Cambodia. I noticed that the ambassador, this morning, did not mention the ECCC model, she mentioned the Special Court for Sierra Leone not Cambodia. My recommendation would be, for all the good the ECCC did, and it did many good things, that model needs to be consigned to history.

MICHAEL SCHARF: One thing you did mention that's really interesting for those of you who have not been to these tribunals is that the Yugoslavia Tribunal and the Rwanda Tribunal had very small audience areas in their courtrooms, the ICC it's slightly larger, but

if you went to the Cambodia Tribunal it was a Carnegie-Concert-Hall-sized audience and, when you say it was filled, you're talking thousands of people who would be bussed in from all over the country to see those cases. That's really something.

Now, Nazhat has been able to join us, this is your first time here as part of the round table, as I mentioned earlier, she is the Deputy Prosecutor of the International Criminal Court. I have a couple of questions for you about some of your cases. Now, unlike the tribunals that are closing down, your tribunal is expanding, you've got investigations over the five continents of the world, you've got a number of ongoing cases, so let's just talk about some of them. Now, I want to start with the Dominic Ongwen case; For those of you who don't know, he was a former child soldier who grew up in Uganda, got kidnapped by Joseph Kony, he was drugged and tortured and turned into a little killing machine which is what Joseph Kony did to thirty thousand people he kidnapped over the years, he grows up to be a Brigade Commander in the Lord's Resistance Army. In February of 2021 he was found guilty of 61 of the 70 charges against him, including crimes against humanity and war crimes, and the defense filed an appeal on a number of grounds. The hearing took place in February of this year, I actually, together with Milena Sterio on behalf of the Public International Law and Policy Group got to argue as amicus at appeal. It was really exciting, for those of you who have not argued in an international tribunal before. The Appeals Chamber is likely to rule in the coming months and, what I want to ask is what outcome are you hoping for? What are the most important issues to you, of that appeal, and what are the ones that you think will have the most significance to all the remaining cases and all the tribunals?

NAZHAT KHAN: First of all, apologies for joining the panel late, *mea culpa*. On the issue of Ongwen, so of course we expect, on appeal, to have the decision of the Trial Chamber upheld but also, I think very importantly, the issues that were presented on appeal were

also ventilated during trial, including duress as well as mental illness, and I think thoroughly ventilated very well, in our opinion, by the court. We do expect that decision to be upheld and, you know, I think an important feature of that case, that the offenses that were alleged were alleged in connection to conduct as an adult. I think that's a very important feature of the case. Let's see what the appeals court decides but we are cautiously optimistic.

MICHAEL SCHARF: Okay, and I will tell you that the issue that we focused on, that was who has the burden of production and the ultimate burden of proof on defenses, however that comes out that's going to have a significant effect on all the litigation to follow, and it's not an issue that's been definitively decided so, interesting stuff.

What I want to do is ask some questions relating to Ukraine, and I think that's what's on everyone's mind, Beth really teed us up for that discussion. What's going on at these tribunals is absolutely relevant to what happens next. Let's begin with Mathias: What are the most significant precedents from the Yugoslavia Tribunal relating to the prosecution of war crimes in Ukraine? The reason I ask that is because the Rwanda Tribunal wasn't as much about shelling cities and things like that, that's what the Yugoslavia Tribunal tried and there are some really important precedents that came out, I think some that have been criticized and some that have been welcomed. What do you say?

MATHIAS MARCUSSEN: I think that's true—I think that there have also been a lot of Yugoslav cases about camps and those kind of things, but I think that based on what we see happening now in Ukraine, some of the cases we've had about conduct of hostilities, I think, have been really important, especially the Siege of Sarajevo. As you all know, it was a long Siege of Sarajevo, basically, because it was sieged, there were military presence in the town, there was a lot of combat activities in and around the town, so legitimate combat, and at the same time massive crimes committed by Serb forces against

civilian populations in Sarajevo. There was extensive shelling of civilians, there were these awful sniper attacks where basically there was a sniper alley in Sarajevo where the sniper is just going to sit up on the hill and look right down through the town and shoot at people when they came by in a truck, in a car, or walked by. Quite precise targeting of civilians but also, and I think that's important for the events in Ukraine now, indiscriminate attacks. How do you deal with disproportionate or indiscriminate attacks? I think it's important that we talk about jurisdiction. The ICTY determined that some of these fundamental humanitarian law rules are "backed up," we could say, by individual criminal responsibility rules. We have Article Seven of the statute of the Yugoslav Tribunal that does not mention the crime of attack on civilians as a crime under customary international law, but the Yugoslav Tribunal found that such a crime exists and basically the elements of the crimes are fundamental rules about total prohibition of attacks on civilians. It is not a defense, you cannot claim that there was some sort of military necessity that would override that obligation not to target civilians. The Principle of Distinction applies, the Principle of Proportionality applies, and there is guidance given on what factors you can consider in trying to find out whether there had been an attack on civilians. I don't think that we can go into the details and issues of a legal nature.

I think the other thing that's important that comes from this is that terror is also customary international law. Attacking a civilian population with a view to inflict terror, to inflict trauma or psychological fear in the civilian population, and also the threat of doing so, can be a crime. I think those things, obviously, come to mind when we read about what's happening in Syria. I think that's some very important precedents from the Yugoslav Tribunal, actually covering the whole range of imaginable crimes, unfortunately, but the current context, in particular I think this conduct of hostility aspects seem, unfortunately, to be quite pertinent.

If I can quickly add, I think the other very important thing, you mentioned JCE—we have extensive jurisprudence on linkage and how you hold senior leaders responsible, e.g., Karadžić, President of the Bosnian Serbs, has been held responsible for the terror campaign and for the attacks on civilians in Sarajevo. Mladić, who was the Chief of the Bosnian Serb Army has been held responsible, they are both under the policy, of course, of superior responsibility and this JCE which, in my view unfortunately, has gained a bad name, has kind of moved out of the discourse. Anyway, that was found to be applicable in these cases and I think that it's very useful for prosecutors to look at those cases to get inspiration and learn lessons about also how difficult it is to do these cases, how technically challenging it is to prove these cases. It is definitely not to show that a building with some civilians got hit, much, much more going into it is going to be very resource demanding to try these sorts of cases, but the Yugoslav tribunal has shown ways that it can be done.

MICHAEL SCHARF: The next question is for Jim Johnson, and it's about strategies for how high up to target the people that you investigate and indict. This is highly relevant to the Ukraine, Paul Williams and I and the PILPG team had a Zoom meeting with the Director of the War Crimes Office that is doing the investigations in Ukraine, and he said this is one of the things he is focusing on—who to focus his investigations and indictments on. There are twenty-two thousand people, potentially, who could be prosecuted. That is very broad, and they don't have the resources for that. Now Jim, the Special Court for Sierra Leone, it defined its personal jurisdiction in terms of "persons who bear the greatest responsibility." It's a higher threshold than the ICC has, it's a higher threshold than the Yugoslavia Tribunal, the Rwanda Tribunal, or the Cambodia Tribunal had, so what do you think are the positive or negative lessons from using a standard like that in the context of Ukraine?

JIM JOHNSON: Well, our threshold to prosecute persons who bear the “greatest responsibility,” came from lessons learned from the ICTY and ICTR in an effort, right up front, to cut down the number of those that we would potentially indict. Certainly, a lot of things went into that, and Hans was a part of those discussions. But, you know, considerations of how much is it going to cost, how long is it going to last, and how can we do it, but before I hit that, let me just go back to the very basic premise: What’s the evidence that you’ve got, and who can you convict? The bottom line, first and foremost, is where does the evidence take you, and then beyond that, yes, you need to start getting into considerations of, “What’s our capacity, how deep can you go in the chain of command?”

MICHAEL SCHARF: Jim, let me ask a follow up. If you had not had that limit, you could have done what other tribunals and national prosecutions do, which is start at the bottom and you create a pyramid of evidence, and you get the lower level people to turn evidence over against the higher ones for plea bargains and leniency. You didn’t have that possibility?

JIM JOHNSON: We didn’t have that. From the very start, we were looking at those who bore the greatest responsibility. We were looking at only the very, very senior leaders to be prosecuted. There was no definition of greatest responsibility, this was at the discretion of the prosecutor. Of course, Robert and I were there in those initial discussions. You know, how many do you think we can indict? What are the resources that are going to be backing us? The longevity of the court? When our court was set up, it was set up with a three-year mandate, which was extended many times. Even though we had a much higher threshold on who we could indict and who was within our jurisdiction, it still lasted a long time.

MICHAEL SCHARF: The last comment you made, about the longevity of these tribunals, is an interesting one. When I worked at

the State Department, in '89 to '93, there were a lot of people still working on the Iranian Claims Tribunal, which had already been twenty years. It's still going on, we're fifty years on and they're still dining that. I predict that these tribunals, even the mechanisms, will have a life that just continues on, and suppose that's just one of the realities of international justice.

MICHAEL SCHARF: Norman, I want to go up to the Great White North and bring you back into the conversation. We were talking earlier about trials in absentia, yours was the only tribunal since Nuremberg that had that ability. The Ukrainian domestic law, including war crimes, includes the ability to have trials in absentia. Do you think the Ukrainian government should be prosecuting Russians where they have evidence and witnesses, but they don't have custody over the particular offender? Or is the lesson of your experience that they should not use that authority? What do you think?

NORMAN FARRELL: First of all, I'd be a little careful to generalize from our experience at the STL, of course, but the first consideration is "What is the purpose of an in absentia trial?" It's obviously not for us, as prosecutors, to decide on that nature of such tribunals, but what an in absentia trial is meant to achieve should inform decision-making. There's a fine balance between an in absentia trial being seen as a failure if no one is arrested after a successful conviction, as opposed to being seen as a success for actually revealing the facts of what happened and creating a factual or historical narrative. There can be valuable purposes of an in absentia trial.

I think trials in absentia are very useful in establishing facts and a narrative, in circumstances where domestic prosecutions may not take place. But, consideration should be given to whether such trials are limited to situations where there really is very little chance of an arrest. It's unfortunate, but having a full-fledged trial, in absentia and then arresting a convicted person and doing the trial all over again

doubles the work and doubles the cost, as it's two trials. But if the concern is that arrest may be unlikely, and an atrocity crime is left untried, then a trial in absentia can be very useful because it hopefully brings about the truth and a historical narrative, which can be done to a criminal law standard. Now, this raises a different issue which may be relevant to the situation in Ukraine, which is the potentially different narratives and historical perspectives that are created by numerous bodies, organizations or inquiries. For example, the High Commissioner for Human Rights, which does a very good job, has set up a three-person inquiry to establish the facts in relation to human rights abuses in Ukraine. Those abuses are, for the most part, specific violations under international humanitarian law and possibly crimes under international criminal law. The Commission has the mandate to look into criminal matters and to collect forensic evidence. Now, if you're trying to do a trial, and you've got another body or a number of other bodies that are actually collecting evidence, or identifying perpetrators when using a different legal standard, it's going to complicate doing an actual criminal trial.

If you're considering a trial in absentia, first you have to determine whether or not you want to proceed to the completion of all such proceedings, even in circumstances where there is little chance of arrest and where there is a risk you will be competing with others for evidence, such as the creation of duplicate statements if witnesses have spoken to numerous organizations; or different factual or historical narratives especially when at an international criminal trial, there is a higher and a harder standard. Secondly, as has been mentioned by Jim, if you're going to be doing a trial in absentia there is very little, I can say from our experience, very little political support for doing the building block approach to investigations, starting as you mentioned Michael, with lower-level investigations and working your way up. There seems to be little political support for that with in absentia trials, at least as far as we've found, so you should only proceed if you really consider that you can target the highest perpetrators possible and have

support to continue until the proceedings are complete. Thirdly, I think it's very important to establish the procedural rules that apply to in absentia trials. There were none at an international level, and it was extremely difficult to figure it out as we went along, including the role defense counsel found themselves in when they didn't have a client. Lastly, doing investigations from an OTP perspective is not that different in in absentia trials or in person trials. But it does affect the defense team more so. For the prosecution, you must prosecute a case at the international level with the appropriate standards and do the investigation whether the accused are there or not because the onus is on the prosecution to prove it beyond a reasonable doubt. I don't think that it has as much impact on the effort to investigate and prosecute. But certainly, the ability to engage others in terms of cooperation may be less in cases where there is no accused in the box. It is different from when you have an accused in the box. Thanks.

MICHAEL SCHARF: Thank you, Norman. I have a question for Nazhat now, about something that is sometimes referred to as reverse complementarity. I'll give you a little bit of background, about a decade ago Steve Rapp sent Paul Williams, myself, Greg Noone, and some others of the PILPG to Côte d'Ivoire to do a needs assessment and, while we were talking to the prosecutors, they said, "Well, you know there's this case that's pending at the ICC. We'd really love for them to share their evidence with us so that we could prosecute the people that they're not prosecuting." They complained that there was no cooperation going down, although the ICC insists that there be prosecution going up, that's the Reverse Complementarity Theory. Nazhat, you have opened an investigation into Ukraine. I don't know if this is news to everybody, it's like the worst kept secret, but the reason Brenda is no longer the Chief Prosecutor of the Cambodia Tribunal is because you hired her to be senior person, I'm not exactly sure of the title, in the investigation of the Ukraine. Head of the Unified Team. My question for you is, I know the Ukrainians would love for you, because you're getting evidence from all over

the world and you have got the great Brenda Hollis working on this, would you share some of the evidence downward, too, for their prosecutions? What's your thinking on that?

NAZHAT KHAN: I think, you know, that the work we're doing with Ukraine and with the Prosecutor General of Ukraine has shown an unprecedented level of engagement with the Ukrainian authorities. I see it very much as a partnership, not sort of downwards or upwards, but this is really an equal, respectful sharing of information. In addition to the work that we're doing with the Prosecutor General's Office, we, of course, have the joint investigation team with a number of countries in the region and, of course, with us, and there is a lot of sharing of information and evidence using that process. We have to remember, also, just echoing what Ambassador Beth said earlier, this is a situation that arose because an unprecedented number of countries referred this matter to us for investigations. There is a high level of engagement and cooperation, but there's also an understanding that there's going to be sharing of information and evidence, and it makes good sense. The ICC can't prosecute everyone, it is the court of last resort. Engaging with countries to ensure that they are able to prosecute those whom we are not interested in, for want of a better word, although we understand that there is evidence against them, it's a logical result. I think what we are doing here is showing and building a universal respect for the Rome Statute and for the values that underlie the Rome Statute, and you're not going to achieve any sort of universal respect if you're having a top-down conversation with countries. It's really important that engagement be equal, respectful and also that engagement not just be with governments, but with stakeholders including judiciaries and legal professionals. That is the kind of engagement that we are involved with. It's not always understood, I fear, by everyone when they see the prosecutor visiting countries and speaking with Heads of State, but it is such an important part of the process because if we are to ensure that people do not fall into the cracks of perpetration, then there has to be a sharing of information, and evidence, and

intelligence, actually. To build that kind of knowledge and those sorts of relationships, I truly believe that we need to share information, and Ukraine is a very good model of how that works.

MICHAEL SCHARF: I think that's really encouraging news, to all of us. Now, another question about Ukraine for you; Everybody heard Beth talk about the idea for this separate court for the crime of aggression, that's because the ICC does not have jurisdiction over the crime of aggression with respect to Russia because it is neither party to the ICC Statute nor the Kampala Amendments. They can only prosecute Russia with the other crimes—war crimes, crimes against humanity, even genocide—but there's a lot of interest worldwide, including in Ukraine, for an ad hoc tribunal for aggression. My question is, has your office taken a position on that? Is it something you're agnostic about, or are you opposed to it? Are you wait and see? Out of curiosity, what is your thinking?

NAZHAT KHAN: I think it's important to acknowledge that ultimately negotiations around the crime of aggression, what is going to happen in the review process in 2025, the creation of a tribunal for Ukraine, this is ultimately going to be a state-led process with state-led negotiations, so we are very careful not to trespass on what is ultimately state responsibility. But, speaking specifically about Ukraine, let me say this: That, first of all, this unprecedented level of referral, the number of states which have referred Ukraine to us. Secondly, our ability to work very effectively and quickly on the ground, we have large numbers of people in our team who are already working in the field, and very effectively. I think more than any other situation. Thirdly, the effectiveness of the Joint Investigation Team, I think that this is a really good model for other situations. We see this sort of immediate partnership, the building of relationships, we see this is a model for the future for the Office of the Prosecutor and it's working really well.

Lastly, with the current scenario that we have with the Office of the Prosecutor, we have an office, we have a judicial system, we're working on the field, we have a great relationship with the Prosecutor General. We are producing results now. I don't know how long it would take to negotiate a tribunal, how to gather evidence, who's going to do this, the recruitment process—if it's anything like the United Nations process, I don't know how long that's going to take. I think the advantage of the ICC process is that we are already on to it and also, again, the level of cooperation and support from all state parties to the Rome Statute in relation to the investigations that we are conducting, remembering also that we don't have unlimited resources to give to Ukraine. There have been a lot of offers for support for all of our situations, understanding that when we give resources to Ukraine, we are taking resources from some other situation which, to the people on the ground, is equally important.

We need to balance that need for resources to be carefully allocated so that no one situation feels that it is poorer off because of Ukraine. The level of support that we've gotten from all Rome Statute state parties has been unprecedented, we've been very fortunate, we've got large numbers of secondees joining the team, and I believe that this kind of a response that we've seen from the OTP is an excellent model for the future, and why prefer a model that is going to take longer, that may not be as effective, and where, evidentially, you may have the crime of aggression specifically as part of the jurisdiction of that tribunal, but where in the context of the Office of the Prosecutor we can, in any event, lead evidence of aggression, contextually, to the court and see that the acts of aggression are taken into account not only evidently but also for the purpose of any sentencing. I'm sorry to sound argumentative, and I reiterate again that this is a state-led process and I would not want, in any way, to encroach on a state-led process, but these are the views of our office. This is a system, at the moment, an institution, a process which is working, and in particular the level of engagement with the authorities in Ukraine.

MICHAELSCHARF: That is really helpful to hear that, it didn't sound argumentative. That gives us time for maybe one or two questions, and it's always good to have questions before we get out for the particular round table discussions because that's what you're here for.

STEPHEN RAPP: It's a question, really, of Michael because he's been leading all this process and I was interested to hear what the Deputy Prosecutor thought of the idea of a more intermediate court within the Ukrainian system. We have the precedent of the ICTY having a Bosnian War Crimes Chamber, initially with international judges but now with national judges, that does the higher-level cases in Bosnia that the ICTY couldn't do. Meanwhile, it's done 161 defendants and, of course you know, in the Central African Republic there's a special criminal court, and whether there are legal issues that we've dealt with, or you probably can't have international judges, but it would be a court that could do a more strategic approach and do some of the senior-mid level cases. I was sort of interested in the views of the Office of the Prosecutor about that, to some extent you might view that as competitive, but it's been a way to work in the complex situations where there's the big cases, the intermediate cases, and then the twenty-three thousand, twenty-six thousand little cases. Any talks on that, perhaps modeled on the Anti-Corruption Court.

NAZHAT KHAN: I think that the concept of a hybrid court is one that could, in principle, deliver substantive justice and I think the key question in relation to all court systems, whether they're hybrid, whether they're national, whether they're ours-international- is the quality of justice that they are capable of delivering. This, I think, nationally, provides the biggest hiccup because often victims and survivors say to us, "Please, don't trust this court system. Take it to the ICC." We understand. But at the same time, we cannot get universal respect for the Rome Statute, or for international criminal justice, if we own everything. First of all, we can't do it, we don't have the capacity. Secondly, that's not the purpose of the court. Thirdly, how

are we going to convince countries to enact legislation creating Rome Statute offenses if we own everything.

Hybrid courts, national courts, much stronger ones, working with judicial systems, having regional courts, the African Union Courts for instance, these are really good models and we are not against any of them. In fact, we would say that, cautiously, it's a very good idea as long as the quality of justice which is delivered is one which would satisfy the standards that everyone in this room would expect. That really might be the sticking point in some models.

The other thing, of course, in relation to hybrid local and regional courts is how willing is a national government to set these institutions up. In some countries that I have visited in the last few months, we've seen a lot of shade and light on what that particular government is willing to do. We'd have a government minister say, "We can do it, leave it to us," but then when you ask further and say, "Well, are we talking about a hybrid court? Is it an African Union Court? What is your position?" Then we get a little less certainty, so I think before we talk hybrid courts or regional courts, we would like to see on the table what this court looks like. Who are the judges sitting on this court, is it ICC judges being transplanted from another country, or is it a completely new animal, as it were? It doesn't matter, as the Prosecutor often says, it does not matter what flag is behind the judge, what matters is the quality of justice that is being delivered, and the level of faith that we can all have in that substance. It's really a very, very important issue. I wish that we could have more regional courts to deal with all of those persons at lower-level perpetration or mid-level perpetration that we would simply not be able to prosecute, and I think that is the future of international criminal justice, but to reach that we need to have much greater global ownership of what we do in the Rome Statute, and speaking for my own region, until I was appointed a lot of people hadn't even heard of the International Criminal Court in the Pacific. So, working and engaging with countries, trying to convince domestic

jurisdictions to look at their legislation and to pass laws so that they mirror ours in the ICC, and then to really be interested in the quality of justice they can provide both regionally and nationally, I think this has got to be a work of priority of the OTP.

Appendices

Appendix I

Agenda of the Fourteenth International Humanitarian Law Roundtable August 28–30, 2022

Sunday 28 August

- 4:45 p.m. **Departure to the Robert H. Jackson Center**
- 5:30 p.m. **Reception and Welcome Dinner**
Hosted by the Robert H. Jackson Center
Invitation Only
- The Joshua Heintz Award for
Humanitarian Achievement**
Awarded to Hans Corell
Presented by Joshua Heintz and Kristan McMahon
- 8:30 p.m. **Return to the Hotel**
Informal reception on the porches

Monday 29 August

7:30 a.m. **Breakfast with the Prosecutors**

9:00 a.m. **Welcome and Introductions**

Keynote Address

Ambassador Beth Van Schaack
Introduced by Leila Sadat

10:15 a.m. **Break**

10:45 a.m. **The Ben Ferencz Prosecutors' Commentary
and Update**

Moderated by Michael P. Scharf

12:00 a.m. **Roundtable Convenes**

Chaired by Brenda J. Hollis

12:15 p.m. **Lunch**

The Katherine B. Fite Lecture

Brenda J. Hollis
Introduced by Milena Sterio

1:45 p.m.

Breakout Sessions Convene

1. Is the current law sufficient to deal with aggression? Co-Chaired by Stephen J. Rapp and Jennifer Trahan
2. The role of outside and non-traditional combatants. Valid? Lawful? Should they be used? Co-Chaired by Paul Williams and Milena Sterio
3. The future? Impact on atrocity accountability? Is there a future? How so? Co-Chaired by Leila Sadat and D. Wes Rist

5:00 p.m.

Breakout Sessions Conclude

5:30 p.m.

Reception and Dinner

The Clara Barton Lecture

Nazhat Shameem Khan
Introduced by Christian Jorgensen

8:30 p.m.

Informal Reception on the Porches

Music provided by Razing the Bar

Tuesday 30 August

- 7:30 a.m. **Breakfast with the Prosecutors**
- 9:15 a.m. **Year in Review**
Valerie Oosterveld
at Presbyterian Hall
- 10:00 a.m. **Break**
- 10:15 a.m. **Roundtable Reconvenes**
- 12:30 p.m. **Lunch**

The Inaugural Magnitsky Lecture
Anna Ogrenchuk
Introduced by Jennifer Trahan
- 2:30 p.m. **The Issuance of the Chautauqua Principles
and Conclusion of the Roundtable**
Moderated by Kristin Smith
- 4:30 p.m. **Lake Cruise**
Hosted by Case Western Reserve
University School of Law
- 6:30 p.m. **Closing Dinner**
Informal Reception on the porches follows

Appendix II

The Second Chautauqua Principles

August 30, 2022



In the spirit of humanity and peace, we who assembled here at the Chautauqua Institution recognize the prevailing impunity enjoyed by atrocity criminals around the world compels the international criminal justice system and individual practitioners to renew our commitment to a global vision of the rule of law and to develop and refine practical responses to atrocity crimes and to secure justice for victims and accountability for perpetrators.

To that end, after presiding over robust debates driven by legal practitioners, experts, academics, and stakeholders, I offer the following principles to practitioners, diplomats, and politicians grappling with these realities:

Principle I. Atrocity Prevention is the Foundation of Accountability.

Atrocities rarely appear suddenly. Instead, the commission of human rights abuses often involving the targeting of the judiciary and the rule of law, the narrowing of space for civil society, and the commission of torture and other abuses typically precede atrocities. International human rights bodies and other global stakeholders should heed these warning signs and employ best practices in addressing looming crises. This may help to avert an atrocity cascade in which human rights abuses become endemic and a situation devolves into massive and systemic violations, war becomes more likely, and the commission of crimes against humanity near inevitability.

Principle II. The Future of Accountability Presents New Challenges to Combating Impunity.

A commitment to prosecuting atrocities at the state and international level is essential to the principle of accountability and to combat impunity. States should incorporate the International Criminal Court (ICC) crimes of genocide, war crimes, crimes against humanity and aggression in their national legislation to be able to prosecute core crimes. The ICC and other global actors should continue to enhance the universal reach of the Rome Statute by encouraging ratification by states, and by entering into cooperative arrangements with non-state parties who may support the goals of the Court.

In considering the future of accountability, global stakeholders should consider developing new institutions at the national or regional level including hybrid tribunals or internationalized national courts. International courts with jurisdiction over transnational crimes may be a useful addition as well. These should incorporate Rome Statute crimes and modes of liability should be based upon customary international law. There is a legal duty to prevent genocide under the Genocide Convention if there is a likelihood of its commission. There is also a duty codified in common article I of the 1949 Geneva Conventions to respect and ensure all obligations under the Conventions including the prohibition of war crimes are respected. States should negotiate and adopt a treaty on crimes against humanity that contains a similar obligation.

Criminal prosecutions should also be paired with other transitional justice mechanisms supporting local needs including, for example, established truth and reconciliation commissions. Global stakeholders should look to empower local communities to address human rights abuses, address atrocity crimes, and intervene in a context-sensitive and inclusive manner. The international community should consider the adoption of new crimes to address new or ongoing bans. These

could include developing a model law on Ecocide, accounting for cyber-attacks, and other new modalities of war in existing legal frameworks. Additionally, a global investigative mechanism must be established with adequate support from the international community to ensure quality fact-finding missions can be completed in a timely and efficient manner to inform judicial proceedings and ensure due process.

Principle III. Current Law and Existing Judicial Mechanisms are Insufficient to Adequately Secure Justice for the Crime of Aggression. In the judgment of the International Military Tribunal at Nuremberg, the Tribunal the crime of aggression was recognized as “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” While the crime of aggression is defined in Article 8*bis* of the Rome Statute and represents customary international law, no competent judicial institutions have jurisdiction to prosecute those most responsible for this crime. States should consider fixing this jurisdictional gap at the ICC.

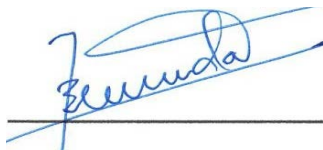
On February 24, 2022, nearly seventy-six years after the IMT’s landmark judgment, Russia launched an unlawful invasion of Ukraine. Both national and international judicial systems need to prosecute those most responsible for the crimes of aggression committed in Ukraine. International tribunal jurisprudence, which renders head of state immunity inapplicable regarding international crimes, including the crime of aggression, should inform their prosecution strategies. It is also essential that, in the event of its establishment, any tribunal or court addressing the unlawful invasion into Ukraine is fair, impartial, and not directed at any particular party or state. Any new tribunal or court must adhere to a clear evidentiary standard of proof of guilt beyond a reasonable doubt.

There is an urgent need for a viable proposal for the creation of a competent international tribunal with appropriate jurisdiction to

prosecute those bearing the greatest responsibility for the crimes of aggression against the people of Ukraine. With that said, any domestic or international tribunals' work, including those exercising extraterritorial jurisdiction, should not diminish, but enhance the work of the ICC.

Principle IV. New Legal and Practical Approaches are Required to Curtail Unlawful Acts Perpetrated by Mercenaries and other Irregular Forces Engaged and Directed by States. As States continue to engage in the use of mercenaries and irregular forces, the legal definition of a mercenary must reflect the common characteristics of modern mercenaries. To wit, the nationality limitations codified in Article 47 of Additional Protocol 1 to the Geneva Conventions should be removed in order to ensure that maligned State actors cannot use loopholes in the existing definition to insulate themselves from criminal liability. All other appropriate practical and legal measures should also be taken to ensure mercenaries and irregular forces act as lawful combatants and all high contracting parties remain in compliance with the duties international humanitarian law requires. Finally, because States bear responsibility for the unlawful acts of their agents, States engaging in the use of mercenaries and irregular forces should provide those forces the same international humanitarian law training they would to armed forces.

As chair of the Fourteenth International Humanitarian Law Roundtable, I call upon the international community to keep the spirit of the Nuremberg Principles alive by calling to attention and putting into action the Principles included herein.



Chair, 14th International Humanitarian Law Roundtable

Appendix III

Biographies of the Prosecutors and Participants

PROSECUTORS



Amb. Fatou Bensouda
– **The International Criminal Court**

Fatou Bensouda, Ambassador of The Gambia to the UK, served as Chief Prosecutor of the International Criminal Court (ICC) from June 2012 to June 2021. Ambassador Bensouda previously held the position of ICC Deputy Prosecutor from 2004 to 2012. Prior to her work at the ICC, Ambassador Bensouda worked as Trial Attorney, Senior Legal Adviser and Head of the Legal Advisory Unit at the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Between 1987 and 2000, she served in successively senior positions in The Gambia, including Attorney General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet. In March 2022, Ambassador Bensouda was appointed by the U.N. Human Rights Council to be Chairman of the three-person International Commission of Human Rights Experts on Ethiopia which is investigating atrocities in Tigray and neighboring regions.



Andrew T. Cayley
– **The Extraordinary Chambers in the Courts of Cambodia**

Andrew Cayley currently serves as Her Majesty's Chief Inspector of the Crown Prosecution Service. In this role he is responsible for inspecting all the national prosecuting authorities of England & Wales and reports directly to the Attorney General and Parliament. From 2013 to 2020 Andrew was Director of Service

Prosecutions, the Chief Military Prosecutor of the United Kingdom and head of the Service Prosecuting Authority. In this role he held the equivalent military rank of Major General. He was appointed as Director in December of 2013 by HM Queen Elizabeth II under the Armed Forces Act 2006. Previously, he was appointed as Chief International Co-Prosecutor of the ECCC in December 2009, and remained in that role until September of 2013. Andrew also served as Senior Prosecuting Counsel at the International Criminal Court and worked in Uganda and Sudan while he was with the court. From 1995 to 2005 Andrew was Senior Prosecuting Counsel and Prosecuting Counsel at the International Criminal Tribunal for the former Yugoslavia where he worked on cases arising from the armed conflicts in Bosnia-Herzegovina, Kosovo and Croatia, including the first prosecution for events at Srebrenica in July 1995. He served in the British army from 1991 to 1998, retiring in 1998 as a major. He is a barrister and now a Governing Bencher of the Honourable Society of the Inner Temple. He was appointed Queen's Counsel, one of Her Majesty's Counsel learned in the law, in 2012, and was appointed a Companion of the Order of St Michael and St George (CMG) for his services to international criminal law and human rights in the 2014 Queen's Birthday Honours List. He holds an LL.B and an LL.M from University College London and is currently a doctoral candidate at the University of Exeter. He attended officer training at the Royal Military Academy Sandhurst.



David M. Crane
– **The Special Court for Sierra Leone**

Professor David Crane was the founding Chief Prosecutor of the Special Court for Sierra Leone from 2002 to 2005 after being appointed by Secretary General of the United Nations, Kofi Annan. Served with the rank of Under-Secretary General, he indicted the President of Liberia, Charles Taylor, the first sitting African head of state in history to be held accountable.

Prior to this position, he served over 30 years in the U.S. government. Appointed to the Senior Executive Service of the United States in 1997, Mr. Crane has held numerous key managerial positions during his three decades of public service, including as Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School. Additionally, until his retirement in 2018, he was a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture between the Maxwell School of Public Citizenship and the College of Law at Syracuse University. He is author of the "Caesar Report," which brought to light the crimes against humanity in Syria. Prof. Crane is on one of the founders of the Global Accountability Network, which houses the Syrian, Yemeni, and Venezuelan Accountability Projects. Prof. Crane recently published his memoirs about his time in West Africa called, *Every Living Thing*. He was made an honorary Paramount Chief by the Civil Society Organizations of Sierra Leone and received the George Arendts Pioneer Medal from Syracuse University. Throughout his career he received various awards including the Intelligence Community Gold Seal Medallion, the Department of Defense/DoDIG Distinguished Civilian Service Medal, and the Legion of Merit. In 2005, he was awarded the Medal of Merit from Ohio University and the Distinguished Service Award from Syracuse University College of Law for his work in West Africa. He founded Impunity Watch, an online public service blog and law review and created the "I am Syria" campaign in 2012. He holds a *J.D.* from Syracuse University, a *M.A.* in African Studies and a *B.G.S.* in History from Ohio University. Prof. Crane has been awarded several honorary doctoral degrees from around the United States.



Brenda J. Hollis
– **The International Criminal Court**

Ms. Hollis has been appointed Senior Trial Attorney (D-1 level), Office of the Prosecutor, International Criminal Court, in which capacity she will lead the investigation into possible international crimes committed in Ukraine, reporting directly to the ICC Prosecutor. Ms. Hollis served as the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia from July 2019 until July 2022, having been the Reserve International Co-Prosecutor from April 2015. Prior to her appointment as the ECCC's International Co-Prosecutor, she was the Prosecutor of both the Residual Special Court for Sierra Leone and the Special Court for Sierra Leone (2010-2019). After serving as a legal consultant to the SCSL Prosecutor in 2002, 2003 and 2006, in February 2007 she became lead prosecutor in the case against former Liberian President, Charles Taylor and continued to lead the prosecution of that case until the appeal was concluded in 2013. From 1994 to 2001, Ms. Hollis held various positions in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, including that of Co-Counsel in the Duško Tadić case, the first litigated case in an international criminal tribunal since the Nuremberg trials, lead prosecutor in both the reopening of the Furundžija case, in which rape was charged as torture, and the preparatory stage of the case against former Serbian President Slobodan Milošević. Ms. Hollis has trained judges, prosecutors and investigators in Cambodia, Indonesia and Iraq. She also assisted victims of international crimes in Colombia and in the Democratic Republic of Congo to prepare submissions requesting investigations by the International Criminal Court. Before entering the international arena, Ms. Hollis was a U.S. Peace Corps volunteer in West Africa, and served as an officer in the U.S. Air Force, initially as an Air Intelligence Briefing Officer and then as a Judge Advocate, the latter primarily as a prosecutor at the trial and appellate level, retiring with the rank of Colonel.



James C. Johnson
– **The Residual Special Court for Sierra Leone**

James C. Johnson is the Chief Prosecutor of the Residual Special Court for Sierra Leone, appointed by the Secretary-General of the United Nations in September, 2019. He is an Adjunct Professor of Law, Director of the Henry T. King Jr. War Crimes Research Office and Faculty Advisor for the Yemen Accountability Project at Case Western Reserve University School of Law in Cleveland, Ohio, and President of the Global Accountability Network. From 2003 until 2012, Mr. Johnson served as Senior Trial Attorney and then Chief of Prosecutions for the Special Court for Sierra Leone. As such, Mr. Johnson supervised trial and investigative teams, which prosecuted ten accused, including the former President of Liberia, Charles Taylor, for war crimes, crimes against humanity and other serious violations of international law. Prior to joining the Special Court for Sierra Leone, Mr. Johnson served for 20 years as a Judge Advocate in the United States Army.



Nazhat Shameem Khan
– **The International Criminal Court**

Nazhat Shameem Khan was born and brought up in Fiji. She studied law in the United Kingdom, at the universities of Sussex and Cambridge. She was called to the Bar of England and Wales at the Inner Temple and at the High Court of Fiji. She practised law as a prosecutor from 1984 to 1999. She was appointed Fiji's Director of Public Prosecutions in 1994. In 1999, she was appointed Fiji's first woman High Court judge. She was responsible for the criminal jurisdiction of the High Court and also sat in the Court of Appeal of Fiji on an ad hoc basis. She left the judiciary in 2009, and opened her own practice, focussing largely on human rights, work place governance and litigation skills training. In 2014,

she was appointed Fiji's ambassador to the United Nations in Geneva and Vienna, and to Switzerland. In 2021, she was elected President of the Human Rights Council in Geneva. In December 2021, she was elected a Deputy Prosecutor of the International Criminal Court.



Mathias Marcussen
– **The International Residual Mechanism for International Criminal Tribunals**

Mathias Marcussen has over 25 years of experience as an international prosecutor at the United Nations' first international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). From 1996, he served for a number of years as one of the first Legal Officers in the Office of the Prosecutor of the ICTR in Kigali, Rwanda. He later held a various of positions at the ICTY, including Senior Trial Attorney and Senior Appeals Counsel with responsibility for investigation, prosecution and appeals in a number of complex cases. In 2013, he set up the Hague Branch of the Office of the Prosecutor of the organization that has taken over the functions of the ICTY and ICTR—the International Residual Mechanism for International Tribunals. Since then he has been its Senior Legal Officer and the Officer-in-Charge at The Hague Branch.



Robert Petit
– **The Extraordinary Chambers in the Courts of Cambodia**

Robert Petit was called to the Bar in 1988 and started his legal career as a Crown Prosecutor in Montreal for eight years eventually focusing on organized criminality and complex cases. In 1996, he embarked on an international career first as a Legal Officer in the OTP of the ICTR. Subsequently, between 1999 and 2004, he was a Regional Legal Advisor for the United Nations Interim Administration

Mission in Kosovo, a Prosecutor for the Serious Crimes Unit of the United Nations Missions of Support to East Timor, and a Senior Trial Attorney with the OTP of the SCSL. In 2006, the United Nations named him the International Co-Prosecutor of the ECCC, the “Khmer Rouge Tribunal”, a position he held until September 2009, when he returned to Canada and to his long-term position as Senior Counsel & Team Leader with the War Crimes Section of Canada’s Federal Dept. of Justice. Following his recent retirement from DOJ, Mr. Petit was reappointed by the Secretary General of the United Nations to lead the Follow-on Mechanism for the Democratic Republic of the Congo, a position he previously held from 2017 to 2021.



Amb. Stephen J. Rapp
– **The Special Court for Sierra Leone**

Stephen J. Rapp is a Senior Fellow at the United States Holocaust Memorial Museum’s Center for Prevention of Genocide, and at Oxford University’s Center for Law, Ethics and Armed Conflict. During 2017-2018, he was the Father Robert Drinan Visiting Professor for Human Rights at Georgetown University. He serves as Chair of the Commission for International Justice and Accountability (CIJA), a Senior Peace Fellow of the Public International Law and Policy Group, and on the boards of Physicians for Human Rights, the IBA Human Rights Institute, the ABA Rule of Law Initiative, and the Siracusa International Institute for Criminal Justice and Human Rights. From 2009 to 2015, he was Ambassador-at-Large heading the Office of Global Criminal Justice in the U.S. State Department. In that position he coordinated U.S. Government support to international criminal tribunals, including the International Criminal Court, as well as to hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity. During his tenure, he traveled more than 1.5 million miles to 87 countries to engage with

victims, civil society organizations, investigators and prosecutors, and the leaders of governments and international bodies to further efforts to bring perpetrators to justice. Rapp was the Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution of former Liberian President Charles Taylor. During his tenure, his office achieved the first convictions in history for sexual slavery and forced marriage as crimes against humanity, and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide. Before his international service, he was the United States Attorney for the Northern District of Iowa from 1993 to 2001. He received a BA degree from Harvard, a JD degree from Drake, and several honorary degrees from U.S. universities in recognition of his work for international criminal justice.

SPEAKERS AND SPONSORS



Jeff Howell

– Global Accountability Network

Jeff S. Howell, Jr. is co-founder of the Syrian Accountability Project and the Global Accountability Network. Mr. Howell holds a Bachelors' Degree from the University of Virginia and a Juris Doctor from Syracuse University College of Law. During his tenure as SAP Chief of Staff, Mr. Howell received training in investigations and conflict mapping from the NGO No Peace Without Justice. Thereafter, Mr. Howell worked in Turkey supporting efforts to train Syrian investigators, jurists, and law enforcement officers in ICL. Since 2020, Mr. Howell has overseen the

Venezuelan Accountability Project, an investigation commissioned by the Organization of American States (OAS) and the National Endowment for Democracy (NED) into atrocity crimes committed against the people of Venezuela. Until 2022, Mr. Howell also served as President of the Parazonium Law Group, a civil litigation firm he founded in Virginia Beach, Virginia in 2016. In February 2022, Mr. Howell left private practice to accept a government appointment in the criminal justice arena.



Christian Jorgensen
– American Red Cross

Christian Jorgensen currently serves as Legal Counsel at the American Red Cross' Office of General Counsel. Here, his principal area of responsibility are issues pertaining to International Humanitarian Law and managing the organization's IHL Dissemination program. Prior to joining the American Red Cross, his main area of focus was migration law. Christian provided legal research for asylum cases under the direction of Dr. Barbara Harrell-Bond, OBE in Oxford, UK. Following his time in Oxford, he worked as a political and legal analyst for a Berlin-based media-startup, focusing much of his reporting on the 2017 French presidential candidates' immigration policies. He later worked in Nicosia, Cyprus as a researcher on the topic of nationality rights and statelessness and coauthored a pedagogical guide for the European Union's NICeR Project (Nouvelles Approches pour l'Intégration Culturelle des Jeunes Réfugiés). He is also a past international legal fellow for Dejusticia, a legal think-tank based in Bogotá, Colombia. Christian earned his J.D. from the University of New Mexico School of Law, an M.Sc. in Refugee & Forced Migration Studies from DePaul University, and a B.A. in Political Science from the University of Iowa.



Phoebe Juel

– International Humanitarian Law Roundtable

Phoebe Juel is a 2008 graduate of Case Western Reserve University School of Law where she concentrated her studies on International Criminal and Counter-Terrorism Law. While there, she worked with the Financial Integrity in Emerging Markets Lab and the Terrorism Prosecution Lab, where she drafted a memorandum for use by the OTP at the Military Tribunal at Guantanamo Bay. Prior to this she completed an undergraduate degree in Military History at Grinnell College and studied Public Health at the University of Iowa. She is currently in private practice in Pittsburgh, Pennsylvania, where she is also active in refugee and immigrant support projects with the Episcopal Diocese of Pittsburgh.



Sarah McIntosh

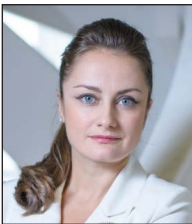
– United States Holocaust Memorial Museum

Sarah McIntosh is the Policy and International Justice Manager for the Ben Ferencz International Justice Initiative. Sarah previously worked as a paralegal in the class actions department of Maurice Blackburn Lawyers. She has also worked as an intern for the U.N. Office for Disarmament Affairs, interned briefly for the Coalition for the ICC, and has volunteered for the Refugee Advice and Casework Service in Sydney. In May 2017, she received her Master of Laws from Harvard Law School. Sarah has a Bachelor of Laws and international studies from the University of New South Wales and is admitted as a solicitor of the Supreme Court of New South Wales.



Kristan McMahon
– **Robert H. Jackson Center**

Kristan McMahon began serving as the President of the Robert H. Jackson Center since April 2019. She is a former principal with Vetted Solutions, an executive search firm specializing in association and nonprofit recruiting and consulting in Washington D.C. where she guided a transformational process for the company’s executive searches. Previously McMahon was corporate counsel for Verizon in Arlington, VA, where she advised all business entities on a variety of antitrust issues, including deal analysis and compliance with antitrust/competition laws for a global Fortune 15 company. Prior to work with Verizon, McMahon was a Staff Attorney for Howrey LLP, where she was part of a team leading government investigations and litigations for global Fortune 500 companies.



Anna Ogrenchuk
– **Ukrainian Bar Association**

Anna Ogrenchuk, Ph.D., a co-founder and managing partner of LCF Law Group, is a highly experienced solicitor and litigator, specialising in commercial law. For over 15 years Anna has successfully represented clients in the most complex and high-profile business litigations in Ukraine. She advises domestic and international businesses, banks and financial companies, corporations and individuals. Anna has been instrumental in facilitating and strengthening international cooperation between Ukrainian and foreign dispute resolution experts — judges, legislators, academics and media. Some of her professional recognitions include: Chambers Europe 2021/Chambers Global 2022, recognition in dispute resolution Band 2; Benchmark Litigation Europe Awards 2021, recognized as Ukraine Lawyer of the Year; The Legal 500 EMEA 2022, Hall of fame; Best Lawyers 2022, Lawyer of the Year in Ukraine, recommended

in administrative law, banking and finance law, litigation, corporate law, bet-the-company litigation, tax law, and others. Anna is a long-standing and active participant of the Ukrainian Bar Association (UBA), since June 2021 – President of the UBA.



Valerie Oosterveld
– **University of Western Ontario Faculty of Law**

Valerie Oosterveld is full Professor at the University of Western Ontario Faculty of Law (Canada) and is the Acting Director of her university's Centre for Transitional Justice and Post-Conflict Reconstruction. Her research and writing focus on gender issues within international criminal justice, and she has published widely in this field. Her most recent book is (with co-editors Indira Rosenthal and Susana SaCouto) *Gender and International Criminal Law* (Oxford University Press, 2022). She is a member of Canadian Partnership for International Justice, funded by the Social Sciences and Humanities Research Council of Canada. Before joining Western Law, Valerie served in the Legal Affairs Bureau of Canada's Department of Foreign Affairs and International Trade, where she provided legal advice on international criminal accountability for genocide, crimes against humanity and war crimes. In this role, she assisted in the creation of, and support for, the Special Court for Sierra Leone. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of States Parties, and served on the Canadian delegation to the 2010 Rome Statute Review Conference of the International Criminal Court.



Gregory L. Peterson
– **Robert H. Jackson Center**

Mr. Peterson co-founded the Robert H. Jackson Center in 2001, as a non-profit organization dedicated to advancing the remarkable legacy of the U.S. Supreme Court Justice Robert H. Jackson.

Peterson currently serves on the Center's board of directors. He has been a partner with Phillips Lytle LLC for over 30 years. His practice focuses on all areas of real estate, including development and financial transactions, areas of corporate counseling including acquisitions, administration and strategic planning, not-for-profit corporate formation, and tax exemption and qualification with New York State administrative areas. Greg graduated Phi Beta Kappa with a B.A. from Allegheny College and a J.D. from The Dickinson School of Law of the Pennsylvania State University.



Kate Powers
– **Global Accountability Network**

Kate Powers is the Executive Director of the Global Accountability Network (GAN) and an independent researcher based in Sarajevo. She holds a Bachelor's Degree in International Studies from the University of Denver (2010) and a Juris Doctor from the University of Michigan Law School (2020). While at Michigan Law, she specialized in public international law and human rights, and she co-directed their chapter of the GAN, she undertook a Fulbright research fellowship in Bosnia and Herzegovina, where she focuses on war crimes prosecutions before their national courts. She has recently begun a new research project on different paths to accountability for crimes committed in Nagorno-Karabakh as a Fellow with the Center for Truth and Justice.



D. Wes Rist
– **American Society of International Law**

D. Wes Rist is the Deputy Executive Director at the American Society of International Law, where he supervises educational programming, judicial training, and public engagement. Wes works on atrocity prevention and international criminal

justice issues, having briefed Congress and led trainings on these and related issues around the world. He also works with high schools and community organizations to promote international law education and outreach. Previously, Wes served as Assistant Director of the Center for International Legal Education at the University of Pittsburgh School of Law. Wes is a committee chair of the Prevention and Protection Working Group and serves on the advisory board of the ABA's Atrocity Prevention and Response Project. He holds a J.D. and an LL.M. (with Distinction) in international human rights law.



Leila Nadya Sadat
– **Whitney R. Harris World Law Institute at**
Washington University in St. Louis
School of Law

Professor Sadat is the James Carr Professor of International Criminal Law and the Director of the Crimes against Humanity Initiative of the Whitney R. Harris World Law Institute at Washington University School of Law. A renowned expert in international law, international human rights, and international criminal law, she has served as Special Adviser on Crimes Against Humanity to the ICC Chief Prosecutor since 2012. The President of the International Law Association (American Branch), Sadat is a prolific scholar and teacher, and she has led the Initiative to draft and negotiate a new global treaty on crimes against humanity. She is a member of the U.S. Council on Foreign Relations, the American Law Institute, and a Counselor of the American Society of International Law. She has received many awards and prizes for her work, including the Distinguished Faculty Award from Washington University and an Honorary Doctorate from Northwestern University. From 2001-2003, Sadat served on the United States Commission for International Religious Freedom.



Michael P. Scharf
- Case Western Reserve University
School of Law

Michael Scharf is the Dean of the Law School and Joseph C. Baker – BakerHostetler Professor of Law at Case Western Reserve University School of Law. Scharf served as Attorney Adviser for U.N. Affairs in the Office of the Legal Adviser of the U.S. Department of State from 1989-1993, where he played a lead role in drafting the Statute, Rules, and Security Council Resolutions establishing the Yugoslavia Tribunal. In 2005, Scharf and the Public International Law and Policy Group, an NGO he co-founded and directs, were nominated for the Nobel Peace Prize for their work assisting in war crimes trials. In 2008, Scharf served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. He is the author of 20 books, four of which have won national book of the year honors. Scharf hosts the radio program “Talking Foreign Policy,” broadcast on WJSU 89.7 FM. He was elected President of the American Branch of the International Law Association and will begin his term in October.



Brandon Silver
– Raoul Wallenberg Center for Human Rights

Brandon Silver is an international human rights lawyer and Director of Policy and Projects at the Raoul Wallenberg Centre for Human Rights. In this capacity, Brandon serves as a Senior Adviser to former Minister of Justice and Attorney General of Canada and longtime parliamentarian Professor Irwin Cotler, and as international counsel to political prisoners and victims of mass atrocity in the pursuit of justice and accountability. Brandon also founded and leads the Centre’s Targeted Sanctions Program, which played a prominent role in Canada’s unanimous adoption of Magnitsky legislation and its subsequent implementation. Brandon’s work has

appeared in leading publications including TIME, Washington Post and the Globe and Mail, and was recognized by the World Economic Forum as a “Global Shaper” and by Canadian Lawyer Magazine as one of Canada’s “Most Influential Lawyers.”



Milena Sterio
– Cleveland State University School of Law,
IntLawGrrls

Milena Sterio is The Charles R. Emrick Jr. - Calfee Halter & Griswold Professor of Law and LLM Programs Director at Cleveland State University, Cleveland-Marshall College of Law & Professor of Law, and Managing Director at the Public International Law and Policy Group. In her capacity as expert on maritime piracy law, Professor Sterio has participated in the meetings of the United Nations Contact Group on Piracy off the Coast of Somalia, as well as at the United Nations Global Counter-Terrorism Forum. In addition, Professor Sterio is an expert on international criminal law, and serves as Co-Chair of the Transitional Justice and Rule of Law Interest Group at the American Society of International Law, and as Board Member of the American Branch of the International Law Association. Professor Sterio is one of six permanent editors of the prestigious IntLawGrrls blog. In the spring 2013, Professor Sterio was a Fulbright Scholar in Baku, Azerbaijan, at Baku State University. She received her J.D. from Cornell Law School, and a Maitrise en Droit Franco-Americain and a M.A in Private International Law from the University Paris I-Pantheon-Sorbonne.



Jennifer Trahan
– New York University Center for Global Affairs

Jennifer Trahan is a Clinical Professor at NYU’s Center for Global Affairs where she directs the Concentration in International Law and Human Rights. She also serves as Convenor of the Global

Institute for the Prevention of Aggression. She has published scores of law review articles and book chapters including on the International Criminal Court's crime of aggression. Her book, "Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes" (Cambridge University Press 2020) was awarded the "2020 ABILA Book of the Year Award" by the American Branch of the International Law Association. She has also authored two digests compiling the case law of the ad hoc tribunals. She serves as one of the U.S. representatives to the Use of Force Committee of the International Law Association and holds various positions with the American Branch. She also served as *amicus curiae* to the International Criminal Court on the appeal of the situation regarding Afghanistan and on the Council of Advisers on the Application of the Rome Statute to Cyberwarfare.



Amb. Beth Van Schaack
– U.S. Department of State

Dr. Beth Van Schaack was sworn in as the Department's sixth Ambassador-at-Large for Global Criminal Justice (GCJ) on March 17, 2022. In this role, she advises the Secretary of State and other Department leadership on issues related to the prevention of and response to atrocity crimes, including war crimes, crimes against humanity, and genocide. Ambassador Van Schaack served as Deputy to the Ambassador-at-Large in GCJ from 2012 to 2013. Prior to returning to public service in 2022, Ambassador Van Schaack was the Leah Kaplan Visiting Professor in Human Rights at Stanford Law School, where she taught international criminal law, human rights, human trafficking, and a policy lab on Legal & Policy Tools for Preventing Atrocities. In addition, she directed Stanford's International Human Rights & Conflict Resolution Clinic. Ambassador Van Schaack began her academic career at Santa Clara University School of Law, where, in addition to teaching and writing on international human rights issues, she served as the Academic Adviser to the United States interagency delegation to the International

Criminal Court Review Conference in Kampala, Uganda. Earlier in her career, she was a practicing lawyer at Morrison & Foerster, LLP; the Center for Justice & Accountability, a human rights law firm; and the Office of the Prosecutor of the International Criminal Tribunals for Rwanda and the Former Yugoslavia in The Hague. Ambassador Van Schaack has published numerous articles and papers on international human rights and justice issues, including her 2020 thesis, *Imagining Justice for Syria* (Oxford University Press). From 2014 to 2022, she served as Executive Editor for Just Security, an online forum for the analysis of national security, foreign policy, and rights. She is a graduate of Stanford (BA), Yale (JD) and Leiden (PhD) Universities.



Molly White

– International Humanitarian Law Roundtable

Molly White is an Attorney Advisor for the Department of Homeland Security’s Countering Weapons of Mass Destruction Office. Prior to making the switch to DHS, Ms. White held multiple positions at the U.S. Department of State.

Ms. White made the move from Michigan to Washington D.C. to work for Diplomatic Security as a Management Analyst). From there she served as the Deputy Counterterrorism Manager at the Global Engagement Center. Following her time as an analyst, she began shifting her focus to more legal adjacent work in compliance with the Directorate of Defense Trade Controls. She earned her J.D. and an advanced certificate of study in National Security and Counterterrorism Law, from Syracuse University College of Law in 2016. Ms. White began working with the International Humanitarian Law Roundtable in 2015 when she interned at the Robert H. Jackson Center. In her spare time, she watches a wide range of dogs, works part time at a PureBarre studio, and is an active member of the D.C. Liverpool Supporters Club.



Paul R. Williams
- Public International Law and Policy Group

Paul Williams is the Grazier Professor of Law and International Relations at American University and the President/co-founder of the Public International Law & Policy Group. In 2005, Dr. Williams, as Executive Director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his pro bono government clients. Dr. Williams has assisted over a dozen clients in major international peace negotiations, including serving as a delegation member in the Dayton, Lake Ohrid, and Doha negotiations. He also advised parties to the Key West, Oslo/Geneva and Georgia/Abkhaz negotiations, and the Somalia peace talks. Previously, Dr. Williams served in the Department of State's Office of the Legal Advisor for European and Canadian Affairs, as a Senior Associate with the Carnegie Endowment for International Peace, and as a Fulbright Research Scholar at the University of Cambridge.

Appendix IV
Breakout Sessions
Student Report

Prepared by

Jessica Chapman

with contributions from

Kelly Adams

Caroline Atlas

Mia Bonardi

Kelsey Delmonte

Brielle Edborg

Ikenna Ezealah

Harper Fox

Elise Manchester

Introduction

The International Humanitarian Law (IHL) Roundtable's breakout sessions were three simultaneously held three-hour-long discussions that included some of the world's foremost experts in the field of IHL. Attendees were dispersed throughout the three breakout groups, each led by a small group of moderators that consisted of both an academic and a practitioner to provide a balanced perspective, where participants were able to engage in lively discourse centered around

the group's pre-assigned topic. Group One's topic focused on the scope of aggression and specifically, the need for addressing Russian aggression in Ukraine. Group Two's theme examined the role of mercenaries in modern-day IHL. Lastly, Group Three explored what the future of IHL looks like and potential barriers the field may face, along with possible solutions. Moderators began the dialogues by introducing the topic, asking one of the curated questions, and then allowed the conversations to flow naturally. The following sections provide an overview of the experts' conversations within the breakout groups and their conclusions.

Roundtable Breakout Group Discussion

Topic 1: The Scope of Aggression

How do we address and prosecute aggression in the Ukraine Situation?

The war between Russia and Ukraine, that began in February of 2022, follows the 2014 annexation of Crimea.¹ Russia's annexation of Crimea and invasion of Ukraine are the first of their kind since World War II; these actions may violate the global restriction on use of force amongst states.² When such violations occur, there is grave importance in holding guilty actors accountable to restore the global commitment to world peace and security. President Zelenskyy, in a pre-recorded message to the leaders of the world, stressed the importance of holding

¹ Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SECURITY (Sep. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>.

² *Id.*

Russia accountable for its actions when he declared, “[a] crime has been committed against Ukraine, and we demand just punishment.”^{3,4}

The International Military Tribunal in Nuremberg held that the crime of aggression was “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁵ The breakout group noted that the crime of aggression has been referenced as a sort of threshold crime that inevitably leads to other grave infractions of international law. Crimes that violate international law, like aggression, harm the victim-state, but also the international community at large, creating the dire need for a forum to punish crimes like aggression.⁶ In attempting to identify the mechanism most likely to be successful in addressing Russian aggression in Ukraine, the breakout group considered reviewing the Rome Statute and the ability to utilize the International Criminal Court (ICC), the possibility of a Ukrainian hybrid court within Ukraine’s domestic legal system, a multi-state court, a regional court, likely a European Union court, and a special tribunal via the United Nations (U.N.) General Assembly (GA). Sections i-v below outline the discussions surrounding the most appropriate method of prosecuting Russian aggression in Ukraine.

3 *Ukrainian President outlines peace formula that punishes aggression, restores security*, United Nations (Sep. 21, 2022), <https://news.un.org/en/story/2022/09/1127421>.

4 The International Military Tribunal at Nuremberg, following the aftermath of World War II, was the first time that the crime of aggression was prosecuted on the international stage. The Kellogg-Briand Pact of 1928, to which Germany was a party, outlawed war; the Nuremberg Court charged German leaders with the “advanced planning of an aggressive war” in violation of the Pact. HATHAWAY, *SUPRA* NOTE 1.

5 Judgment, 1 Trial of the Major War Criminals Before the International Military Tribunal 186 (1947).

6 *Id.*

A. The Rome Statute & the ICC

The breakout group emphasized that the main issue regarding the utilization of the Rome Statute is whether it is realistic to attempt to amend it to expand ICC jurisdiction over the crime of aggression in Ukraine. The Rome Statute gives the ICC jurisdiction over member states to punish the crime of aggression in article 5(d).⁷ In a 2010 amendment, the Rome Statute then allowed the criminalization of the crime of aggression, describing it as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁸

However, the breakout group noted, neither Russia nor Ukraine is a party to the Rome Statute and thus are not within the jurisdiction of the ICC. The group further discussed how Ukraine had indefinitely submitted to the ICC’s jurisdiction in 2015, allowing the Court to hear cases of specific international crimes being committed in Ukraine, like genocide, crimes against humanity, and war crimes. The breakout group specified that despite the agreement to submit to the Court’s jurisdiction, Ukraine is barred from pursuing a case for the crime of aggression; the Rome Statute’s jurisdiction for that crime does not extend to non-state parties, such as Russia. The breakout group concluded that to amend the Rome Statute to allow non-state parties to be charged with the crime of aggression within the ICC’s jurisdiction would take a considerable amount of time to draft, lobby, vote, approve, and implement, if at all even possible. The group’s consensus around the ICC, as the mechanism to address Russian

7 Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

8 Rome Statute of the International Criminal Court art. 8 bis, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 (emphasis added).

aggression, is that the international community's time is better spent on a more effective and timely option.

B. Ukrainian Hybrid Courts within the Domestic System

Another mechanism discussed by the breakout group was the utilization of a hybrid court that would amalgamate part of the Ukrainian domestic judicial system with an international justice mechanism. However, the group concluded that this is unlikely to prove a fruitful option for two reasons. First, the breakout group identified that the Ukrainian Constitution explicitly prohibits a hybrid option.^{9,10} Second, even if the Ukrainian government wanted to change the Constitution, article 157 of the Ukrainian Constitution prevents any amendment during a time of martial law.¹¹ Because of these two currently impassable roadblocks, a hybridized court within the domestic legal system is likely not a viable option for Ukraine.¹²

9 HATHAWAY, *supra* note 1; 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/>.

10 This constitutional limitation is pointed out by Ukrainian Lawyer, Alexander Komarov, and international lawyer and professor of law, Oona Hathaway, stating that article 125 of the Ukrainian Constitution prohibits the establishment of any special courts domestically, leaving an internationalized tribunal as the most likely solution.

11 Ukr. Const., art. 157.

12 The Public International Law & Policy Group (PILPG) has advocated and drafted a law for a Ukrainian High War Crimes Court solely within the domestic system that would allow the national courts to remain un-internationalized. Article 4 of the draft states that the legislative framework for the High War Crime Court would “consist of the Ukrainian Constitution, the Law of Ukraine “On the Judiciary and Status of Judges,” This Law and other laws of Ukraine, international treaties in force, consented by the

C. Multi-State Court

The breakout group discussed how a multi-state court could be a potential mechanism to address Russian aggression and came to the conclusion that a multi-state court would require the creation of a treaty and subsequent ratification, which would likely take longer than other mechanisms, and is therefore not a timely or effective option.

D. European Union Court

Like the African Union Court approach, a European Union court could be a possible tool to prosecute the crime of aggression in Ukraine. The breakout group noted how the European Union is presenting itself in support of the Ukrainian people and their current situation, however, there are two major issues in attempting to create a European Union Court. First, the breakout group noted that both France and the United Kingdom narrowed their jurisdiction of the crime of aggression in 2017 after leaving the Kampala Review Conference.¹³ The breakout group further discussed how France and the United Kingdom are key players in Europe, wielding a concentrated amount of political power; without their participation, a European Union Court could face issues down the road with enforceability, funding, legitimacy, declining support of some European states, etc.

Verhovna Rada of Ukraine as binding.” This recommendation, although with merits, does not address the necessity for international accountability because of the slim likelihood that Russia and its cronies would submit to solely Ukrainian jurisdiction. *See generally*, Public International Law & Policy Group, *Draft Law for a Ukrainian High War Crimes Court*, (2022).

13 Jennifer Trahan, *The Need to Reexamine the Crime of Aggression’s Jurisdictional Regime*, JUST SECURITY (Apr. 4, 2022), <https://www.justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/>.

Second, there is a risk that if the Ukrainian situation becomes a regional issue, it could minimize the severity of the conflict, which would otherwise continue to be seen as a truly “international” problem. The breakout group pointed out that this could also ultimately end up affecting the impact of the court after its closure and its ability to enforce its holdings. A regional court is unlikely to yield the lasting results that a truly international justice mechanism could and therefore, is not the best option for addressing Russian aggression in Ukraine.

E. Special Tribunal via the United Nation General Assembly

Both Russia and Ukraine are parties to the U.N. Charter (Charter), which makes the U.N. a more feasible mechanism than the Rome Statute.¹⁴ The breakout group discussed that although the GA does not have the power to create an international special tribunal for Ukraine, it does have the ability to authorize the Secretary General to establish a special tribunal through direct collaboration with Ukraine, requiring

14 The U.N. Charter (Charter) was drafted and ratified with the purpose of establishing the standards for peace among nations, with the governing framework crafted to sustain the goal of peace and security. A foundational feature of the Charter is the prohibition of the use of force. The Charter establishes in Article 2(4) that, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The U.N. GA, post-World War II, reaffirmed unanimously the commitment to the punishable nature of aggression, amongst other international crimes, that the International Military Tribunal at Nuremberg and its’ judgment laid out. U.N. Charter, art. 1, <https://www.un.org/en/about-us/un-charter/chapter-1>; HATHAWAY, *supra* note 1; U.N. Charter, art. 2, ¶ 4; Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 Pace Int’l L. Rev. 203 (1998), <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1260&context=pilr>.

Kyiv's willing consent.¹⁵ The breakout group concluded that the most timely and likely manner in which to establish an international special tribunal would be through the GA for two reasons. First, this would allow for true international participation because all 193 U.N. member states would be involved, and their critical mass would add weight to the condemnation of the crime of aggression in Ukraine. The breakout group emphasized that this critical mass has been seen before in the 140 member states who voted in support of the U.N. General Assembly Resolution Condemning Russia's Attempted Annexation of Ukraine's Territory.¹⁶ Second, if the special tribunal were to be put to a Security Council vote it would inevitably fail due to Russia's veto power as a permanent member. Therefore, the U.N. GA is left as the best option for establishing a special tribunal pursuant to the Charter.

1. *Size and Scope*

The breakout group emphasized that complementarity is of paramount importance when it comes to the scope of a special tribunal for Ukraine. The breakout group proposed that the scope of jurisdiction be limited to include crimes that cannot be punished by the domestic courts or other international bodies, narrowly tailored to the prosecution of the crime of aggression. The group further discussed that although the Sierra Leone conflict was a civil war, the special tribunal in Ukraine would likely be modeled after the size and scope of the Special Court for Sierra Leone (SCSL). The Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone sets out in Article 1(1) that the "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law" would be within the

15 HATHAWAY, *supra* note 1.

16 *Id.*

purview of the court's prosecutorial scope.¹⁷ Limiting the scope to the actors bearing the greatest responsibility for serious violations of international law and Ukrainian law would likely be within the scope of a UN-created tribunal for Ukraine. The breakout group stated that this would likely mean tailoring prosecutions to the Head of State and other high-ranking officials.

2. *Judges*

The push for an international special tribunal for Ukraine, in part, is to ensure buy-in from civil society and other states by choosing non-Ukrainian judges so as to be seen as impartial. The judges for the special tribunal should therefore be internationally sourced.

3. *Jurisdiction*

The breakout group discussed that one major question surrounding jurisdiction for a special tribunal for Ukraine would be surrounding temporal jurisdiction. The illegal annexation of Crimea in 2014 is generally seen as the prelude to Russia's larger invasion in 2022.¹⁸ The special tribunal would be faced with the task of determining if the temporal jurisdiction would start from the 2014 Crimean annexation or from the February 2022 territorial invasion of Ukraine.

17 *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, art. 1, ¶ 1, Jan. 16, 2002, <http://www.rscsl.org/Documents/scsl-agreement.pdf>.

18 See generally, Center for Preventative Action, *Conflict in Ukraine*, GLOBAL CONFLICT TRACKER (Nov. 8, 2022), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>; Francesca Ebel, *Fierce claims to Crimea highlight slim chance of Russia-Ukraine peace deal*, The Washington Post (Dec. 11, 2022), <https://www.washingtonpost.com/world/2022/12/11/crimea-russia-ukraine-negotiations-war/>.

Another issue of concern is that of pendent jurisdiction. The breakout group unanimously agreed that there should be no pendent jurisdiction as it would conflict with the ICC's jurisdiction.

The final jurisdictional issue discussed in this breakout group was universal jurisdiction. The breakout group talked about how there are already states that have universal jurisdiction over the crime of aggression and have already begun independent investigations, such as Poland and Lithuania.¹⁹ The group noted the importance that if a special tribunal or other court is empowered to investigate and prosecute aggression, there will be a need for a memorandum of understanding to ensure complementarity so that multiple states and the tribunal are not pursuing the same individuals and the same crimes. There should be a call for organization and prioritization amongst the states and international bodies that are aiming to prosecute the crimes of Russia to ensure there is access to necessary evidence, no contradictory grants of immunity, and swift coordinated investigations.

4. *Funding*

The funding of an international special tribunal for Ukraine should be based on an efficiency model. The breakout group specified that this model would use judges on retainer, rather than judges having active status at all times. This would aid in minimizing costs and satisfying cost-conscious donors. The breakout group also articulated that there should be no victim standing because the violence is so widespread that all Ukrainians are suffering, and every Ukrainian is a victim. Reparations are also a concern surrounding funding of a tribunal. It is the view of the breakout group that reparations would be left out

19 Diane Orentlicher, *How States Can Prosecute Russia's Aggression With or Without "Universal Jurisdiction"*, JUST SECURITY (Mar. 24, 2022), <https://www.justsecurity.org/80818/how-states-can-prosecute-russias-aggression-with-or-without-universal-jurisdiction/>.

of the creation of the tribunal because it is seen as a separate issue to be addressed independently.

5. *Absentia*

The breakout group unanimously agreed that there should be no trials in absentia.

6. *Indictments*

An unsealed indictment against Putin has the potential to amplify the narrative of public condemnation and to energize the widespread support of civil society.²⁰ Other high-ranking officials may qualify for unsealed indictments if there is a need for similar public condemnation. Other high-ranking officials and state actors would likely have sealed indictments to better chances of detaining them when they are off-guard.

7. *Complementarity*

Although the tribunal cannot be hybridized with any Ukrainian domestic court, there is still the possibility of other states and judicial bodies exerting their universal jurisdiction to prosecute Russian crimes in Ukraine. The goal of a special tribunal is to complement

20 We know now, in March of 2023, the International Criminal Court has issued public arrest warrants for both, Vladimir Putin and Maria Alekseyevna Lvova-Belova, for war crimes concerning the deportation of Ukrainian children. *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INTERNATIONAL CRIMINAL COURT (Mar. 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

other secondary approaches to fill in the gaps of the ICC, as they cannot pursue prosecutions of the crime of aggression.

Main Takeaways from Discussion:

- Current Law and existing judicial mechanisms are insufficient to adequately secure justice for the crime of aggression.
- Atrocity prevention is the foundation of accountability.
- The most likely method of prosecuting Russian aggression in Ukraine will be through an ad hoc international tribunal via the United Nations General Assembly.
- An ad hoc tribunal should have a similar scope to the Special Court for Sierra Leone, impartial non-Ukrainian judges on retainer, a combination of sealed and unsealed indictments for differently ranked Russian actors, no trials in absentia, with an emphasis on complementarity.
- A Rome Statute amendment hybridized Ukrainian courts, a European Union Court, and multi-state courts are less favorable options of addressing Russian aggression due to time constraints, Ukrainian constitutional limitations, and incompatible member-status to the Rome Statute and other multi-state instruments.

Topic 2: The Role of Outside Combatants in International Humanitarian Law

What should the definition of ‘mercenary’ extend to in the field of IHL?

The term ‘mercenary’ is generally referred to as a person, or people, hired by a private company to carry out military activities.^{21,22,23} Although mercenaries have been utilized throughout time,

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of international Armed Conflicts (Protocol I) art. 47, Jun. 8, 1977; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, OAU Convention for the Elimination of Mercenarism in Africa art. 1, Dec. 4, 1989; OAU Convention For The Elimination of Mercenarism in Africa art. 1, Jul. 3, 1977; U.N. G.A.O.R. resolution 54/151, *Use of Mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination*, A/RES/54/151 (Feb. 29, 2000), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/295/24/PDF/N0029524.pdf?OpenElement>.

22 The use of mercenaries in armed conflict, notably during the Thirty Years War, as mobs of armed men sometimes acting as agents of nobles or a king, became disfavored as the laws of war progressed to namely be confrontations of nation-states. Sean McFate, *Mercenaries and War: Understanding Private Armies Today*, National Defense University, <https://ndupress.ndu.edu/Media/News/Article/2031922/mercenaries-and-war-understanding-private-armies-today/>.

23 Mercenaries were also utilized in the American Revolutionary War by the British, known as Hessians, and were explicitly cited as one of the crimes against the colonists by the British, with Jefferson citing mercenaries used by the Crown during the war as one of the twenty-seven grievances in the Declaration of Independence. David Head, *Hessians*, MOUNT VERNON DIGITAL LIBRARY, [https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/hessians/#:~:text=The%20term%20%22Hessians%22%20refers%20to,also%20saw%20action%20in%20America](https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/hessians/#:~:text=The%20term%20%22Hessians%22%20refers%20to,also%20saw%20action%20in%20America;); Dave Roos, *The Declaration of Independence Was Also a*

transposing an historic definition to the application of a modern issue can be outdated and imprecise and should therefore merit cautious administration.²⁴ The breakout group discussed that generally, the use of mercenaries is illegal under IHL, but modern-day practitioners of IHL have been faced with determining how far the definition of ‘mercenary’ should extend and if the fine-tuning of the definition affects the legality of their utilization. The breakout group explored whether only active combatants can be deemed mercenaries, or if the definition should also encompass the technicians who provide integral support, service workers, or the employees who provide training and aid to the combatants. The breakout group surmised that there is a need to better clarify what separates mercenaries from non-combatant participants and/or civilians to a conflict because the terminology used to classify people within a conflict determines their appropriate treatment and punishment; civilians and civilian objectives are protected under IHL, while combatants and military objectives may be targeted in conflict.²⁵

There is no modern bright line illuminating mercenary status. The breakout group members discussed that if mercenaries are combatants, then they should receive statuses in accordance with that categorization, like POW status, to further legitimize them. If mercenaries do not rise to the accepted international definition of lawful combatant, then they risk not being afforded any special

List of Grievances, The History Channel, <https://www.history.com/news/declaration-of-independence-grievances>.

24 See generally, *Id.*

25 Tanya Mehra & Abigail Thorly, *Foreign Fighters, Foreign Volunteers and Mercenaries in the Ukrainian Armed Conflict*, INTERNATIONAL CENTRE FOR COUNTER-TERRORISM, (Jul. 11, 2022), <https://icct.nl/publication/foreign-fighters-volunteers-mercenaries-in-ukraine/>.

status.^{26,27} Both Russia and Ukraine are parties to the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries that requires parties to criminalize mercenaries, but despite this membership no prosecutions have occurred.²⁸

The field of IHL has not specifically outlawed the use of mercenaries, but breakout group members alluded that if mercenaries act pursuant to all the rules of IHL then they are likely legal and a valid resource in war.²⁹ The breakout group noted that mercenary validity is linked to their legitimacy; if mercenaries are seen as legitimate, then their use is likely valid. The breakout group further posited that mercenaries strengthen their legitimacy when they align their practices and

26 The Additional Protocol I states that mercenaries, as an established rule of customary international law, do not have the title, and subsequent statuses like POW, of combatants. However, they do still enjoy the protection afforded under article 75. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I), art. 47(1) (June 8, 1977).

27 Earlier this year, Russian Defense Ministry Spokesman, Konashenkov, announced that any mercenaries that the West would send to fight in Ukraine against Russian forces would not be given the title of ‘combatant’ and thus not afforded any of the statuses that are typically included for combatants under IHL, including prisoner of war status. He further articulated that any captured mercenaries in Ukraine would be brought to justice under criminal charges in the Russian judicial system. *Foreign mercenaries in Ukraine will not have POW status- Russian Military*, TASS: RUSSIAN NEWS AGENCY (Mar. 3, 2022), <https://tass.com/politics/1416131>.

28 MEHRA & THORLY, *supra* note 26.

29 The official definitions do not indicate the legality of the use of mercenaries, but a 1907 international law directs states to do everything they can to prohibit mercenaries, effectively condemning them and showing the negative connotation mercenaries have achieved through history. *See generally*, Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907.

standards to those exhibited by militaries. Consequently, it was also expressed that there are gray areas when mercenaries engage in highly specialized operations that regular armed forces may not be able to execute and what that specialization means in terms of defining their legitimacy and validity.

A. How far should responsibility extend when mercenaries commit IHL violations?

The breakout group also discussed how consent may play into mercenary responsibility. This is because combatants have certain rights because they have consented to them; if mercenaries are combatants, it means they have consented to the norms of IHL so they should be given the same status as militaries/combatants and applicable responsibility should be attributable. While some experts argue that mercenaries should be granted combatant status and subsequent POW status, others argue that the granting of status to mercenaries could have unintended repercussions stemming from the granting of legitimacy. A third option, preferred by some experts in the breakout group, argues there is no need for classification of POW status, rather mercenaries could simply be classified as either combatants or noncombatants to ensure that the law could be uniformly applied to anyone who violates it. Within this view, the general rule still exists that states cannot outsource unlawful actions no matter the circumstance.

Importantly, mercenaries may still be charged for their actions if they violate the Geneva Conventions, i.e., committing war crimes under current IHL. Concerning mercenary prosecutions, attribution can be difficult to prove because it is often unclear who has done what exactly, as mercenaries are private entities, shrouded in a buffer of insulation and a lack of military structure. If illegal mercenary action cannot be appropriately attributed to the correct party, it can lead to a lack of accountability within IHL.

What protections are extended to mercenaries?

Prosecution of mercenaries is solely circumstantial. The success of mercenary prosecution relies heavily on availability of evidence, the strength of said evidence, and the ability to identify the chain of command. The absence or weakening of these evidentiary factors for prosecutions can effectively work to protect mercenaries. If mercenaries are private corporations, they may be subject to corporate liability according to precedent from World War II.³⁰ Corporate liability from IHL violations is an emerging field, and is therefore difficult to determine how it may be reconciled with states' differing policies. It has been challenging to prosecute individual mercenaries, let alone prosecuting mercenaries as corporations. The breakout group articulated that one benefit to the theory of corporate liability for mercenaries would be that the corporations would have to pay victims who were targeted and harmed by the crimes perpetrated by the entity. However, prosecution of corporations, due to its foreseen difficulties, can be seen as a protection as it is burdensome to successfully accomplish, similar to individual mercenary prosecution.

Has the privatization of war outrun existing law, and if so, how do we effectively address this challenge?

1. *Terrorists*

Modern-day IHL has grown in new directions that require inventiveness within the field, in order to tackle current issues. IHL has seen the emergence of terrorism and been faced with the challenges

30 Michael J. Kelly, *Atrocities by Corporate Actors; A Historical Perspective*, 50 CASE W. RES. J. INT'L L. 49 (2018), <https://scholarlycommons.law.case.edu/jil/vol50/iss1/6>.

of squaring it away within the existing legal framework.³¹ Terrorist groups are non-state armed actors that participate in terrorism, which are subsequently subject to IHL if their members' acts are committed in peacetime; it is less clear how terrorist groups fit within the IHL context in comparison to mercenaries. The breakout group discussed that there are notable differences between mercenaries and terrorist groups that may indicate how existing law can accommodate these new developments and where its weaknesses may lie—mercenaries are driven by financial gain as they are private, for-hire armed groups. Mercenaries also tend to deploy force in a military manner rather than a law enforcement manner due to the nature of mercenary group structure. The breakout group delineated that terrorist organizations are largely driven by politics, religion, or some other underlying factors, and thus are not typically considered mercenaries, but potentially could be if they are state-sponsored. In today's context, the nature of how IHL sees terrorist groups in comparison to mercenaries is important to consider. Ukrainians, and other nationals, are volunteering to help support military efforts against the Russian invasion but are not conscripted into the military. The breakout group discussed how classifying these individuals can be complex, presenting an emerging challenge determining where they fit within the scope of present-day IHL.

31 Terrorism, as defined by the U.N. Security Council as: “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitutes offenses within the scope of an as defined in the international conventions and protocols relating to terrorism...” U.N. G.A.O.R. Resolution 1566, ¶ 3, S/RES/1566 (Oct. 8, 2004), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement>.

2. *Child Soldiers*

The breakout group asked whether child soldiers are seen as mercenaries through the lens of IHL, and if so, how practitioners should classify them. Developmental trajectories for child soldiers are not that of a typical “mercenary.” The breakout group noted that child soldiers are unable to make informed decisions and cannot consent, therefore they bear lesser, if any, legal responsibility for their actions. The group reached the consensus that this idea of lesser responsibility is an almost universal understanding, and therefore, that child soldiers should likely be considered outside the standard mercenary framework because they lack the capacity to truly consent to their membership and/or participation in their organization’s crimes. Although child soldiers are kidnapped/recruited, and indoctrinated before they can consent to their actions, some remain as soldiers far into adulthood. This leads to the question if they can be held accountable for their actions post-age of consent.

The Additional Protocols I and II, the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the Convention on the Worst Forms of Child Labour all prohibit the recruitment of children as child soldiers.³² The prohibition on recruitment and use of child soldiers has been found as a practice in customary international law and IHL with no totally uniform agreement concerning the minimum age for recruitment, though there is consensus that the age of recruitment should never be below 15. The Additional Protocol I and the Convention on the Rights of the Child establish that states recruiting between the ages of 15 and 18

32 Additional Protocol I, art. 77(2) (cited in Vol. II, Ch. 39, § 379); Additional Protocol II, art. 4(3)(c) (*id.*, § 380); Convention on the Rights of the Child, art. 38(3) (*id.*, § 381); African Charter on the Rights and Welfare of the Child, art. 22(2) (*id.*, § 386); Convention on the Worst Forms of Child Labour, arts. 1 and 3 (*id.*, § 388).

must give preference to the older recruits.^{33,34} The breakout group’s discussion mirrored this widely held idea of thought.

What are the major issues with hiring mercenaries?

Mercenary groups, although not state-run, usually have state-aligned interests.³⁵ The process of states hiring mercenaries is extremely vague—documentation often simply references “security.” The

33 ICRC, RULE 136: RECRUITMENT OF CHILD SOLDIERS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule136#Fn_64781199_00001.

34 Notably, Dominic Ongwen was a child, believed to be between the ages of nine and fourteen, when he was abducted by the Lord’s Resistance Army (LRA) in his country of Uganda. Ongwen remained in the LRA for just over 27 years, turning from child soldier into its “rebel commander.” Ongwen has now been found guilty on multiple counts of war crimes and crimes against humanity after being prosecuted by the International Criminal Court in 2021. Ongwen’s charges relate back to his conduct as an adult, but he did not receive the maximum life sentence because of consideration of his abduction as a child and subsequent grooming by his captors. Thus, it remains unclear what accountability standards should be applied to child soldiers and whether child soldiers are mercenaries under international law. See generally, *Improve Integration of Child Soldiers*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 1, 2018), <https://www.ohchr.org/en/stories/2018/09/improve-integration-child-soldiers>; *DOMINIC ONGWEN—FROM CHILD ABDUCTEE TO LRA REBEL COMMANDER*, BBC (May 6, 2021), <https://www.bbc.com/news/world-africa-30709581>; *THE PROSECUTOR V. DOMINIC ONGWEN*, ICC-02/04-01/15, MAJORITY OPINION OF THE APPEALS CHAMBER, ¶ 9 (Dec. 15, 2022), <https://www.icc-cpi.int/uganda/ongwen>.

35 For example, the Wagner Group is a mercenary group founded in Russia that fights alongside the Russian military. The Wagner Group is contracted and paid by the government and has fought in Syria, Central African Republic, and Ukraine. Core Engelbrecht, *Putin Ally Acknowledges Founding Wagner Mercenary Group*, THE NEW YORK TIMES (Sep. 26, 2022), <https://www.nytimes.com/2022/09/26/world/europe/russia-wagner-group-prigozhin.html>.

breakout group noted that it is also unclear if foreseeability is a factor when states contract with mercenaries, and if leaders should reasonably foresee the consequences of hiring mercenaries when the paper trail specifies only security as the purpose for their employment. Mercenaries have many purposes when hired by a state: to carry out certain missions that traditional military forces may not be able to carry out, to supplement the military, and to provide more cost-effective and disposable protection than traditional military groups. As highly specialized and disposable actors, the breakout group determined that mercenaries often come with two major challenges: accountability and attribution.

1. *Accountability*

It is important to determine if a mercenary group is a private business or a state actor, and if the latter is true, it is then necessary to determine if the mercenary is under the effective control of their private leadership or the state, in order to understand who should be held accountable when violations occur.³⁶ The breakout group noted that prosecution in

36 The connection of effective control over a mercenary group is difficult to prove. The test for effective control that has been utilized by the International Court of Justice, established in the Nicaragua Paramilitary case, requires that armed groups be under the control of, operating under the direction of, or under the instruction of the state in question. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 99 (June 27). The Yugoslavia Tribunal utilized a less strict test than the effective control test for finding attribution. The overall control test establishes that there is sufficient attribution to the state when the armed group is under the overall control of the state, not requiring the state to plan all operations, choose targets, or issue specific instructions. In the International Criminal Court for the former Yugoslavia (ICTY) there was a connection established between paramilitary groups and the military by examining documents and finding evidence of subordination agreements, payments to the mercenary group, and other circumstantial evidence, thus

an international justice mechanism, proving control over a mercenary group, is usually circumstantial as the evidence is often paperwork of the state, and is oftentimes easily destroyed.³⁷

2. Attribution

The situation in Ukraine is complex and attribution of mercenaries only adds to that complexity. The breakout group discussed how this is problematic as causation must be linked up the chain of command to establish attribution, and then accountability can be addressed. The global perspective is mixed on the level of attribution that should be required in Russian prosecutions because many states utilize mercenaries alongside their own military operations and do not want strict standards to also apply to their own conduct. In conclusion, we

satisfying the overall control test. *Prosecutor v. Tadić*, Case No. IT-94-1-, Appeals Chamber Judgment, ¶ 120-122 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999; ¶ 150).

³⁷ Russian mercenaries in Ukraine present challenges. It would be difficult to connect the Russian mercenary group's activities in Ukraine to Putin because it would have to be proven that Putin is circumstantially related to those activities, and likely needing to satisfy the effective control test. A video out of Russia in September of 2022 shows, what appears to be, Yevgeny V. Prigozhin, the de facto leader of the Wagner Group, recruiting in a Russian prison while addressing inmates. Prigozhin explains how inmates can have their prison sentences commuted in exchange for their fighting on the Wagner Group's behalf. This presents a possible link between the Wagner Group and the Russian state as Putin is presumed to have effective control over Russia's penal system. Accountability for the crimes committed in Ukraine are heavily reliant on being able to attribute control to the appropriate party and it is unclear if Russian mercenaries are under the effective control of Putin. Christian Triebert, *Video Reveals How Russian Mercenaries Recruit Inmates for Ukraine War*, THE NEW YORK TIMES (Sep. 16, 2022), <https://www.nytimes.com/2022/09/16/world/europe/russia-wagner-ukraine-video.html>.

know that causation must show attribution to the mercenary group by the state in order to prosecute Russia successfully and hold them accountable for crimes under IHL in Ukraine.

Main Takeaways from Discussion:

- New legal and practical approaches are required to curtail unlawful acts perpetrated by mercenaries and other irregular forces engaged and directed by states.
- The appropriate standard for aggression in Ukraine should be slightly heightened above “should have known” and “failed to prevent or punish”. There should be no joint enterprise standard applied in Ukraine.
- If states utilize mercenaries, they must also hold them accountable when they fall short of international law standards. It may be beneficial to entertain amending the Armed Forces Act to extend jurisdiction to mercenaries as an accountability mechanism.
- Any accountability mechanism for mercenaries must be fair and unbiased.

Topic 3: What is the Future of International Humanitarian Law?

Do existing laws meet the challenges sufficiently of current events?

As we progress as a society there are new crimes that may not be appropriately addressed by existing IHL. Some of these new crimes are, but not limited to, ecocide, terrorism technology, and international corruption. These emergent crimes present unique challenges and will require new innovative solutions to adequately address. Ecocide is mass environmental destruction, and there is a

push to criminalize it within international law due to its detrimental effect on the world as a whole.³⁸

The breakout group examined possible solutions for the unique issue of ecocide. This included giving rights to nature, similar to Brazil's domestic legal system, and the adoption and utilization of an environmental justice framework as seen in indigenous communities. The breakout group discussed how, In Brazil, there is a new form of jurisprudence taking hold, recognizing nature as an entity legally deserving of rights similar to humans.³⁹ Environmental rights to nature are also seen in the Ecuadorian Constitution, and other Latin American states, but now, Brazil, home to the majority of the Amazon region, has begun to follow suit in three municipalities.⁴⁰

38 Josie Fischels, *How 165 Words Could Make Mass Environmental Destruction and International Crime*, N.P.R. (Jun. 27, 2021), <https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court>.

39 The Stop Ecocide Foundation coalition has employed environmental experts to draft a legal definition of the term, which provides that ecocide is the “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.” This drafted definition is created in hopes of it being included in an amendment to the Rome Statute, to allow the criminal prosecution of ecocide, rather than the imposition of fines on corporations and states, which allows them to further commit ecocide. However, it may be more beneficial to create a model statute including criminal liability and negligence for ecocide in attempting to amend the Rome Statute. Xingú and Carajás Territory Brazil, INTERNATIONAL RIGHTS OF NATURE TRIBUNAL (2021), <https://www.rightsofnaturetribunal.org/tribunals/brazil-delegation-2022/>.

40 Jasmine Haniff, *The Rights of Nature Movement*, LATIN AMERICA BUREAU (Jan. 12, 2021), <https://lab.org.uk/the-rights-of-nature-movement/>.

Similarly, the group discussed the need to consult environmental justice frameworks, as seen in indigenous communities, when creating international ecocide statutes. The breakout group noted that the indigenous perspective can work to challenge dominant Western legal frameworks, by emphasizing the pluralistic and intergenerational core notion shared by many indigenous communities that when you destroy the land, you destroy the person.⁴¹ The breakout group explored the idea that the ICC may not be the appropriate legal venue, right now, to punish ecocide. The group members discussed if existent anticorruption courts could be a possible solution to ecocide, in that they may provide a venue to hold corporations accountable when they destroy and/or pollute the environment. The group mentioned that the idea of criminal liability under the existing anticorruption framework could be a deterrent to ecocide offenders.⁴²

41 See generally, Meg Parsons, et. al, *Decolonising Blue Spaces in the Anthropocene: Freshwater management in Aotearoa New Zealand*, PALGRAVE STUDIES IN NATURAL RESOURCE MANAGEMENT, (2022), <https://link.springer.com/content/pdf/10.1007/978-3-030-61071-5.pdf?pdf=button%20sticky>.

42 Grand corruption is “the abuse of public office for private gain by a nation’s leaders” and is seen as a roadblock to a state’s ability to respond effectively to global pandemics, the maintenance of peace and security, and the promotion and protection of human rights. Although there are many anti-corruption laws within the domestic legal system of most countries, and over 180 states have become party to the U.N. Convention against Corruption, corrupt leaders, state officials, and lobbied industries are nonetheless able to skirt crimes with impunity. This is because they have learned how to manipulate and exploit the legal frameworks intended to protect business ventures while institutional capture of courts, prosecutors, and police have assisted bad actors in achieving their nefarious financial goals. A possible solution to holding kleptocrats, national leaders who are offenders of corruption, accountable would be the creation of an International Anti-Corruption Court (IACC). An IACC would serve to hold kleptocrats and other offenders accountable for their offenses that go widely unpunished today, to

The breakout group briefly mentioned terrorism as an evolving crime, but one that has existed for a long time, with questions arising around framing terrorism, and other crimes, within a human rights framework.^{43,44}

deter other actors from future commission of corruption, and as a means to make victims whole through repatriation. Also, new technology, utilized by terrorists, is ever evolving. From recruiting members in distant locations, to widespread access to the internet, to new weaponry and cyber warfare, to end-to-end encryption, and the utilization of virtual private networks, terrorist organizations can adapt and challenge existing counterterrorism tools. Mark L. Wolf, et. al, *The Progressing Proposal for an International Anti-Corruption Court: I. Introduction*, AMERICAN ACADEMY OF ARTS & SCIENCES, <https://www.amacad.org/publication/proposal-international-anti-corruption-court/section/1>.

43 Terrorist organizations, both international and domestic, are generally unsophisticated, small in scale, and utilized fairly simple operations. But with the advancements in technology, terrorist organizations can extend their radicalized reach further than ever before. Possible solutions are to update policies to include the promulgation of laws that compel suspects to provide passwords for devices and encrypted messaging apps, and requests for telecommunication companies to incorporate “backdoors” into their structure for easier access to information when attacks have been executed. There is also the possibility for states to invest in counterterrorism efforts, allowing for more effective terrorist defense by funding agencies to improve tools; this has been seen in Europe where London’s Metropolitan Police revealed the Talon, a new device that is aimed to immediately halt vehicles in response to the increase in vehicle-ramming at large public gatherings. Seth Harrison, *Evolving Tech, Evolving Terror*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Mar. 22, 2018), <https://www.csis.org/npfp/evolving-tech-evolving-terror>; Nick Robins-Early, *London Deploys the ‘Talon’ to Thwart Car-Ramming Attacks*, HUFFINGTON POST (Sep. 11, 2017), https://www.huffpost.com/entry/london-car-ramming-attack-terror_n_59b68f88e4b0354e441344e2.

44 In terms of combatting new challenges within the field of IHL it could be beneficial to utilize technology by sharing victories on different social media sites like Facebook, LinkedIn, Twitter, Reddit, Instagram, Discord,

Have recent events garnered public support for IHL?

A breakout group member poignantly stated, “[t]he legitimacy of a court system does not rest upon the sword, but on the perception within the community.” Engagement with civil society takes on many different forms: through outreach on social media, like LinkedIn, Facebook, and Twitter, through engagement with journalists, and through increased access to victim-groups due to universal jurisdiction. The breakout group discussed how difficult it can be to engage with civil society due to budget and staffing constraints, which are further exacerbated when the international justice systems cannot adequately satisfy civil society’s expectations. The conversation continued by discussing the importance of managing these expectations and explaining to communities why certain prosecutions don’t occur, while also acknowledging that civil society’s engagement should not distract from the core function of the courts: bringing perpetrators to justice. The breakout group suggested that, specifically for the International Criminal Court, educating victims and survivors about the Rome Statute could be a possible tool for managing these expectations.

What does the future of prevention look like for the field of IHL?

The importance of prevention has typically not garnered the same attention as accountability. There was an overall theme within the breakout session that prevention must be a bigger focus in the future and there seems to be a general international consensus regarding its

etc. Easily consumable content can work to improve the communication feedback loop between practitioners and civil society. Better understanding of what aspects of internet content resonate with civil society is integral in terms of garnering support—what makes hashtags go viral like “#BringBackOurGirls” and “#Kony2012,” what allowed for the sweeping international civil support of Ukraine in 2022, and what impact do these social media movements have on the field of IHL?

importance, though it is acknowledged there is no ‘one size fits all’ model. The breakout group noted that aggression is the catalyst to all other IHL violations and that all aggressive war leads to atrocities.⁴⁵ In order to better understand atrocity prevention, the mechanisms of prevention must first be identified: identifying warning signs, upstream engagement and early intervention, institution building, strengthening state systems, and optimized media utilization.

A. Prevention Mechanisms

Atrocities are not spontaneous, which highlights the importance of being able to identify warning signs that violence may lie ahead. The breakout group discussed different indicators that atrocity prevention should be activated when occurrences, like shrinking civil society space, lack of ability for judiciaries to act independently, the othering of minorities or marginalized people, gender-based violence and abuses, and state torture going unchecked, come to light. Once able to identify different atrocity indicators, early intervention is incredibly important to mitigate escalation to violence and conflict.

The breakout group indicated that upstream engagement is essential to atrocity prevention; the longer the international community waits to intervene, the more limited the preventative tools.⁴⁶ The breakout group highlighted that early intervention is often more cost-effective in a preventative stage in comparison to intervention during an

45 The U.N. emphasizes that an important aspect of atrocity prevention is understanding the root causes to better address the usual escalation seen before atrocities occur, as atrocities are not spontaneous. *Atrocity Crimes: Prevention*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/prevention.shtml>.

46 *Before the Violence Starts: Early Intervention is Key to Preventing Atrocities*, COLUM. L. SCH. (Nov. 25, 2019), <https://www.law.columbia.edu/news/archive/violence-starts-early-intervention-key-preventing-atrocities>.

ongoing conflict and even in post-conflict situations. A part of the cost-effectiveness of early intervention comes in the form of education. Funding for prevention education is often stable over years; for example, the group pointed out that it is easier to give \$10 million over a period of ten years, but difficult to give \$100,000 in ten days. The breakout group noted this is exemplified by the case of Sri Lanka, a state that has been plagued by violence and atrocities throughout its history, and which has implemented a successful atrocity-risk program that invests in reconciliation and atrocity prevention measures.⁴⁷ The breakout group expounded that the bombings of Sri Lankan religious sites several years ago garnered funding within hours for interreligious gatherings—this did not turn into a mass atrocity, thus it didn't make national news because of its effectiveness.

The breakout group also discussed that important aspects of institution building (the strengthening of the overarching state systems that provide for the basic needs of individuals) include strengthening the State's Bar—who tell us where we should dedicate resources—and providing provisions of food, water, shelter, and better treatment of marginalized people. Breakout group members stated that strengthening state systems and institution building are important preventative measures because ethnic violence often results from leaders taking advantage of faults or weaknesses in these systems.

The tech world, specifically within the sphere of social media, has been confronted with growing challenges in atrocity prevention. The

47 See generally, Kate Lonergan, *Does Reconciliation Prevent Future Atrocities?*, U.S. INSTITUTE OF PEACE (Sep. 27, 2017), <https://www.usip.org/publications/2017/09/does-reconciliation-prevent-future-atrocities>; Kate Lonergan, *Does Reconciliation Prevent Future Atrocities? Evaluating Practice in Sri Lanka*, PEACEWORKS: U.S. INSTITUTE OF PEACE (2017), <https://www.usip.org/sites/default/files/PW132-Does-Reconciliation-Prevent-Future-Atrocities-Evaluating-Practice-in-Sri-Lanka.pdf>.

breakout group discussed how the online world has been flooded with misinformation, which can be difficult for individuals to navigate when they're not well-equipped to pick out 'bad' information. The breakout group further articulated that the creation of counter-narratives to circumvent hate speech and misinformation often cannot keep up with false narratives.⁴⁸ The breakout group explicitly mentioned the need for content moderation as a tool of atrocity prevention, which can also be seen in the Gambia's lawsuit against Facebook filed in the ICJ.⁴⁹ The Gambia alleges that Facebook's lack of content moderation is a direct cause of incitement of violence, specifically genocide, in

48 2021 Nobel Peace Prize winner, Filipino journalist, and Rappler CEO, Maria Ressa, has notably drawn attention to the threat of democracy posed by tech giants, like Facebook, in their failure to protect its users from the spread of hateful disinformation. Ressa claims that Facebook does not appropriately moderate content and has prioritized the spreading of false information over facts. Ressa has attributed the lack of moderation on Facebook, a platform widely used by the vast majority of Filipinos on the internet, to the violence seen in the Philippine's deadly war on drugs deemed the "violent killing campaign" of the Duterte administration. In an interview Ressa states that when social media platforms fail to moderate content and combat misinformation, "A lie said a million times becomes a fact." This illustrates that when there is a lack of a shared reality based on widely accepted, objective facts, it can threaten democracy by splintering the people, especially when weaponized by dangerous leaders. Karen Lema, *Philippine Nobel winner Ressa calls Facebook 'biased against facts'*, REUTERS (Oct. 9, 2021), <https://www.reuters.com/world/philippine-nobel-winner-ressa-calls-facebook-biased-against-facts-2021-10-09/>; Clare Baldwin, et. al, *Duterte's War*, Reuters (Jun. 29, 2017), <https://www.reuters.com/investigates/section/philippines-drugs>; The Late Show With Stephen Colbert (Paramount: CBS, television broadcast Nov. 29, 2022), https://www.cbs.com/shows/video/_7AeOuxXB9tK2PZEWfZXVWD80Bj7jw4x/.

49 Jenny Domino, *Gambia v. Facebook: What the Discovery Request Reveals about Facebook's Content Moderation*, JUST SECURITY (Jul. 6, 2020), <https://www.justsecurity.org/71157/gambia-v-facebook-what-the-discovery-request-reveals-about-facebooks-content-moderation/>.

Myanmar.⁵⁰ The lawsuit was filed after the UN's Fact-Finding Mission on Myanmar released its report finding that human rights violations had occurred against the marginalized Rohingya population, which included crimes in violation of international law that directly resulted in the incitement of violence.⁵¹

The breakout group highlighted how Facebook, and other widely used social media platforms, are falling short in terms of content moderation because they are largely based in the United States, with the majority of English-speaking employees. The group noted that it's important to ensure appropriate moderation of hate speech and misinformation, and that non-English-speaking content moderators are utilized by internationally reaching social media companies. Some breakout group members emphasized that non-English-speaking content moderators are not enough, and that there is a further need for employees with cultural knowledge and lexical expertise to recognize and identify warning signs of atrocity prevention throughout the world. Social media companies must also be aware of the complexities of content moderation and content removal, which can often have the opposite effect and create a push towards the inciting rhetoric when individuals feel like information is being 'silenced.' The intricate balance of culturally-aware content moderation and the goal of curbing incitement to violence are of paramount importance for states, social media companies, and governments.

B. Barriers to Identifying Prevention Mechanisms

Atrocity prevention faces multiple barriers to successful implementation. The breakout group outlined that some of the most

50 *The Gambia v. Facebook*, Global Freedom of Expression: Columbia University (2021), <https://globalfreedomofexpression.columbia.edu/cases/gambia-v-facebook/>.

51 DOMINO, *supra* note 49.

pressing challenges are the Global South suspicion, language and cultural barriers within international justice mechanisms in order to establish engagement, understanding and trust over time, and opposition to culturally informed stances on human rights violations. In order to identify early warning signs of atrocities in countries within the Global South, there should be a fostered relationship of trust to curb the suspicion. This inherently links the first and second barrier to prevention: the establishment of engagement, understanding and trust between nations. The breakout group pointed out that due the deep and turbulent history of colonialism, human rights abuses, exploitation, neocolonialism, etc. of primarily states in the Global South by the Global North, there is inherent suspicion of the motivations of Western states and their desire to interrupt violence in the South. Building a foundation to a bridged relationship between the Global South and the Global North is integral to improve atrocity prevention.⁵²

52 Another barrier is the cultural justifications seen surrounding human rights violations. The Morality Police in Iran, in response to women allegedly inappropriately wearing hijabs, are currently committing a range of human rights violations including suppressing peaceful protests. The Morality Police claim to operate under the religious and cultural justification within Islam that the hijab and other coverings are a showing of modesty, however, the Morality Police prioritize the hijab as a mandatory aspect of life for women in Iran and have used it to justify brutal attacks and torture against the Iranian women who choose to not wear a hijab or wear it improperly according to the police's standards. A similar justification is seen employed by the Taliban, banning women and girls from school and university. There must be a balance struck between universal and culturally relative human rights to better prevent future atrocities and gross human rights violations. See Press Statement, Anthony J. Blinken, Secretary of State, Statement on Designating Iran's Morality Police and Seven Officials for Human Rights Abuses in Iran (Sep. 22, 2022), <https://www.state.gov/designating-irans-morality-police-and-seven-officials-for-human-rights-abuses-in-iran/>; Juana Summers, *The History of Iran's So-Called Morality Police*, NPR (Sep. 30, 2022), <https://www.npr.org/2022/09/30/1126281355/the-history-of-irans-so-called-morality-police>; Belquis Ahmandi & Asma

C. Global Prevention Policies

1. *UN Atrocity Prevention Framework*

The breakout group emphasized the importance of creating a prevention arc to reference and signal to the international community when atrocities likely lie ahead. The U.N. has published the ‘*Framework of analysis for Atrocity Crimes: a tool for prevention*’, which outlines the institution’s stance towards achieving atrocity prevention. The U.N. proposes a framework that identifies risks, both general and specific, and assesses the risk of genocide, crimes against humanity, war crimes, and ethnic cleansing.⁵³ The specific risk factors that the U.N. framework identifies are situations of armed conflict or other forms of instability, a record of serious violations of international human rights and humanitarian law, weakness of state structures, motives and incentives of bad actors, the capacity a group or state has to commit atrocity crimes, the absence of mitigating factors, the presence of enabling circumstances or preparatory action taken by the potential offender, and any other triggering factors. The U.N. also has identified six specific risk factors that include intergroup tension or patterns of discrimination against a protected group, signs of widespread or systemic attack against any civilian population, signs of an intent to destroy in whole or in part a protected group (genocide), signs of a plan or policy to attack a civilian population, the presence

Ebadi, *Taliban’s Ban on Girls’ Education in Afghanistan*, U.S. INSTITUTE OF PEACE (Apr. 1, 2022), <https://www.usip.org/publications/2022/04/talibans-ban-girls-education-afghanistan>.

⁵³ The U.S.’s Strategy to Anticipate, Prevent, and Respond to Atrocities focuses on prevention pre-conflict, during conflict, and post-conflict; where post-conflict includes accountability for past atrocities. *Framework of Analysis for Atrocity Crimes*, U.N. 5 (2014), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf.

of serious threats to humanitarian or peacekeeping operations, and any serious threats to those protected under IHL.⁵⁴

2. *U.S. Atrocity Prevention Strategy*

The breakout group discussed the U.S. atrocity prevention strategy and emphasized the U.S. focus on the cost benefit associated with early intervention.⁵⁵ The breakout group discussed how U.S. policy focuses on three strategic goals and how they must be addressed in tandem to be successful: 1) to act early in prevention and source local solutions in states that are deemed of the highest priority; 2) to engage in thoughtful and strategic messaging to the public, in order to promote civil society engagement with the atrocity prevention, and to advance international collaboration and cooperation in the face of atrocity prevention; and 3) to install an effective and relevant prevention architecture by training the U.S. Government to better identify and respond to atrocities.⁵⁶ The U.S. Department of State has also included a non-exhaustive list of tools to better prevent atrocities and aid in signaling for early intervention needs including diplomacy, foreign assistance and programming, defense support and security cooperation, trade investment, commercial diplomacy, sanctions and visa restrictions, intelligence analysis, justice and accountability, among others.⁵⁷

Is there a legal obligation to prevent genocide, war crimes, or crimes against humanity?

54 *Id.*, 10-25.

55 BUREAU OF CONFLICT AND STABILIZATION OPERATIONS, 2022 U.S. STRATEGY TO ANTICIPATE, PREVENT, AND RESPOND TO ATROCITIES (Jul. 15, 2022), <https://www.state.gov/2022-united-states-strategy-to-anticipate-prevent-and-respond-to-atrocities/>.

56 *Id.*

57 *Id.*

There are obvious moral and ethical responsibilities to prevent atrocity crimes from occurring, but there are also well-established legal precedents articulating obligations of states to their populations. The breakout group emphasized that states have obligations to prevent genocide under the Genocide Conventions; the group identified the importance of obligations to prevent crimes against humanity and war crimes, however, the group could not identify specific international instruments that would require such conduct.⁵⁸

The breakout group briefly mentioned that international justice mechanisms have also indicated a legal obligation of states to prevent atrocities; the ICJ has illustrated that under the Genocide Convention there is a non-territorially limited legal duty to prevent when ruling in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro).⁵⁹ The Court noted that there were many international instruments, including but not limited to Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, Article 4 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973, and Article 11 of the Convention on the Safety of United Nations and Associated Personnel of 9 December 1944, that

58 In 2005, all U.N. member states, pursuant to the Outcome Document of the 2005 World Summit, committed that every state has a responsibility to its civilian population to protect against the commission of genocide, crimes against humanity, ethnic cleansing, and war crimes; this is commonly referred to as R2P (Responsibility to Protect) 2005 World Summit Outcome, art. 138, A/RES/60/1 (2005).

59 *Framework of Analysis for Atrocity Crimes*, U.N. 3 (2014).

require state parties to take certain steps to prevent the specific acts that each respective instrument seeks to prohibit.⁶⁰

What does the future of prosecution look like for the field of IHL?

Finally, the breakout group explored the idea that international justice mechanisms, when prosecuting crimes within IHL, must foster a political will of states to engage in the process. Additionally, the breakout group emphasized the need to recognize and respect victims while addressing their harms in order to make courts, like the ICC, more effective in the future. Group members noted how complementarity, in relation to prosecution, is a point of focus for the ICC in the future. The ICC has been coined a court of last resort, and with that it becomes important that when states have exhausted all other remedies and seek help from an international court, that the Court ensures it has appropriate capacity to take on the task.⁶¹

In summary, future prosecutions by transitional justice mechanisms are key for breaking cycles of violence. In transitional justice, trials may be necessary, but are not sufficient in addressing the harms of victims. Tools that can be utilized in the future in conjunction with prosecutions include, but are not limited to, historicized and published records of victim narratives, deference to communities that have been

60 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007 I.C.J. ¶ 429 (Feb. 26).

61 See generally, *Pressure Point: The ICC's Impact on National Justice*, HUMAN RIGHTS WATCH (May 3, 2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and>. HWR research shows that at times procedure and justice were stalled due to low frequency of visits by the OTP, indicating that even though they lacked capacity, the ICC contributed incrementally to progress in the Guinea situation.

affected by atrocities and subsequent prosecutions to see where there are gaps in their needs are, truth telling mechanisms, and domestic grassroots efforts utilized in conjunction with top-down processes of the international community.

Main Takeaways from Discussion:

- The future of accountability presents new challenges to combating impunity.
- New and advanced crimes in the field of IHL, like ecocide and terrorism, present unique challenges and may require IHL to adapt by incorporating an environmental justice lens that centers indigenous communities and acknowledging the potential use of existing anticorruption courts as venues to hold corporations accountable when they commit ecocide and/or terrorism.
- The future of atrocity prevention rests on detecting early warning signs of conflict and violence and intervening as early as possible; atrocity prevention is the foundation of accountability.
- Early warning signs of atrocity crimes are shrinking civil society space, lack of ability of judiciaries to act independently, the othering of minorities and marginalized groups, gender-based violence, and unchecked state torture.

About the ASIL

The American Society of International Law (ASIL) is a nonprofit, nonpartisan, educational membership organization founded in 1906 and chartered by Congress in 1950. Headquartered in Washington, D.C., its mission is “to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice.” ASIL holds Special Consultative Status with the Economic and Social Council of the United Nations and is a constituent society of the American Council of Learned Societies.

ASIL’s 3,500 members come from more than one hundred nations with nearly 40 percent residing outside the United States. Its members include scholars, jurists, practitioners, government officials, leaders in international and nongovernmental organizations, students, and others interested in international law. Through its many publications, conferences, briefings, and educational events, ASIL seeks to serve the needs of its diverse membership and to advance understanding of international law among policymakers and the public.

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