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Proceedings of the Fifteenth International Humanitarian Law Roundtable

August 27–29, 2023, Chautauqua Institution

Edited by Michael D. Cooper and David M. Crane

American Society of International Law

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ASIL

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The Chautauqua Institution

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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 Stan Lundine

Former Lieutenant Governor of New York, Congressman and Mayor of Jamestown, NY; Fifteen-year supporter of the International Humanitarian Law Roundtable

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Participants of the Fifteenth International Humanitarian Law Roundtable

Foreword

Foreword

David M. Crane*

It is with great pleasure and a sense of profound duty that we present the proceedings of the 15th Annual International Humanitarian Law Roundtable, held from August 27 to August 29, 2023, in the serene and historically rich setting of Chautauqua, New York. This year's theme, "The Cutting Edges of International Humanitarian Law in 2023," brings into sharp focus the evolving challenges and innovative responses within the field of international humanitarian law (IHL).

The Significance of Gathering

The Chautauqua Roundtable has become a vital forum for leading prosecutors, scholars, and practitioners of IHL to convene, reflect, and chart the course for future legal and judicial advancements. The significance of this assembly cannot be overstated, as it is within these deliberations that the principles guiding the prosecution of war crimes and the protection of human rights are continually refined and reaffirmed.

Commencement of Proceedings

The Roundtable commenced on Sunday, August 27, with a reception at the esteemed Robert H. Jackson Center. Here, we celebrated the Heintz Award, a recognition bestowed upon a distinguished individual whose contributions to IHL have been exemplary. Joshua Heintz presented the 2023 award to Brenda J. Hollis. This award ceremony was followed by a music and dance presentation in the Jackson Center auditorium.

* The Special Court for Sierra Leone.

Keynote and Roundtable Sessions

On Monday, August 28, the formal proceedings began with a welcoming address and an introduction to the distinguished prosecutors in attendance. A moment of silence paid tribute to those who have dedicated their lives to the advancement of justice and the rule of law. The keynote address, delivered by the esteemed David Scheffer, provided a powerful charge to the Roundtable, urging all participants to push the boundaries of legal thought and action in their pursuit of justice. Scheffer's insights, drawn from his extensive experience and profound commitment to international justice, set the stage for the ensuing discussions.

The sessions that followed were both rigorous and enlightening. The Benjamin B. Ferencz Prosecutors' Commentary and Update, moderated by Michael Scharf, provided crucial insights into current prosecutorial efforts. This segment, named in honor of the legendary Nuremberg prosecutor, offered a comprehensive overview of the latest developments and challenges faced by prosecutors in the field of IHL.

Subsequent subgroup discussions delved into pressing issues such as trials in absentia, universal jurisdiction concerning Syria and Ukraine, sanctions and asset freezes, and the contentious matter of head of state immunity. These focused groups, led by experienced co-chairs, provided a platform for in-depth analysis and robust debate, ensuring a thorough examination of each topic. Ambassador Roger Carstens gave a stirring lecture on the scourge of hostage taking as the Clara Barton lecturer.

Honoring Milestones and Thought Leadership, Monday evening's formal reception and dinner commemorated the 20th anniversary of the indictment and removal from office of President Charles Taylor by the Special Court for Sierra Leone. This milestone underscored the enduring impact of international criminal justice. The Katherine

B. Fite Lecture, delivered by Binta Mansaray, further enriched the evening. Mansaray, with her extensive experience in international justice and her profound insights, highlighted the ongoing struggles and achievements in the field of IHL, underscoring the Roundtable's commitment to honoring past achievements while looking resolutely towards the future.

Culmination and Reflection

On Tuesday, August 29, the Roundtable reconvened for a comprehensive review of the past year's developments in international criminal law, led by Mark Drumbl. This Year in Review Lecture provided a detailed and insightful analysis of significant legal developments, cases, and emerging trends in IHL over the past year. Following this, subgroup co-chairs presented their detailed reports, culminating in the drafting of the Chautauqua Principles. (These principles, signed by Roundtable Chair Andrew Caley, encapsulate the collective wisdom and resolutions of the Roundtable, serving as a guiding document for future endeavors in IHL).

Prior to the signing of the principles, just after lunch, Ambassador Anton Korynevych delivered the Magnitsky Lecture, provided a poignant reflection on the ongoing struggle for human rights and accountability for the people of Ukraine. Korynevych's lecture, drawing from his extensive experience and expertise, underscored the critical importance of sanctions and other legal tools in the fight against impunity and Russian aggression.

The formal conclusion of the Roundtable was marked by the issuance of the Chautauqua Principles, signaling a renewed commitment to justice and accountability. These principles, carefully drafted and agreed upon, reflect the collective determination and strategic vision of the assembled experts.

Closing Moments

The Roundtable concluded with a boat cruise and an informal dinner, allowing participants to reflect on the discussions, forge stronger connections, and envision the future of IHL. This gathering reaffirmed our shared dedication to advancing the cause of justice and the protection of human dignity across the globe.

Acknowledgments

We extend our deepest gratitude to all participants, speakers, and organizers, as well as our many sponsors whose tireless efforts made this Roundtable a resounding success. Their contributions were invaluable, and their commitment to the principles of justice and human rights continues to inspire us all.

In solidarity and with hope for a just future,

David M. Crane
Founder of the International Humanitarian Law Dialogs and Roundtable
Chautauqua, New York 27-29 August 2023

Lectures and Commentary

Keynote Address

David Scheffer*

Thanks so much, Leila for a very generous introduction. Obviously, I have to start with thanks to the Chautauqua Institution, to the Jackson Center, to Jim Johnson, and Molly, and everyone who has made this possible. But, in particular, I wanted to start by saying we are at the 15th anniversary of these dialogues. I've been able to make about eight or nine of these, including the one convened in Nuremberg. The person who is the pillar behind all of this is, of course, David Crane. It is his enthusiasm for actually creating this, and then pressing it forward every single year and not letting it drop, which I think we all have to recognize and be extremely appreciative of.

There are two people in this room who know from my discussions with them yesterday, Dave Crane and Mike Newton, that I was quite perturbed as to what I could possibly say to such an experienced, skillful, intellectually sound audience. What do I have to say to all of you that you don't already know?

I went to bed last night quite perturbed, but I woke up very early and this always happens with me. This happened when I worked for Madeleine Albright. We would have a ton of work at the end of the day, but I was so tired. I couldn't stay up until 1 or 2 am. That is not possible for me, and so I would wake up at 4:30 am in the morning, and I would immediately write the memo that had to be written because my mind was actually on and working. So, I woke up this morning, and some thoughts came to mind.

First of all, we must recognize that we are all a community of justice. This is the community of justice in this room today, and we should be very proud of that. I want to be personal for a few moments, before I

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* Arizona State University (Washington, D.C.).

get on to a few modest substantive points. I think I would entitle this, "Random Thoughts from a 30 Year Veteran About Our Profession: Atrocity Law and Atrocity Crimes." And, of course, as so many of you know, that means international criminal law, international humanitarian law, international human rights law, the law of war, genocide, crimes against humanity, war crimes, and the crime of aggression. We just bundle those all together in atrocity law and atrocity crimes. It has been an extraordinary 30 years that began for me most prominently in 1993 upon entering the Clinton Administration, working for an incredible individual, Madeleine K. Albright, who first was our Ambassador to the UN for four years and then was Secretary of State. When you work for someone who becomes Secretary of State, you do get a good job, which is how the ambassadorship was created, with her inspiration and her persuasion of President Clinton to actually create the ambassadorship during the second term.

But I wanted to just recognize some people because, for me, our profession is personal, and I want to bring personal characteristics to it today. First, Madeleine Albright. I think we have to recognize that she is with us. I was not at last year's Chautauqua conference, but she died in the Spring of 2022. I was able to go to her National Cathedral memorial service which was totally packed. She had developed a network of individuals that is unparalleled. I just want to tell you a few things about her. It's not hype; she was totally dedicated to these tribunals. Totally dedicated. She was extremely proud of them, and when people would call her the mother of the war crimes tribunals, she was proud. I mean she'd smile, she'd look at me and she'd wink, and she was very proud of that title. She wore it with strength and courage for eight years in her job, and, really, it was at her initiation. Almost all of the tribunals were created, literally, with her inspiration. The Yugoslav Tribunal, the Rwanda Tribunal she was onto in early June of 1994 before the genocide ended. She was pressing the reality that we had to have the Rwanda Tribunal and as fast as possible. And the Cambodia Tribunal: I don't know how many people know how

dedicated she was to Southeast Asia and, in particular, to Cambodia. The Special Court for Sierra Leone was also negotiated on her watch.

During the first term of the Clinton administration, she would have dinners in her home in Georgetown that I would attend, and she would bring Washington experts on Cambodia to her dinner table. She was determined to get the UN Peacekeeping Force in place in Cambodia. Once we had built the Yugoslav and Rwanda Tribunals, she would turn to me and she would say, "David, it is intolerable. How can we possibly have these two tribunals and overlook the deaths of almost two million Cambodians, in Cambodia, under Pol Pot, as recently as the late 1970s?" She gave me marching orders, she said, "to make this happen." It took many years, but she never stopped saying that. She said, "David, I don't care if there's a new obstacle on this. You make this happen." So, I had those instructions from Madeleine Albright to wake up to every morning. Anyway, I just want to say that I think we should all just recognize that she passed and she was a real titan in our profession, and I am very proud to call this our profession, atrocity law and atrocity crimes.

Now, other people, and they're so alive. Brenda Hollis, I want to recognize you and your receiving the Heinz Award yesterday, which was so merited. When I think of Brenda Hollis, who I've known since 1993, there are three words that come to my mind, "voice of experience." You want to call someone up with the voice of experience? You call Brenda Hollis. You want to bring someone into a project with the voice of experience? You bring Brenda Hollis. That has been demonstrated repeatedly, and I will just take great pride, Brenda, in signing off on you on the list of secondees to the Yugoslav Tribunal in 1993 from the Air Force JAG Corps. I don't know if you remember this, and I may have a bit of a sketchy memory myself about this, but we did have, just before you and the other secondees went off to the Yugoslav Tribunal, a meeting at the State Department where I had a few former Nuremberg prosecutors in the room. My

intent was to have them relate their experience at Nuremberg and to inspire you as you went to The Hague. I believe in the room was Whitney Harris and Mr. King, and I can't quite remember who the third one was at this point, but I just thought of that in preparing this because it kind of creates a nice circle from Nuremberg through you to the present day that we had those generations in the room. But anyway, congratulations, Brenda.

I want to remind you all that, although he was not in that secondee class, he arrived through a different route: through actually answering an employment bid by the ICTY at generally the same time that Brenda arrived, and that is our good friend and colleague, Mark Harmon, who I want to recognize today very importantly.
Mark, for those of you who know him, is an extraordinary person. He is encountering some health difficulties, now, and I want to make sure we recognize him today. I got quite close to Mark Harmon through the years. I had him talk to my class by video many years ago. He was just an extraordinary individual whom I strongly recommended for the Co-Investigating Judge job at Cambodia, which he took after his tour at the ICTY, and I worked with him very closely when he was in Cambodia in that capacity. I can't tell you how much I admire him. I was on Zoom with Peter McCloskey, whom some of you know, about a week or so ago. Pete brought me up to date on Mark, and I just wanted to mention this about Mark. He was the prosecutor at the ICTY on the *Perišić* case and he won at the trial level. Then, it was reversed at the appeals level, and a key issue was aiding and abetting and what constitutes proof of it. On mens rea, do we have a knowledge standard or an intent standard? Mark was very determined to demonstrate the knowledge standard, and he was reversed on that, but then subsequent decisions of the Yugoslav Tribunal, the Rwanda Tribunal, I think too, as well as the Special Court for Sierra Leone on Brenda's watch on the Charles Taylor trial; a magnificent appeals judgment that just was a slam dunk, if I can use that word, on the knowledge standard, which all of us cited endlessly in our amicus briefs, etc. Mark was so proud

of his *Perišić* work and then so distressed at the appeals judgment that I enjoyed talking with him in the aftermath when the other decisions came down that, in fact, in the end, he was vindicated.

Well, guess what? Some of you may not be aware of the 9th Circuit's docket at all times, but in July, the 9th Circuit Court of Appeals in California came down with their preliminary decision on the Cisco case—the large telecommunications company. This is the Falun Gong in China, where the Chinese government had a big contract with Cisco many years ago to basically enable them to spy on Falun Gong in China and to disrupt their private lives and, of course, ultimately destroy their religion. That's the objective, and Cisco was in there with contracts, earning a lot of money from China. Well, that's an Alien Tort Statute case—welcome to America—and that case has been going on for years in the 9th Circuit. Paul Hoffman, whom some of you know, is a great litigator of the Alien Tort Statute and has been leading in that case. I filed amicus briefs, and, sure enough, in July, after losing at the district court level for the Falun Gong, at the appeals level, the judges determined that the knowledge standard is the standard we will apply for aiding and abetting liability. Period. They explicitly rejected the intent standard, and cited everyone in the room. I think, Brenda, they cited your judgment that you were behind at the Sierra Leone court. They were generous with my amicus briefs. It was a great moment. Now, of course, Cisco has appealed for an *en banc* sitting of the 9th Circuit, so this will go on. We'll wait for the *en banc* decision, and then, Cisco, if they lose there, will appeal it to the Supreme Court, and we'll wait for the Supreme Court. So, this still has years to go, but stay tuned, okay? And, for me, it's Mark Harmon who is behind this.

Obviously, I want to recognize Ben Ferencz, too, who passed away. Michael Scharf is coming up later with a Ben Ferencz commemoration. The three words that come to me when you say Ben Ferencz are "most effective lobbyist" because he was on the crime of aggression, and it

started in 1995—the first UN session on the talks for the International Criminal Court regarding what would become the Rome Statute. Ben was there and pressing me because I was the US negotiator, and it just went on for years. I can remember moments like crossing 2nd Avenue in New York. Ben came scurrying after me to make some point to me before I got back to the UN. He was persistent, and of course, in the end, he more or less prevailed. I'll just never forget that when I thought, at the end of Kampala, that at least an operational modality for aggression had been achieved, and the Rome Statute would be amended for that methodology, and I wrote a piece for the *New York Times*, saying, "yeah, we've reached this historic moment," etc., Ben was smarter than me. He and his son, Don, came up to me afterwards, and said "Well Dave, that was a good article, but, you know that we failed in Kampala?" Of course, he felt that they failed because of the very problem we are now confronted with in Ukraine. That the non-party states who actually commit aggression on the territory of state parties would get a pass, and that was failure to Ben Ferencz. It was a little distressing for me, but I said "well, Ben, I'm not the US Government here. I didn't negotiate it. I'm just writing about it, observing it here in 2010." But, nonetheless, that was Ben Ferencz, and I just think the world of him.

Then, I just want to quickly acknowledge a few other people here, because I just can't pass this up. Michael Scharf and Paul Williams, PILPG. What an unbelievable organization you guys have created that is historic, powerful—just jumps right in on all of the issues that we care about with major law firms and pressing it before governments, and that's all your leadership that has done that. I would say further that, not only is Paul Williams sort of the king of Transitional Justice in this world, but Michael Scharf is actually, I would argue, the top academic in America, and possibly the world, in advancing our profession in law schools and in practice. That's Michael Scharf throughout his career. Michael, just to show you one small example of that: do you remember 20 years ago, you held one of

your zillion conferences at Case Western, this one being on lawfare. I was there, having a role in the whole thing, and we were kind of looking at lawfare in a defensive way. There were a lot of reasons why people felt threatened by lawfare, and I made the point that "Guys, throughout the 1990s, I practiced lawfare. That's building the war crimes tribunals. That's lawfare" to try and get the right perspective on it. I've become more interested in lawfare very recently now, but in that positive sense, and I think you'll see an example of that in my latest article, which was a couple of weeks ago in *Just Security* on "Deterrence Lawfare to Save Taiwan," and how we can think about using law in the defense of Taiwan. Not just always worrying about how to militarily defend Taiwan if it's invaded, but how can we possibly prevent that invasion by using lawfare in advance.

I want to recognize Andrew Cayley. With Andrew, I spent years in so many capacities, but most prominently in Cambodia. He really does demonstrate why he's a barrister, an English barrister. He is brilliant in the courtroom, and he did that for the Cambodia Tribunal, time and time again. I thoroughly enjoyed working with you, Andrew, particularly in the Cambodia work during the years you were there. And then, of course, you were succeeded by the far more skillful Brenda Hollis, but we'll let that pass.

[Laughter]

I want to also point to Mike Newton. When I think of Mike Newton there's just one word that comes to mind (sorry about this, Mike): "discipline." When Mike gets involved in any project, he brings an intellectual and pragmatic discipline to the exercise, as a lawyer, and as someone committed to our profession. Mike worked on my staff at the State Department as a JAG officer and has had such a distinguished career at Vanderbilt Law School. You've brought such sanity to so much of what we do, particularly with your military law background, so I just want to very broadly recognize you.

And then, of course, there's Stephen Rapp which one could talk about forever. Stephen for me is the Energizer Bunny of our profession. He's just constantly everywhere in every capacity, every possible capacity, and brilliantly so. He has a memory that no one here can equal. He has the best memory in this room. Stephen, thank you also for being the successor to me because I'm so proud that the office bears your reputation. It really does.

Finally, just a couple more names. Fatou Bensouda, we go so far back, and I know, Ambassador, that you have made such an enormous mark on our profession, but I want to express publicly my sincere appreciation for the fact that when I was, several years ago, pressing both the Court and the Trust Fund for Victims to look at a new financing model for how they could actually finance what they can do far more easily than they do now, Fatou put herself on the line to back me internally, and I will never forget that. I am deeply indebted to you for stepping up for me as I was advocating those points in The Hague.

And then Leila Sadat, who is not only a first rate scholar, friend, and champion of our profession, she is the pioneer of the Crimes Against Humanity Convention, and history will look very, very kindly on you. Someday that Convention is going to be solidly on the books, absolutely.

Finally, Norman Farrell is somewhere in the audience. I point out to my students various things about the Special Tribunal for Lebanon. I usually stress, particularly, the professionalism of it, but then, of course, I can't help but tell them a little anecdote, for which I blame you. That is that one day, when I was visiting the Special Tribunal for Lebanon in The Hague, where frankly I used to hold some of my Northwestern conferences in your little conference room there, I went up to the courtroom to watch the trial. I was the only person in that courtroom. There was no audience whatsoever for your trials. I'm sorry; I don't mean to say that, just that day there was no audience, and I think that the reason why was that I sat there for hours, and it

was just this endless rendition of establishing the proof of the phone taps you had in your evidence base. The phone recordings had to be entered into evidence and had to be done religiously and very diligently. I said to myself at the end of it, I said, "Yes, this is part of international criminal law, absolutely."

Those are my personal points. I know that I'm running away here with time. I've got just a few substantive points that I'm going to state rather quickly and then you're free to go after me in later discussions. One is that, on the crime of aggression, what has impressed me during the Ukrainian experience is, it is a perpetual crime. It is a continuing crime. I think so often when the journalists interview you, they think that the aggression is February 24, 2022, period, then let's get on to war crimes and crimes against humanity, etc. No. Aggression is occurring today. Every time a missile crosses that border, it's aggression. Every time troops cross that border, it's aggression, and that happens every single day. This is a continuing crime of aggression. If it is ever prosecuted, there is a wealth of evidence to be brought to bear as to who made the decisions in the leadership throughout this process. Maybe he wasn't there making a decision on February 24th, but on August 15, 2023, he actually made a decision to send Russian troops across the border into Ukraine, or he made a decision to fire cruise missiles across the border into Ukraine, and that will be a crime of aggression on that day, say August 15, 2023. I just always like to keep that context in mind. I don't want it to be lost as we think about the crime of aggression.

On the crime of aggression, many of you know that I am part of a group that is pressing for a Special Tribunal for the Crime of Aggression against Ukraine. I'll let all of our writings stand to make that case, but one of the things that I want to put on the table, and I am sure that some of you will say, "Wait a minute, he's overlooking something," or "He's naive," and that's the risk we always take. It astonishes me that when you have a continuing crime of aggression, as I have just

described, and then, in the simplest possible example, a Russian tank commander is on Ukrainian territory, and he decides that he will fire upon a combat unit of the Ukrainian military that is in trenches in front of him, defending their territory. The Ukrainians are defending their own territory here, and the tank fires onto these soldiers. There are no civilians anywhere nearby, there's no small town, there's nothing Geneva Convention existing anywhere near them. They're just another combatant force. It's combatant force against combatant force. In the law of war, we consider that to be legal. I mean, these are combatants fighting each other: *jus in bello*. These are combatant privileges: they can engage in war as long as they don't cross the line into violating what so many call "international humanitarian law." Well, wait a minute. We need to rethink that. Is that what the law of war is? That a force can be an aggressor force, and yes you can argue that ultimately, we can try to get liability for the leadership that sent the force across the border, if we can figure out how to prosecute them. So yes, there's liability individually for some top leaders in the Kremlin under the crime of aggression. Even if you're in a situation in the future where the ICC has jurisdiction over the crime of aggression, they're still going to just look at the leadership. And yet, the law of war is permitting aggression to continue on Ukrainian territory at the tank commander level. He's not the top leadership; he's a tank commander. He will be firing on Ukrainian forces with no liability whatsoever. He's part of the aggressive force, and he's doing it. He's enabling the leadership in the Kremlin to achieve their dreams of aggression. He's on the ground; he's a tank commander. He's hitting the Ukrainian forces.

Now, I come to this simply because one day I tried to put myself in the mindset of the Ukrainian soldier looking out at that tank and saying, "On what basis are you striking me? What is your rationale? What is your justification for you firing on me? We're both in uniform. But what gives you the right to fire on me?" I think in our law, international criminal law, we have a gap. Which is, we have

decided that on aggression, we'll go after the leadership and that'll happen someday, perhaps. Unless there's an atrocity crime being committed by that tank commander, the tank commander is in the clear. He's an agent of aggression. He's fine. Just go for it and wipe out the Ukrainian soldiers in the process. I know that that's a simplistic statement, but it's something that deeply disturbs me, that that is allowed to exist in our law internationally. Maybe I've stated it too simply, but I do wonder about that gap.

The second point I want to make in the Ukrainian context is just a kind of a teaser which is, someday, there may be peace negotiations between Ukraine and Russia. Unless, who knows, Ukraine's totally victorious and there's no deeply substantive peace negotiations to be held—although I think there still would be because there are still so many things to wrap up, like return of children and prisoners of war, etc. Someday, there will be this reality of peace negotiations, and I think a lot of us will be under considerable pressure to start thinking about: "When the Ukrainians go to the negotiating table, what is the fate of justice at that table? Will the Ukrainians be dogmatic and say they want 100 percent justice of everyone for every possible crime and you, the Russians, must concede? You must in order for us to have 100 percent judicial accountability for atrocity crimes and the crime of aggression." That's where we began these negotiations. Well, you can just imagine the prospects of the Russians leaping at that opportunity. We need to do a lot of thinking about what can be the give and take in the peace negotiations if justice is on the table.

You could structure the peace negotiations so that justice is not on the table at all. You just have a separate justice track doing whatever it can, jurisdictionally, if we cannot get to the Russians residing in their safe haven. We have to wait 30 years to do so, we'll do that, but that's just it: we cannot force Russians to send people to The Hague to stand trial. We'll just keep tracking along on our track—justice—which is what we're doing now. And then peace is peace, we're just going

to work peace issues separately in these negotiations. Or will the Russians insist on saying "no, we're not going to permit you to do that because we want to have some immunities for our leaders as a *quid pro quo* basis for what you are asking for in terms of territory, etc.

Anyway, all those things could come up, and I just think we need to be thinking very, very carefully now about how to proceed if those negotiations take place. Related to that a little bit, but more from my experience on the Special Tribunal issues, we need to do a lot more thinking within our community of justice about double standards. For those of us who are engaged in think tank discussions and in front of journalists, that is the most persistent thorn in our sides. Foreigners' perspectives about the United States can be colored by how we have performed in the past. Or how we, in the United States, have failed to perform. When I am in discussions that some might call intellectual discussions, the intellectuals of the Global South, speak of double standards. They say, "What are you talking about? The United States invaded Iraq in 2003 and now you are barking about Russia invading Ukraine? Get your stories straight on Iraq, first, and then come talk to us. But you have never gotten your straight on Iraq, and we have not forgotten that." I am paraphrasing what they bluntly say to you. Then on issues of justice, they will say, "Wait a minute, what is this? You're not a party to the International Criminal Court and yet you keep pontificating about compliance with international criminal law. It is not a message we need to necessarily listen to from you because you are not part of the game. You are outside of it." And they are very blunt about this.

We have a lot of work to do on that, and I like to think of trying to resolve things. For me, a lot of it is we need to reestablish our reputation of inclusion with the rest of the world on these important issues, but also on treaties that we have led and negotiated and yet we have still not ratified. The obvious one is the Rome Statute, but others are the Law of the Sea Convention, Protocols 1 and 2 of the Geneva

Conventions, and the Convention on Disabilities. All of these are not ratified by the United States, but the world is waiting for us to actually do something on that account.

I will close with a final idea I want to throw out at you that I have been hoping to sort of get going on in some sort kind of grant structured way. I firmly believe, having been at the Sit Room table for many years, that we were always lacking a financial estimate of our decision making. It just wasn't there. The Pentagon would always come to the table, of course, and tell you how much it would cost to do x, y, and z, but that's not the totality of a foreign policy decision, particularly one that bears upon national security. What should be received and which we can do, particularly perhaps with artificial intelligence working beneficially for us, is to be able to give policymakers as they are reaching policy decisions —not after—a financial cost estimate of taking certain actions to prevent atrocities versus the cost of waiting to get involved in a conflict where the atrocities are underway and so much death and so much property destruction has occurred. They should know the costs before they make a decision. Because it is so easy for policy makers to avoid the tough decision because they see minimal costs involved with avoiding the tough decision, without being fully cognizant of how expensive it will be by not making the tough decision to intervene effectively to staunch that threat, whether it be atrocities or of taking over Ukraine, etc. I just put that down as an idea of something that we need to be thinking about, particularly in our field when we talk about prevention of atrocities.

Thank you very much.

Katherine B. Fite Lecture

Understanding International Humanitarian Law – A Grassroots Perspective – Sierra Leone as a Case Study

Binta Mansaray*

Introduction

Excellencies, Friends, and Colleagues, let me thank the organizers of the IHL Roundtable for giving me the opportunity to participate in this event and deliver the Katherine B. Fite lecture – at the formal reception and dinner in honour of the 20th anniversary of the indictment and removal from office of Mr. Charles Taylor, former President of Liberia. When I was contacted to deliver the Katherine B. Fite lecture, I said I wanted to talk about IHL. Jim initially agreed, but last week he tried in vain to nudge me to choose another subject. I think he did so because he was worried that I would be addressing a body of academics and experts in International Humanitarian Law who know far more about it than I do. The topic I'm going to talk today has been on my mind for 20 years: 'Understanding International Humanitarian Law – A Grassroots Perspective' which is grounded in my experience with the Special Court for Sierra Leone as Outreach Coordinator.

What do I mean by understanding IHL? By understanding International Humanitarian law (IHL), I mean understanding International Humanitarian Law at the grassroots level following the establishment of the Special Court, when the armed conflict in Sierra Leone ended in 2002; why was that important for the Special Court and how the Court was able to transmit the knowledge of IHL to the people of Sierra Leone in the language and format they understand.

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* The Residual Special Court for Sierra Leone.

Background

The Special Court Outreach Section published a booklet in 2005 in response to the outreach experience of the Court since 2003. The booklet is titled: *Wetin na International Humanitarian Law: International Humanitarian Law Made Simple.* In the introduction of the booklet it is stated, I quote:

> Even though the war in Sierra Leone has come to an end it is still important to promote greater awareness of the Law of Armed Conflict. People should be informed on these principles at all times; during peace times or during an armed conflict. We believe that wide dissemination of information on the Law of Armed Conflict can help prevent such acts occurring in the future and hope this booklet might also serve as guidance for dissemination in other countries.

I still hold this belief today as we did back then.

Reason for Publication

As stated in its mission statement, part of the mission of outreach was to engage with the people of Sierra Leone to promote an understanding of the work of the Special Court. As we set out to talk about the mandate of the SCSL, we realized that we could not do so without talking about IHL and yet, knowledge and awareness of IHL among both the literate and non-literate population in Sierra Leone, including the grassroots was very limited. The literacy level was also very low. Outreach messages entailed complex legal concepts in the SCSL Agreement, Statute, mandate and indictments which needed to be communicated within the framework of IHL. One of the questions asked most frequently by civil society and communities was *Wetin na International Humanitarian Law*, the Krio (lingua franca) phrase for *What is International Humanitarian Law?* In this context, ex-combatants also asked, [d]oes the international community expect all

of us to be educated and knowledgeable about IHL? In response to these questions, the Outreach section published the booklet in collaboration with the International Committee of the Red Cross office in Sierra Leone (ICRC). The booklet bears the title of the frequently asked question and simplifies the principles and prohibitions contained in the Geneva Conventions and their protocols.

The Geneva Conventions of 1949 and their Additional Protocols

As we all know, the body of laws that are at the core of International Humanitarian Law which seeks to regulate the conduct of armed conflict and limit its effects is the four Geneva Conventions of 1949 and the Additional Protocols of 1977.[1]

The fundamental principles of IHL are the distinction between civilians and combatants, the prohibition of attacking those *hors de combat*, the prohibition of inflicting unnecessary suffering, the principle of necessity and the principle of proportionality.[2] These principles contain the standard requirement of 'humane treatment' and are enshrined in Common Article 3 to the Geneva Conventions, as reinforced by the Additional Protocols.[3]

In June 1965, Sierra Leone acceded to the Geneva Conventions, and in October 1986, it acceded to the additional protocols on war crimes.[4]

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1 *See* https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols.

2 UN Office on Drugs and Crime, "Core principles of international humanitarian law," https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/core-principles-of-ihl.html.

3 *Id*.

4 *See* http://www.rscsl.org/Documents/International%20Humanitarian%20Law%20Made%20Simple.pdf.

In less than five years after its signatory to the additional protocols, the armed conflict in Sierra Leone broke out.

The Armed Conflict in Sierra Leone 1991-2002

The armed conflict in Sierra Leone started on March 23, 1991, and raged on for a decade. Contrary to the IHL principle of distinction between civilians and combatants, the deliberate targeting of innocent civilians by combatants was a strategy of war. A small group of rebels called the Revolutionary United Front (RUF) started the war and increased their number by abducting civilians, men, women, boys and girls and forcing them into combat. The defunct Sierra Leone army known as the Armed Forces revolutionary Council (AFRC) joined the rebellion and the pro-government Civil Defence Forces (CDF) was formed to defend the country.

The decade-long war was characterized by serious violations of International Humanitarian Law. These included murder, amputations and mutilations, the burning of houses, mosques, churches and other buildings, enslavement, rape and the forced marriage of women, attacks on peacekeepers, and the use of children as combatants.[5] Torture, physical maiming and killing of civilians were systematic. For example, machetes were used to mutilate limbs, nose, ears, upper lips and fingers; gouge out eyes and conduct genital mutilations. Victims were branded on the front or back with written inscriptions such as "R.U.F." Very often victims bled to death before receiving the necessary help and the terrifying climax was the destruction of much of Freetown in January 1999.

By all accounts, Sierra Leone is a case study of the failure of IHL to protect civilians, non-combatants and persons hors de combat

5 *See* http://www.rscsl.org/Documents/International%20Humanitarian%20Law%20Made%20Simple.pdf.

during an armed conflict. According to Amnesty International, Sierra Leone significantly suffered from a protracted and violent conflict characterised by some of the most significant violations of international law ever committed in an armed conflict anywhere in the world.[6] All parties to the conflict failed to respect the principles and prohibitions of International Humanitarian Law. Such a failure can arguably be attributed, in part, to the combatants' ignorance of IHL. Though ignorance of the law is not an excuse for failure to comply, but knowledge and awareness of IHL and the consequences of its breaches could have mitigated the atrocities committed.

The war finally reached a negotiated settlement at Lomé, the capital of Togo, in July 1999. Although the Lomé Peace Agreement did not end the fighting entirely, it began a process that brought fragile peace to the country. The presence of a large United Nations peacekeeping force, the United Nations Assistance Mission in Sierra Leone (UNAMSIL), after the Agreement did much to prevent a renewal of the conflict and to ensure that the processes that would bring a lasting peace, notably disarmament and demobilisation, would be carried out.[7]

As horrific as the armed conflict in Sierra Leone was, unfortunately, it was just one of many wars the world had seen. For example, the world witnessed the atrocities of World War II in the 1940s, in the former Yugoslavia and Rwanda in the 1990s, and now the world is witnessing the atrocities in Ukraine, in South Sudan, and in other parts of Africa where awareness of IHL is also very limited. The International Community has responded in diverse ways to these atrocities including by setting up ad hoc International Criminal

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6 Amnesty International, 'Sierra Leone Renewed Commitment to end Impunity' AFR 51/007/2001.

7 *See* https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category_id=12.

Tribunals and the International Criminal Court in the hope of stopping and limiting the effects of armed conflicts. However, much more needs to be done to raise awareness of IHL.

Prosecution of International Crimes

The Nuremberg tribunal was established by Allied governments in 1945, with significant contribution of Katherine B. Fite to the London Charter, to try Nazi war criminals for the atrocities committed in WWII. The ICTY was established to prosecute perpetrators of serious violations of international humanitarian law in the armed conflict in the former Yugoslavia and the ICTR was set up to prosecute those responsible for the genocide in Rwanda.

In addition to these international criminal tribunals there are other 'hybrid' tribunals established to prosecute those who are alleged to have committed international crimes examples include: the Extraordinary Chambers in the courts of Cambodia, the Special Tribunal for Lebanon, among others.[8]

In Sierra Leone the Truth and Reconciliation Commission and the Special Court were established as transitional justice mechanisms.

The Sierra Leone Truth and Reconciliation Commission

Article XXVI of the Lomé Peace Agreement of 1999 provided for the establishment of a Truth and Reconciliation Commission.

8 International Humanitarian Law and International Criminal Justice: An Introductory Handbook, https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/inline/Law%2BIntroductory%2BHandbook%2BEB.pdf.

Accordingly, in 2000, the Sierra Leone Parliament adopted the Truth and Reconciliation Act.[9] The Act mandated the TRC to:

> … create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[10]

In 2005, The TRC issued its report comprising of four volumes of almost 2000 pages with several recommendations. The report contains the historical antecedents to the conflict, the causes of conflict, the story of the conflict—including its military and political dynamics, its nature and characteristics; the role of external actors and factors that fueled it, such as the exploitation of mineral resources; the impact of the conflict on specific groups, particularly on women, children and youths; [11]

The Special Court for Sierra Leone

The Special Court was established by an agreement between the United Nations and the government of Sierra Leone on January 16, 2002. It was mandated to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian

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9 *See* https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category_id=12.

10 Section 6(1) of the TRC Act.

11 *See* https://www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapter-1?category_id=12.

law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996.

Thirteen individuals including Sam Hinga Norman, the former deputy Minister of Defence and coordinator of the civil defence forces and Mr. Charles Taylor, a former Head of State of Liberia were indicted for serious violations of international humanitarian law—namely, crimes against humanity under article 2 of the Court's Statute, violations of article 3 common to the Geneva Conventions and of Additional Protocol II under article 3 and Other serious violations of international humanitarian law under article 4.

Of the 13 indicted, two died before the trials started, Norman died before the verdict in his case was delivered and Johnny Paul Koroma remains at large. Nine persons including Charles Taylor were tried and convicted on various counts of crimes against humanity and war crimes.

The Special Court's Trial Chamber II unanimously found that Mr. Taylor both planned crimes and aided and abetted RUF and AFRC rebels in the commission of war crimes and crimes against humanity in Sierra Leone.

Mr. Taylor was convicted on 11 Counts of war crimes and crimes against humanity - Count 1 for acts of terrorism (a war crime), on Count 2 for murder (a crime against humanity), on Count 3 for murder (a war crime), on Count 4 for rape (a crime against humanity), on Count 5 for sexual slavery (a crime against humanity), on Count 6 for outrages upon personal dignity (a war crime), on Count 7 for cruel treatment (a war crime), on Count 8 for inhumane acts, including mutilations and amputations, (a crime against humanity), on Count 9 for the recruitment, enlistment and use of child soldiers, on

Count 10 for enslavement (a crime against humanity), and on Count 11 for pillage (a war crime).[12]

With the completion of the Taylor case, the Special Court became the first tribunal since Nuremberg to successfully bring to justice a Head of State (at the time of his indictment). The Special Court issued several other unprecedented judgements related to the enlistment, recruitment, conscription or use of child soldiers; attacks on peacekeepers; forced marriage; sovereign immunity; effect of national amnesties on the jurisdiction of an international court and procedural relationships with a Truth and Reconciliation Commission.

The Judgments of the Court and the long sentences it imposed on the convicted persons, ranging from 15-52 years including a 50-year sentence on Mr. Charles Taylor, were meant to send a strong message that violations of IHL and atrocities committed against the people of Sierra Leone cannot be tolerated and that no one is above the law. Sierra Leoneans' understanding of IHL, especially grassroots communities, survivors of war, ex-combatants and civil society was foundational to their understanding of the Court's mandate and the administration of justice by the SCSL. It was also important for their perception of justice.

How the People of Sierra Leone Understood IHL

The booklet *IHL Made Simple* with its illustrations helped the people (literate and non-literate) understand the rules of war and international crimes in its simplest form.[13] It is user-friendly and easily understood.

12 *See* https://s3.eu-west-1.amazonaws.com/rscsl.org/Documents/Press/2012/pressrelease-042612.pdf.

13 *See* https://rscsl.org/documents/outreach/.

IHL was communicated through various outreach formats including community town hall meetings, radio programs, production/ distribution of printed educational/informative materials, video screenings, training programs and conferences.

The outreach programmes targeted various groups including, socially disempowered groups, potentially destabilising groups, like ex-combatants, military/civil defence forces, influential members of the society, justice sector leaders, prison officers, teachers, students/school children, customary law practitioners, and religious leaders and other targeted groups.[14]

For the Special Court, the benefit of promoting awareness and understanding of IHL was enormous. For example, the indictment of Sam Hinga Norman posed one of the greatest outreach challenges for the Court. In the Southern Province, which was the stronghold of the CDF, there was resentment towards the Court. In other parts of the country the Norman indictment triggered a debate about a just and unjust war because it was not clear why someone who was fighting and defending democracy on behalf of the Sierra Leone Government would be indicted.

In 2004, immediately after the indictments were unsealed, at a townhall meeting in Bo, the Kamajors appeared with their free Hinga Norman T-shirt and vented their anger at the Court and made veiled threats that the war was not over. Notwithstanding these challenges, we relied on the provisions of the IHL to consistently and effectively explain to communities in rural and urban areas, traditional leaders, community elders that there are laws that regulate armed conflict and that Norman was indicted because of how he fought the war, not why. Once our booklet on IHL was published in 2005, it was disseminated

14 *See* https://rscsl.org/download/outreach-report-2003-2005/.

to everyone – civil society, teachers, local authorities as part of our continued IHL educational campaign.

In December 2008, the Court and the Outreach Section were recognized by traditional leaders and community elders in Moyamba and Bonthe districts for their contributions to peace by helping community members understanding why Norman and other CDF members were indicted. A monument was erected in Bo and Bonthe in honour of the Special Court.

Wide Dissemination of IHL

At this juncture, we have heard how education and awareness raising of IHL and consequences of its breach is important for the understanding of the administration of international criminal justice given the experience in Sierra Leone. I have also talked about how the lack of such awareness may have contributed to a total disregard for the IHL principles during the armed conflict in Sierra Leone.

As stated in our booklet, we believe a wide dissemination of information about IHL at all times will promote respect for its principles and mitigate the sufferings caused by war in other countries as well. This is particularly relevant given the continued incidence of armed conflict on the African continent and the extensive violations that are being documented during recent armed conflicts in Africa.[15] This view is supported by Professor Heike Krieger who argued in her book *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* that, I quote:

> [E]mpirical findings show that only a minority of individuals living in areas of armed conflict know about the rules of

15 Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region 1 (Krieger, Heike ed., 2015).

> international humanitarian law. If there is no room for professional training in order to create a habit of norm-compliance, the logic of consequences, particularly the fear of sanctions, may induce individual soldiers and fighters to comply. Based on its experience, seen in practice as well as in empirical research, the ICRC emphasizes the importance of the fear of sanctions as an instrument for inducing compliance of individual soldier.

The annual IHL dialog of experts and academics hosted by the Jackson Center is one such way of raising awareness of IHL. More efforts should be made towards creating practical approaches for educating people at the grassroot levels about International Humanitarian Law. Similar IHL Dialogs must be held among civil society and in communities. The outcomes of this IHL Dialog where the cutting edge of IHL is discussed must be widely disseminated and actively promoted. Training on IHL must be held. I'm not talking about professional training, but capacity building training to empower and make IHL more accessible to civil society, potentially destabilizing groups, the war affected and communities. With more awareness and cooperation of stakeholders at all levels, there would be increased understanding, adherence and compliance with the existing IHL provisions.

Conclusion

To conclude, for our part, the efforts of the SCSL to make IHL more accessible to the grassroots population in Sierra Leone continues through the work of its successor, the RSCSL whose mandate includes the preservation and promotion of the legacy of the SCSL. The RSCSL continues to create awareness about the war in Sierra Leone to the younger generations who were not born during the time of the conflict; in doing so, the Court continues its educational outreach and ensures that the people learn about the rules of IHL and what International Criminal Law entails.

Discussion

MILENA STERIO (moderator): We do have time for a few questions before we begin the musical entertainment section of the program. Does anybody have any questions?

ATTENDEE: I wanted to ask, do you think that in the future there will be a possibility where a lot of countries from Europe or Asia that, like you said, we would not have thought of being in danger or involved with wars. Do you think there could be an agreement where there will be a mandatory, not class, but information passed around in schools and even in kindergartens because I think, not about international humanitarian law, because I can tell you a lot of people from more poorer countries from Europe do not even know their basic human rights, so I think from a young age, people should be taught what their human rights are to later on be able to understand what international humanitarian law is.

BINTA MANSARAY: The way I would answer that is, it's a good idea but it's a challenge. In our country, we would expect that IHL or even lessons about the war are thought in schools. But that does not happen. Two, three years ago, a very limited effort was made to teach pupils about the war in schools. Those that undertake such limited ad hoc task come to us and say they do not have materials. Teachings about the war have not been formalized in schools in my country, but what you're saying about the need to teach people from a young age about their human rights, if it happens, that would be so good. But it's a matter of lobbying governments, lobbying your national systems to do so. What we have been doing instead of waiting for the politicians to act, is to organize field visits for schools twice a week at the Sierra Leone Peace Museum. We target upper elementary school and secondary school pupils and college students. These efforts are not enough, but it is better than nothing. So, in essence, I entirely

agree with your view that it is necessary for children to be taught human rights and IHL at a young age.

ATTENDEE: Binta, thank you so much. This was fantastic. When we reflect on the number of crimes committed in Sierra Leone and the prosecution has ten perpetrators, and higher level perpetrators, it means all your direct perpetrators are walking around Sierra Leone. Do you see any negative ramifications in society? What does it feel like? That's just my question, you know how is it to have all of the perpetrators simply out there having not faced justice?

BINTA MANSARAY: Yes, that is a very important question, and we dealt with that. In 2005, we organized the Victim's Commemoration Conference because we were bombarded by that question everywhere we go. The prosecutor indicted thirteen persons. All of us know that international justice is costly and it is not possible to bring all perpetrators to justice, it's just not going to happen. And even if it does, it could be disruptive. For example, in the context of Sierra Leone you had a whole Sierra Leone army which was supposed to defend the country instead they joined the rebels. And all those soldiers have their relatives, and we are an extended family country. So, if you say you are going to indict all perpetrators, you never give peace a chance.

The idea of greatest responsibility needs to be looked from two perspectives. I'll leave it to the prosecutors, to talk about how they determined to bring charges against individuals alleged to bear the greatest responsibility. From the outreach perspective, we explained to Sierra Leoneans that if you see Mr. Taylor on trial, it's not just because of what happened to those who testified against him, but what happened to everyone who was affected by his crime. But still, that was one question that was frequently asked by community members for whom those who bore the greatest responsibility were the neighbours that they see, those who committed crimes against them. During the Victim's Commemoration Conference, we brought

together representatives of the UN, the Government of Sierra Leone—those who signed the agreement establishing the Court, but also other post-conflict entities like the UNHCR, UNICEF, the disarmament, demobilization, all institutions that were involved in the post-conflict reconstruction efforts. We brought them together so that the people would see the small role of the Special Court for Sierra Leone, and everyone would explain their role in the post-conflict efforts, and this way they are able to have a comprehensive view of how post-conflict needs were addressed. But more importantly, the Parties to the Agreement establishing the Court were able to explain the rationale behind the limiting the mandate of the Court to those who bear the greatest responsibility. That helped a lot even though the people did not initially accept it, but in the end because we were forthright people understood and accepted the mandate of the Court. The way you build relationships with these courts and make people understand and trust you is to just tell them the facts. And if you have limitations, you tell them. That was what we kept doing and, in the end, the people's perception of the Court was very, very positive. Thank you.

ATTENDEE: Your talk was amazing and like my question for you, when you're trying to explain the humanitarian law to people that are really not familiar, is it the technical rules or is it the fact that there is this law, the text: which parts of the concept do you think are most important to distinguish to people? The rules are to protect the people, so it's probably just the core idea of "you have rights to be treated a certain way even if people are fighting." I was just curious, what were your key things that you tried to communicate?

BINTA MANSARAY: I think it's both. It's just very simple. IHL, you can make it as complex as you want but you can also, in fact the ICRC helped, because they've summarized those principles. If you take the summary of those principles, really, especially this distinction between civilians and combatants but also hors de combat or even proportionality, you can explain it in a layman's language.

This booklet I'm talking about is available on our website, rscsl.org.[16] If you look at the images there, here it is saying "the civilian population and its property may not be used as targets for an attack."

The civilian population and its property may not be used as targets for an attack.

That's one explanation. And then, here we have this picture, the caption beneath it is saying "it's forbidden to kill or injure fighters that have surrendered."

16 The full publication is available at https://rscsl.org/download/international-humanitarian-law-made-simple-nov-2011/ (visited May 16, 2024).

It is forbidden to kill or injure fighters that have surrendered.

Okay? You have the caption there but you have the picture explaining it. In a nutshell, that is the illustration of persons hors de combat. I don't want to waste time here, but the booklet is available on our website. It says, "captured fighters and civilians living in an area under the control of the enemy have to be treated with respect."

Captured fighters and civilians living in an area under control of the enemy have to be treated with respect.

So, it's showing you the picture. We did not go into the complexities that lawyers would get into like explaining scenarios. We explained that when the combatants took up arms, they had an enemy in mind. Therefore, the enemy is whom they should be fighting, not raping innocent civilians in their villages, chasing them, burning their houses, killing them in churches, mosques. That should not be hard to explain. And that's what we did here.

ATTENDEE: Can I just add the ICRC does some great work on that and the Red Cross. One of my favourite teaching videos is "Who is Game of Thrones' Worst War Criminal?" Which is actually a video that the Australian Red Cross put out, that produced a movie [unclear] Game of Thrones and they ranked all the war criminals.

BINTA MANSARAY: Yes, we produced the booklet together with the ICRC. And actually, we said what we wanted. You know how they sometimes have the cartoons as images to illustrate an idea? We said we didn't want cartoons because when you have cartoons, people are not going to identify with cartoons. We wanted images of Sierra Leoneans showing the way we tie our heads, the way we braid our hair, and images of the rebels—this bandana that they use. That's the RUF, that's what we wanted! We wanted to see people in military fatigue. We wanted the people of Sierra Leone to recognize the fighters here, to recognize victims and that's what we got. And in fact, right now, our civil society partners are asking us to reprint copies of the IHL booklet because they find it very informative and useful. The booklet is user-friendly—civil society partners, community-based organizations, any teacher in the village, even if they didn't go to college, as long as they can read and write, they should be able to read, understand and explain IHL to people. School pupils can read and understand it. That is what we wanted to achieve, and we achieved it.

Year in Review Lecture

The Cutting Edge of International Humanitarian Law

Mark Drumbl*

Good morning all of you. I hope you folks are all doing well; striving and thriving. Smiling. Well, we've had a lot of words over the past little while. The Year in Review lecture is titled in a way that I might interpret slightly differently in viewing what has been over the past year. I hope to distill out a couple of bigger themes, a couple of bigger threads that perhaps wove their way throughout the past year as reflected in some of the words that have been exchanged since we all got together here in Chautauqua.

I want, in a sense, to tie and weave those threads into the conference theme, which we haven't heard that much about. This is: *The cutting edge of international humanitarian law.*

I've always been interested in the interrelationships between law and life. Life and law. Life not just lived as transnationally, in The Hague or Geneva, or Manhattan, but, life as often lived "on the ground" so to speak, notably, in places and spaces afflicted by the kind of violences that we are very concerned about preventing and punishing. On this note, I found the evening keynote last night was just a wonderful presentation as well, to try to bring the life of law to life as lived the way ordinary people live it.

With those particular themes, what I would like to do is pull out four topics—metaphors, signifiers, that I think have, as I said earlier, woven their way into the tapestry of international criminal law over the past year. The first is time. The second is theater. The third is Cutting Edges. Fourth, I would say, is harm, pain.

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* Washington & Lee University School of Law.

Let me start off with time. One thing over the past year is the interplay in international criminal prosecutions with the notion of age, chronology and life cycles. This is something that I think, in certain ways, is a recurrence in international criminal law. But I feel it has really come to bear quite a bit this past year. We have already heard some of it. We heard Andrew talk about the ECCC's prosecution of very aged and infirmed defendants. Now it comes to bear with the Kabuga process, as well, that we also heard about yesterday

This is a topic that is really interesting to me. Together, with a French law professor, Caroline Fournet, I'm editing a book called *The Sights, Sounds and Sensibilities of Atrocity Trials*. It unpacks the idea of the aesthetic: the visual, the noise, the impression. What do people take away? How does it feel? What does it sound like? What does it look like?

Here, I think intersectionalities with age are critically important. The idea of the very elderly defendants, barely alive. Hobbled and hobbling, infirm. Perhaps not fully functional. A shell of the defendant's former self. Someone who has stood tall and lorded power over others can shrink and shrivel and enter into a place of helplessness, of infirmity. How does that look when we prosecute such individuals, and how should those prosecutions unfold? Caroline and I organized a big conference on this, we published a double journal issue on this, and we have a book coming out.

To me it's very interesting on the idea of lawfare. Another theme that has come up at the conference is that there is such a thing as age-fare. The presentation, often intentional by very elderly defendants, of themselves—as very feeble. And also the perception of this. We had this Cypriot law professor, Konstantinos Tsinas, who contributed to the volume, and he spoke about lots of Aristotelian notions, not just of catharsis and pathos, but also of these ideas of asymmetry. How when one can look at someone in the present, one can forget what they once were and how powerful they may have once been.

What do we do with these kinds of defendants? What happened with Félicien Kabuga, for example? At the ECCC, when I went to visit the ECCC before the pandemic, Caroline and I wrote a blog piece; that is something I thought was a real gem. I'm not trying to sound like an egomaniac. But, you know we all do things that we like and things that are just okay, but I thought this was great. It's a blog piece called *The Judicialized Infirmary*. How at a certain point of the life of the ECCC, it turned into a convalescent facility, with an on-site hospital, and you go there and the first thing you see is an ambulance on the outside.

Similarly, Guantanamo is basically turning into a convalescent home. I am not validating the existence of Guantanamo or not—but that is there, and that is part of these visualities. What does one do in that context? At the national level, German prosecutors have been dealing with this extensively over the past several years, in this final post-Demjanjuk push to prosecute folks in their 90s, often late 90s, for Holocaust crimes committed a very, very long time ago.

One of the most fascinating recent prosecutions took place in Hamburg. A man called Bruno Dey who was 17 at the time he committed Holocaust-related crimes at a concentration camp. He's a 90-some-odd year-old man on trial. Because of his age at the time of committing the crime, he's prosecuted in juvenile court. Which, to me, is just a fascinating paradox of the second half of what I'm going to talk about on my first theme: age. Namely, childhood, and youth. The alternative side of the life cycle.

How do those proceedings look? Caroline and I wrote a bit about another trial: Oskar Gröning, the accountant of Auschwitz. Also, in this case, he was a little older, very early 20s when he gets to Auschwitz. He's the accountant. He strips the remaining possessions of the already stripped-to-their-bones inmates and detainees who were forcibly transported in. Groening was prosecuted for his complicity in the murders at Auschwitz.

In all of these cases, the defendants look like elderly grandfathers. One cannot help but feel sorry for them. There's a twinge and a tweak that one feels when one sees them being prosecuted. That's the aesthetic. That's the look. Should we, in response to that, be clement, merciful, forgiving? Should we let the prosecution go? To me, that's a very interesting question.

In this book volume that Caroline and I are putting together, we have a contribution from a Canadian political scientist, Kirsten Fisher, who wrote what I think is one of the most powerful pieces in the entire volume. And she titled her work, "A Rebuke of Ageism." She makes the argument that treating the elderly in their present form with excessive mercy, for what they may have done when they once were very powerful, is actually slipping into a form of ageism that treats the elderly in ways that doesn't fully reflect value, their autonomy, and their position in society. She makes the argument that there's a very fine line between paternalism, mercy, on the one hand, and the kind of reciprocal respect, exigence, and demand that may be required in order to fully put in place an equal positioning in society for the elderly and to take the elderly seriously. Fisher riffs into the treatment of the elderly, I think throughout many nations, in the COVID pandemic, and the point that I think is really fascinating is there is something to be said for prosecuting despite the aesthetics. For prosecuting despite the mercy.

Now, in my second point, theater, I will get into how law interfaces with that, because law, after all, in the Kabuga case, also hinges on due process and the competence of the defendant. But, I think equally important to assessments of competence is the way in which the ordinary public looks at these trials and what will they generate. We have a contribution in the volume by two Argentine lawyers who comment on the positionality of, again, very elderly defendants who had been implicated in the *Dirty Wars* and the Junta in the 1970s, where a lot of international criminal law, at least at the national level, and

truth commissions began to emerge. This piece similarly points out how many of these elderly defendants actually in some ways display *age-fare*; use their grandfatherly status to deflect responsibility in the present, for things for which they were clearly powerfully responsible for in the past. I think it's extremely important for us to think about how to acknowledge these kinds of perceptions that the outside world, outside of law, may have about how law moves forward.

The flip side, of course, of the very elderly on trial is the very young and their intersectionality with law, and this has been quite a recurrent theme in the work of the International Criminal Court. I've done quite a bit of work in the area of child soldiers. The first conviction at the ICC in *Lubanga* involved an adult prosecuted for illicit recruitment and use of enlistment for children under the age of 15. That's the Rome Statute crime and customary crime, but in the, sort of, the straight eighteen position, in human rights more broadly, eighteen is generally seen as the cutoff. In that instance, what do we see? We see prosecutions in cases in which children are harmed. We see it now with Putin, for example, and the unlawful deportation of children. There's a real emphasis on presenting persons under the age of 18 as faultless, passive victims. As placed within the aesthetic, in some ways, as among the perfect kind of victims to quote Nils Christie, a Norwegian criminologist, who really started thinking a lot about perfect victimhood. What is the ideal victim, from the marketing perspective of law? Children tend to fall into that particular place.

Then on the other hand, in the ICC, we also see this ultimate medley of adulthood and power and youth and disempowerment in the conviction of Dominic Ongwen. Here we see, once again, this interplay of age, with both victimhood and, in a very complex sense in *Ongwen*, with perpetration. What do we do with that? I think at a fundamental level, we are very uncomfortable, very uneasy, with the intersectionality of age and violence, especially from the perpetration side. The very

young person can be very capable of committing violent acts that really hurt other people, including other very young people.

The agency of child soldiers, of children in this context is a lot more complicated than the reductive or flattening approach that law often tends to take. To sum up my first point, what I think we really have to do with this notion of time in law is grapple with the reality that observers of what law does have their own aesthetic, their own perception, their own takeaway. Law shouldn't flatten that entirely with child soldiers.

Many afflicted communities simply do not see a 16- or 17-year-old as a faultless, passive victim. That doesn't mean they should be prosecuted in The Hague or in Freetown. However, one thing we need to be aware of, and this leads a bit into my second point on theater, is that our prosecutions are about law and they're in law, but they are really about life.

But what I want to share with you, is how we can conceptualize the intersection of law and atrocity with broader conversations about age, life cycles, and capacity. To go back to Professor Fisher's contribution I mentioned earlier, this rebuke of ageism, I think it maps very well on emancipatory and liberation theory assessments of children's human rights. In which treating children always as faultless, passive victims, in a very paternalistic, very fulsome, and very protective sense, at the end of the day, doesn't curb what I think is one of the major unspoken reasons why children become enmeshed in violence, whether armed conflicts or crime or other forms of violences. This is the power of gerontocracy that still remains in society. The power not necessarily of the elderly, but of individuals at the apex in many ways of assertions of power in society. And until we shatter that and build real cultures of juvenile rights, this pattern of enmeshing children in violence will simply recur. I think it's important for us to be aware that our legal narratives contribute to a much broader conceptual policy understanding of how the world goes. At least I hope so. I hope

that what we do, who we prosecute, who we think and talk about matters. I think it does, and I think this is one way in which it matters.

So, one of my first points that I would pull out from what has been going on in law this past year, is our relationship with time. Second is theater, which riffs off of the first one. For example, as discussed yesterday regarding the Félicien Kabuga proceedings: what does one do with someone who doesn't appear competent to stand trial?

One response is to construct proceedings that may look like, but aren't really, criminal proceedings, and continue to do that within the framework of an institution that is created statutorily and also through the experience and the expertise of the folks involved. It's still a trial, it's still a court, but it looks a little different. It is a different kind of process. I can understand the impetus behind doing that. I understand the trial-level move in *Kabuga*. But I much better understand the appellate decision in those particular proceedings, to say "look, if it's a courtroom, it has to adhere to a certain level of due process." It must. Or else we lose the one thing that I think we all cherish the most, and that is equality of arms in proceedings of a public nature, and I think the higher authorial or authentication value of judicial decisions roots in all of those due process requirements.

The outputs of trials are just more believable because the evidentiary process is more rigorous. If we lose that, we lose something else. On the other hand, going back to what I said earlier, I also think there is something really empty in having time tick by and thereby permitting someone to benefit from impunity. There's, to me, something empty about that. It's not right. And this is my point on theater. We've constructed this stage in law to showcase and to channel naming, blaming, and claiming. We should take away from this intersection of time and age a recognition of our own limitations and the limitations of legal process, and be more welcoming to other ways in which prosecutions of those who may not be competent in the moment even

though in the past they conceptualized themselves and often actually were dominant. Maybe we should think more actively of other ways. That doesn't mean converting our existing procedures that you very brilliantly mentioned in your comments about this exact case. Not necessarily converting what we have into something different, but just having something very different.

Perhaps we should conceptualize more at the international level, of remedial mechanisms that become officialized and internationalized, that are theater, like trials are theater; but have different rules and different stages, perhaps intersecting much more with notions like truth commissions. I think this is also something that came out of this aesthetics project that I mentioned to you earlier. That we can be more creative in how we deal with time, because at the end of the day, doing nothing does seem hollow. It does seem insufficient. I think there is nothing more painful, in my view.

I think there must be nothing more painful to someone that suffers a grievous human rights abuse to then have a moment of accountability, but then the entire conversation is how the human rights of the abuser are violated by dint of the very process that is supposed to bring *you* relief for justice. This American philosopher, Jill Stauffer, wrote this wonderful book. I'm just totally captivated by it, called *Ethical Loneliness*. She makes an argument in that book that one of the loneliest places is to be abandoned by humanity and suffer atrocity violence, and then not be properly listened to when you try to claim some justice after the fact. Because your victimhood is subservient to the victim status of the perpetrator, and that happens at both edges of the age spectrum. When the perpetrator is a child, determined to be a faultless, passive victim, or if the perpetrator is so old that they're no longer, in an earthly sense, competent in that moment in time. So, perhaps we can construct alternate ways to tell those stories, and think outside the box.

This leads to my third point on *The Cutting Edges*. This criminalization paradigm just continues to roll forward. We have more and more international crimes that are increasingly constructed. One is ecocide, that's something I've thought about a fair bit. I think it's extremely important to conceptualize long term and severe harm to the environment and armed conflict, or beyond, as penal in nature. That said, I'm not certain as to what international tribunals can do in that particular regard. But we'll get to that in a second.

The criminalization paradigm rolls forward in the environmental space. Increasingly, it's also rolling forward in the world of international law outside of Rome. One of my favorite plays by Shakespeare, is a play called *Coriolanus*. It involves a Roman general who becomes a bit too arrogant, almost detached, and thereby falls out with the people of Rome. A tribune of the people is constructed and banishes Coriolanus from Rome. Being banished from Rome meant you fell from the city on the hill, you fell from the city of grace. Not to invoke the Puritans, but the idea of the city of the hill has existed for a long time. Rome, as a city on the hill, in that empire. But there is life outside of Rome, and there is a lot of work that is going on in international human rights law outside of the Rome Statute. Coriolanus, upon banishment, exclaims: "There is a world elsewhere." He is right.

I have the privilege of being an expert on a committee on the United Nations Convention on the Elimination of Racial Discrimination, that is tasked now to write an additional protocol to ICERD. ICERD is the only one of the major human rights treaties from the 1960s that lacks an additional protocol. There's an impetus now at the UN to develop one for this treaty that would criminalize racially-motivated hate crimes and racially-motivated violence. There are five experts on the drafting committee, and of course this is presented to the diplomatic representatives of ICERD. I find this also a very interesting process, because part and parcel of this process is to criminalize this kind of violence, when in reality, perhaps, we should

be thinking of a much broader multiplicity of approaches that include remediation, rehabilitation, resocialization. The jail cell is not the most productive place to try to think of reconstruction. And in the pandemic times many hate groups formed online, and many involved young people, children, teenagers. Now, is this the kind of thing that should be penally sanctioned? I'm not so certain. But I was really struck in all of these sessions in which I participated by the extent to which we as international criminal lawyers have really captured the market. That the ultimate theater, the ultimate place to condemn wrongful behavior, is through the courtroom. Personally, I think we should do what we do in the places in which we are doing it, but also be mindful of our own limitations. Criminal law is a very coercive mechanism of social control.

Anyone who's spent any time in the United States over the past three to four years is well aware, at the national level, of the critiques of our criminal justice system in this country, and all of its shortcomings and the injuries it inflicts, while also at times and places delivering justice. One theme that I see in this frame is that perhaps we should become less tethered to our own expertise, less reflexively drawn to the criminal trial as the solution to is all. Perhaps that takes a level of circumspection, but that is something that I would encourage thinking about.

And now to the last of the themes, and I'd love to open it up to have a much more communal conversation. The fourth of my four themes is the idea of pain and harm.

Since World War II, since Nuremberg and Tokyo, I think we have seen emerge the notion that the most grievous breaches of security, stability, human rights, and sovereignty interests involve intentional *mens rea* thought—through conduct. Genocide, persecution, certain war crimes, the crime of aggression. They all centralize around the idea of intent. That's why they showcase the perpetrator, whose intent

must be demonstrated. It's all rooted in the idea of intent, the idea of hate, and we've built an architecture of international criminal law that revolves almost entirely around that thread of the human condition. That the worst way to bust the global trust, that the most grievous threats that we face, the gravest wrongdoing, has this deliberateness to it. It informs so many of our crimes.

By my view, when we look ahead, at all the students as you're just sitting in one place, mostly on the far side and some of you are up here; but when I look ahead after I'm going to be long gone, I think the biggest security, stability, sovereignty, and human rights threats that you all will face in your lifetime, are not going to be hate-based *mens rea*-based violence. I think it's going to be careless, negligent, thoughtless, understandable harm.

What do I mean by that? Things like climate change, pandemics, transnational capital flows. None of these things, none of them, materially are caused by hate. They're caused by carelessness, thoughtlessness, desperation, poverty. Sharecroppers in Brazil and the Amazon who are cutting down the rainforest are not doing it out of hate, it's happening because of desperation, poverty, to grow something for another season.

If things like climate change become shoehorned into a criminal law paradigm, then we will have over-criminalization on a level that we have never seen before. Because all of us, each one of us, in our own ways, is complicit in something that is emerging rapidly as I think the greatest stability, sovereignty, human rights and security threat of the future.

So what do we do about this? What do we do about this? Sure, we can say that we are addressing environmental inequity, like criminally prosecuting ecocide. The percentage of global environmental harm that traces to ecocide is however infinitesimal. It's good that we can

criminalize it, it's fine, but it's infinitesimal. The vast majority of the major threats that we face in the future are not *mens rea* harms, there are all kinds of harms. What do we do about that? Is there even room or a place for law? Maybe regulatory law, but for penal law in that area, I'm not certain. What I would really encourage young folks to think about is the potential mismatch that I see emerging between the gravest threats that are faced, and the model of remedy that is now emerging, namely criminal law, criminal courts, and criminal prosecutions.

What do we do if the remedial model cannot deal with the harm? What happens if the nature of harm is not intrinsically driven by penal or criminal or malevolent conduct? This to me is a really big future challenge, and something that I think pushes the cutting edges of international humanitarian law well beyond anything that is constructed as the current perimeter into something very, very different. Perhaps it may be in the life cycles of younger folks now who come of age, and as I cycle out, and some of us and, well, you all are going to live forever, you are all permanent, but I won't. Now as that cycles out, a new challenge emerges and that is I think the greatest sources of pain and harm aren't necessarily going to be courtroom-able, at all. If there is one baton that perhaps we can pass on for those of us who've really been involved in building cultures of justice for the kinds of threats that we have seen so far as the most dangerous, one baton perhaps to be passed on is the baton of modesty, to think that there may be other threats that emerge.

The pandemic killed so many people. Climate change looms. I'm not trying to sound like some dude in doomsday character, but this is a serious thing, and I don't think courtrooms are the place. I also wonder, looking ahead, what will the theatrical architecture of international justice look like? And I don't know if it's going to have the kinds of rules and procedure and evidence and joint criminal enterprise and co-perpetration, to wit, all of these tools with which we're so familiar.

Discussion

ATTENDEE: About 50 years ago, there was a thought that cigarette companies could not be sued because it was difficult or impossible to prove causation. There was the same talk about climate change until the last couple of years, and now we are starting to see cases all over the world including the United States where they're piercing causation problems, technology is helping with that and we're seeing climate change emerge as a courtroom battle. Is that a good thing or a bad thing? What's your position on that?

MARK DRUMBL: Yes, there are courtroom battles like that. I've been following this litigation in Montana that I think is extremely interesting at the state level, but it's not penal law proceedings, right? They're alternate. It's law but it's an entirely different branch of law, that we would probably consider inadequate with hate-based violences that we have hitherto seen as so important as different forms of legal proceedings. But even there, I appreciate the smoking analogy.

I understand the lawsuits that relate to the addiction that was created, and I think we're going to have lawsuits along similar lines in the future. I would not at all be surprised. Maybe I'm crazy, but it would not surprise me at all if at 15 or 20 years, we start seeing lawsuits that involve iPhones and tech companies, where people are going to start saying, "you let your 12-year-old spend 10 hours a day? On the cellphone?" Because just like regulation of certain kinds of activities that neurologically interfere with the brain—alcohol and so forth, we all set age limits on when you can buy beer—but there's no age limit on when you can use your mobile all day long, and I think there's neurological effects as well.

It's really interesting because I teach a course in international environmental law, and what I find fascinating there is this conflict among the various international human rights. In many ways, the

right to environmental well-being is intrinsically at odds with other international rights, like the rights to development, rights to inclusion in economic life, rights to health, rights all of these things, because affirmation of all of those rights of development and so forth are contingent on a certain level of economic production.

So, how do we deal with the fact that all forward progress on the right to development is going to be antithetical in a certain way to the collective right to be free of the effects of climate change? I think the only way forward is some technological solution but that's not going to come either in law or in the courtroom. With COVID a push emerged to have its intentional spread designated as a crime against humanity. For example, if you intentionally spread COVID, let's criminalize that. It's the same thing with the HIV/AIDS epidemic. That said, the percentage of people in society who intentionally spread COVID is infinitesimal, just like the percentage of people who intentionally destroy the environment. It's not really going to redress the ravages of the pandemic or the ravages of climate change. So, from my perspective, I think one of our greatest obstacles is perhaps to recognize that some of the greatest future challenges just don't sit and fit too well with law, and if we flit around trying to get criminal law to accommodate that we have to be very careful of this false allure, in other words, an early closure on that.

ANDREW CAYLEY: I really enjoyed your remarks, they were very thought-provoking and particularly going back to when you said we reflex towards criminal law, particularly people who have spent all their lives in the courtroom. But the one question I have for you is when you say essentially we shouldn't be criminalizing carelessness, but certain systems, certainly in the English system, you can be guilty of a homicide by gross negligence. So, manslaughter equals gross negligence, which I know is a much higher threshold than carelessness, but nevertheless we use that charge a lot in the UK

for individuals who suffer death as a result of an individual's or a corporation's gross negligence.

If someone releases COVID, for example, and they're grossly negligent, in my view you would be able to prove gross negligence because you should have measures in place. Do you not think that for some of these things you could have criminal charges? I agree with you that it's not the only remedy, but I just wondered what your view would be.

MARK DRUMBL: Andrew that's a great point. And I think there are also issues of state responsibility that arise—certainly in the context of COVID and perhaps ostensibly with other future pandemics that hopefully won't happen but probably will. I really like your raising the idea of corporate responsibility. That's another big theme now in international criminal law. To what extent can we hold corporations, or individuals who run corporations liable, let's say, for climate change on negligence bases? To me that is reshuffling chairs on the Titanic. I am not convinced that international criminal law, which is fundamentally rooted in a neo-capitalist world order, can necessarily do more than rearrange deck chairs on the Titanic that itself is based on. I think if we really wanted to get serious about corporate malfeasance we shouldn't be speaking to each other, we should be speaking to our domestic corporate law colleagues, we should be speaking to our domestic legislators, and we should be having a very cutting edge conversation about the reality that the limited liability corporation, which is endemic in all societies, isn't so great.

I mean Fukuyama is right, we are at an end of history in the sense that the triumph of neoliberal capitalism is absolute and everywhere. Even in transitional justice scholarship, if you have transitional justice from an autocratic realm, the only legitimate place to which you can now go is a neoliberal social democratic model that entrenches the idea of the corporation as an independent entity. It's become ubiquitous.

Sure there are lamentations around about monopoly capitalism and tendencies towards other forms of cartelization and antitrust and so forth, but so fundamentally anchored in our thinking is that corporations should have limited liability. If we really think that industrial action, commercial activity, all of these things which are presently conducted through corporations are absolutely constitutive of climate change, then I'm sorry—the only logical solution, if that is the problem, is to do away with that entire economic structure. A handful of international criminal law prosecutions are not going to achieve that. It just once again gets rid of the ugliest, but then the system continues and we can hope that the system might be a little more informed, or a little bit more tactful, or a little more aware, but at the end of the day, fundamentally, the only solution of getting rid of the limited liability corporation is revolutionary legal change at the national level all across the place.

You know I am very skeptical of revolution in general, generally it doesn't always lead to a better place, but the honest answer I think would only be there. But yet here once again we are caught in this same paradox because we lament corporations for the environmental harm they inflict, but probably in all of us is this hope that some corporate entity will develop a set of magic bullet solutions to climate change, incented by the immense profit that will come from that. Just like we had that response when it came to the COVID vaccine. Ee have this really conflicted relationship with corporate entities, but I think if there is a consensus that corporate activities, our entire time, up until now since the enlightenment we have really glorified invention, entrepreneurialism, right? And we created the corporation so as to facilitate that, but what if that exact same quality, now, is our Achilles heel? Can that be court-roomable? I don't think so. I am no Marxist, at all, but I am just trying to have a conversation. Marx was right about a number of things, history might prove him really right about this.

ATTENDEE: Should child soldiers be prosecuted for atrocity crimes?

MARK DRUMBL: Right, so from the international criminal law perspective, the operational likelihood, or possibility that anyone under the age of 18 or 15 but certainly 18–let's take the straight 18 position–the likelihood that anybody in that age bracket ever would be prosecuted for an atrocity crime is virtually zero. Hardly any international donors at the national level would fund a national society's decision to criminally prosecute individuals in that age bracket. But to me, that's an altogether different question than the question of how we should talk about the pain that victims inflict on others.

It's another area in which we are very uneasy in international criminal law. We like perpetrators to be tall, and powerful, and easily blamable, but many perpetrators are small and contribute in small ways. What do we do about that? Once again, I don't think the criminal courtroom is appropriate, but if the criminal courtroom is all we got, that means we're going to be missing many kinds of conversations.

I want to add something to something that you said, and going back to Professor Stauffer and her ethical loneliness idea. I'm not certain if you're a victim of a violation of your bodily integrity, I'm not certain if someone you love is murdered or you suffer grievous harm, I'm not sold that it is easier for you, as a victim, to come to terms with your pain when the person who did it is totally high on drugs and is seen blameless because of that. I'm not sure it dulls the pain one feels when the person who did it didn't even know what they were doing. In some ways it's even more complicated because it's harder to articulate blame, so I think we also need to recognize that people hurt each other in many, many different kinds of ways, and perhaps there's a perennial dissatisfaction in a society when only the most blameworthy ever face account, I've argued in my own work that criminal prosecution of former child soldiers is not a great idea, I am a bit of a skeptic on criminal prosecutions generally. But I am an even

greater skeptic on just doing nothing at all. And that is something I think that we see at both ends of the age spectrum.

DAVID CRANE: Thank you, Mark. I was just sitting here listening to a brilliant lecture by a brilliant human being that I've known for a long time, and I was thinking about a case study that just, bumped, hit me right in the head and that was the Special Court for Sierra Leone. As I am ticking off your various discussion points dealing with age, we were stuck with 30,000-plus child soldiers who would destroy an entire country in horrible ways, and our decision to not prosecute them and consider them as victims, as much as they are victims, and made that the announcement in Kabul in November 2002, but the idea of [age] was very much within our investigations and who we were going to indict. You know I had the authority to prosecute 8-year-olds who had committed alleged war crimes or crimes against humanity, so your age point just really struck home.

But also the idea of theater and our decision to go out to the countryside to listen to the victims tell us what happened to them. It was largely theater. I remember at one point I made a statement before a thousand young ladies talking about justice for Sierra Leone, and here I am this old white guy from North Carolina, and so I had to figure out how to kind of bring them into some kind of level to discuss. I was standing among them and I looked to this young lady and I had her stand up and I asked her what's your favorite rock and roll singer or who's your favorite rap artist. She said it was P-Diddy and I said could you stand up and sing a song and I'll sing it along with you and so she started to sing and I was dancing next to her. The best theater is that all of a sudden I'm at a level where I can talk about justice and get their comfortable level to a fact where you get them to ask you questions and make comments.

Also, your idea about pain and suffering, the idea that the victims, really as we all know all of us, the victims just want their story to

be told and there are many ways by which that story is told. Again I am struck; when we were in Kabul I had an individual come up to me after a town hall meeting, his right arm and his left leg were cut off intentionally so that for the rest of his life he would be off balance. So I remember him leaning against me telling me about how that happened. There's a picture of me listening to him intently, but the point is, that struck home to me and forever that really the victims want their story told.

Then, of course, cutting edge kinds of things, rethinking how we approach international criminal justice, particularly when you are placed right in the middle of the crime scene and realizing that there are twelve plus other organizations, people, doing things that you have to respect—civil society for example. You know we had a truth and reconciliation commission (TRC), we were the only international criminal tribunal that had a TRC working side by side, and our decision to not do anything with them other than work with them at our town hall meetings telling people peace plus justice equals sustainable peace. And working with them and having lunch with them and coming together with fish so that people would realize they are working together, that there's more to it than just truth and justice, but also just truth about what happened. So again kudos, well done, because I'm thinking that you are coming up with these very interesting thoughts but there's a perfect case study in the Special Court for Sierra Leone.

MARK DRUMBL: And something that is undeniable, and this is something that has arisen now too with the arrest, the whole proceedings that have been initiated against Putin and the Russian Child Rights Commissioner; and that is the power of the international imagination of the child as victim. When I was thinking about this last night—I am very old school, I got the hotel to print off a couple of pages of debate in the EU Parliament when it came to the political discussion of the International Criminal Court moving forward.

There's a real centrality in all of this discourse about children as victims as a space of among the greatest forms of cross-cultural commonality that exists about conduct being particularly iniquitous. And again, I am thinking about the *Lubanga* case at the ICC that also came out in the victim's testimony and how your entire team, the entire prosecution went forward in that regard. If you read through some of these statements you know there is one statement: "They are only children, not soldiers, not enemies for sure. They are only innocent children that will be marked for life, there is no shred of humanity in you." Here's another one from a French Representative "*ces enfants sont les butins de la guerre*" [meaning] bounty, spoils of war.

You are almost describing children as something you can plunder: finding them, bringing them back to house. This should be our imperative as Europeans. I think this presentation of the child as this, sort of, perfect victim, galvanized the laws of merited and appropriate condemnation of those who violate the rights of the child. And unequivocally this deportation, it is one of the six cardinal violations under the international human rights law when it comes to children, it is in the genocide conventions as well if they're accompanying it.

I'm 100% on that. But we also have to be very, very, very careful, I think, in recognizing that. In order to build a full culture of juvenile rights, then juvenile autonomy, independence, action, political involvement also has to be recognized. If children are intractably only treated as helpless dilapidated victims it becomes much more difficult to sustain a societal discourse that adolescents should have rights to public health, rights to reproductive freedom, rights to political participation, rights to voting, rights to a legitimate and meaningful place. One thing I have worried about is that, in our international criminal law narratives of children completely decimated by conflicts, there is another side to that, and that is the intractability of this kind of helplessness that can arise.

Maybe we need to finesse things a little bit better, but here once again to go full circle, the language of law is not generally based on finesse, rather it's based on its greatest power which is guilty-innocent, right-wrong, up-down, victim-perpetrator. I just think this is also something that we should be mindful about, both for the very elderly but also the very, very young. Sometimes excessive victimization discourse simply leads to social disempowerment.

MATHIAS MARCUSSEN: Everything is really interesting to hear this big picture and hearing your discussion of the moral and philosophical foundations for international criminal law are actually much broader from justice and social justice and the world we live. But I have to say, I am left thinking these are very interesting questions, those questions have been demanding an answer, we might not like the answer, but we do recognize that children are human beings, that are uninformed, and they have certain vulnerabilities and therefore need to be protected. But also, the theory of juvenile courts is that they can also be perpetrators and they need to be tried, and there needs to be a mechanism for that. And at the other end of the spectrum [INAUDIBLE] aides of heath [INAUDIBLE] but there are some values that we feel have to be taken into account when we try children. And one of the choices we have made [INAUDIBLE] You have certain rights, even if we accuse you of war crimes and it means you should be able to participate in [INAUDIBLE]. We treat you as innocent no matter how sure we are that they committed the crime.

In a way we are putting ourselves above the alleged perpetrators, we are showing them the mercy that they didn't show to their victims. We may need to go out and explain why this happened. I think if we go out and tell the victims we recognize your — this is why we have the whole process. But for these reasons, unfortunately, we could not get to the end, but this is because me, you, are better, and therefore we have to stop and I think that people need to understand that.

MARK DRUMBL: Yes, I think that's right, I think clarity and honesty of communication as opposed to hyperbole is by far the better way forward in all capacities. But I think I would simply say in response to treat the system as we already have it, as so omniscient that only tweaks to it can accommodate all of the changing threats and characters that we face is a bit self-important. I think that this entire system only emerged because of big-picture thinking in response to what was constructed as the most serious harms at the time, and I don't necessarily think that every infrastructure is always permanent. On the other hand, I think you're absolutely right in pointing out the critical capacity of existing structures to absorb these nuances, but I really do think looking ahead on the last point about the kinds of threats future generations will face, I'm really not convinced that extinct infrastructure can adequately deal with that. I really have a feeling that in 50 years when we have a room full of conversation about what is justice, I'm not sure people trained in the way we have been trained will be in that room. But that's fine, I won't be here so I won't know, right? It's the ultimate guess you can make. You'll still be here; you're looking pretty fit!

[Laughter]

BRENDA HOLLIS: Just a few points, I think your idea about corporate victims fits into how we view them. It's easy to feel sorry for people and want to help them, and to see them as weak, powerless, weeping, unable to cope. Victims are individuals and they deal with victimhood in different ways. Some victims are not good people, I have prosecuted perpetrators where I really didn't like the victim, but that does not change their victimhood. So I think we need a much broader view of victims. They're not puppets in a room, we just pull them out and they're all the same, they're people and one of the big issues I think we face today is how we respond to victims. There is what I call the "social worker effect" and that is we know what's best for you and we'll take care of you. Now, one of the worst things

that happens to people is their ability to make decisions about their own bodies and lives is taken from them, so one of the things we do is give back to them. I think the idea of a perfect victim is so we feel comfortable to help them, and when they don't react like we think victims should react we wonder if they are really victims—and they were. When it comes to criminal justice I view these atrocities [as] different packages that victims of atrocities need. One of those, I believe, is inherent in us as human beings. If we were wronged, we want some form of accountability for those who have wronged us. But that's a package, and within that package there is international criminal action, national, truth and reconciliation commissions. In Rwanda, there were local groups that decided what happened to these people. In Sierra Leone victimizers were often welcomed back into the community more than the victims were welcomed back in. I don't think it's either-or, and I think as we move forward there are very big challenges that people will come after us with. We can't think of it as an either-or, but we can't discount the importance of criminal proceedings for conduct that's so offensive to what we consider to be normal and acceptable conduct. To me it is a very broad and nuanced issue, but it exists today as a very broad and nuanced picture in response to these atrocities, I don't think it's so black and white, either this or that, even today.

MARK DRUMBL: I think that's something we can all agree on. I just think we need to be mindful of the other as well as it comes in. And I do think one thing that the present paradigm- rooting back to, I mean suspended in the Cold War but still a bit prevalent, but you know starting in Nuremberg and really blossoming in the 1990s—I do think one thing that is a good legacy for dealing with future security threats that may be of a very different nature, but still are security threats, is the idea that national politics cannot solve or define all of our norms. Right, that there's a check and balance that's in there that's somewhat different, that's a medley of positive and natural law, and I think that's what the international criminal law system has brought

to the table. It's not perfect, I get it, anyone who professes perfection is peddling a potion. But that is I think something, and if that could be the kind of carry over into this climate change notion, and even into corporate domestic law, we might be at a place into the future where the idea of the limited liability corporation, whatever purposes it may have served, is just going to be looked at retrospectively in the mirror the way we look at other political and legal constructs in the past that were treated as normal.

That may very well be, maybe people in a hundred years will be thinking "what the heck were those people thinking back then?" But if everything is just left to national politics, you don't have this, and I think that is what's attracted me to international law in a certain sense, going back to Grotius is this idea that there's this one place because of a lack of a dominant political structure, you've got this interplay of that which is made by people, that which is made by entities, and that which is just divine as something that we should really think of.

Norm, I thought it was really interesting, your presentation yesterday, where you talked about customary crimes against humanity and then whether in statutes or treaty crimes against humanity and how we are so much more comfortable with positivism, person-made law. But at the end of the day, things people make can also be defective or limited. But this idea of customary international law, I mean I get it, it is made by a variety of actors. I guess also on this notion of a lot of everyone's comments, I also think it's really important for us to always take a step back and think of who is the we, who's the we of what we have made. Who's the we? And I think, in my view, just in my tiny little view as a tiny academic, there's just so much conversation that has revolved around is international law actually law? Barring the former interesting question, is it international?

If you want to do some epistemology, from where it is that we know what constitutes international law. It certainly is not very

representative of certain regions of the world. I think if we really want to have customary international law as a frame of reference, we should look at some of the neglected spaces in which this particular law is made. For years I've had this ongoing interest in this historiography of what transitional justice or criminal proceedings or holding people to account look like in places that we don't really speak about very much, or in which there is no international intervention. I think that's a really interesting area as well.

MICHAEL NEWTON: I was just going to say, this is going to be a theatrical point, and I totally agree with Brenda: that's why the theater piece here, that's why the victimhood concept is so central to the theater, which is a substanding truth, but the reality is, we all know this, that the theater and the construct of the system has to be that way because these things are not self-perpetuating, they are not automated, so if you're going do anything for victims at large, as Brenda points out, it's not monolithic but neither is it self-actuating. So, the theater and the idea of victimhood is vital, that's why a brilliant prosecutor should charge Putin with deporting children because it's vitally important to sustaining political will in the larger sense. And you're right to say there's a lot of victims, there's a lot of parts of the community that are untouched by the criminal process solely. I see a yin-yang to the larger political process, the political impetus to maintain courts to fund prosecutors, to succumb people, to do victim's trust funds, all [of that] requires a larger political role and that's where the concept of victimhood really comes in. That's why, it's interesting, why the European Parliament is even coming in.

MARK DRUMBL: Yes, that's a great point.

MICHAEL NEWTON: Because they are and because they have to. The same thing is going on in the capitals and in the marshes all around the world, but that's a necessary piece of this larger mosaic to solve all parts of the problem. There are some victims that just want their homes

rebuilt, you know, and they should be served as well. We shouldn't just prioritize victims because they're named in this particular village in this particular place so they get reparations, but sorry we didn't quite have your village so you get nothing? That's where this idea of victimhood, pure victimhood becomes so important and it's a bit of a sliding scale because what we're out of necessity doing is prioritizing different victims and different groups with different characteristics. And that's why I thought what you had to say about the connection between that and the theatrics is really important.

MARK DRUMBL: Right. Another really interesting set of papers we have in this *Sights Sounds and Sensibilities of Atrocity Prosecutions* book is written by two German women who are theater professors. They've written a fascinating contribution about the extent to which in Germany, film and actual plays, theatrical productions, have supplemented gaps in atrocity justice for the Holocaust. You can extend this to all places and spaces and to me this is really, really interesting because I think that we probably would see a theatrical play as something less authentic than a judicial theater of a trial. It's all in our DNA, all lawyers have this in their DNA or it would be, you know, we may be slightly different cousins about how hugely we value these things but it's all in our DNA or else we wouldn't be in law. But it is really interesting because their finding is that a much larger number of people learned about what may have happened on the play stage instead of the courtroom stage. But without, in many instances, courtroom stages existing somewhere previously then the play may just be fiction. Do you understand what I'm trying to say? There's also this kind of connectivity, but I think we vastly underestimate the power of theater, film, poetry, literature, and the arts, in also building these norms of what is right and wrong. One thing we should be mindful of is a hundred years ago war crimes may have been seen as ethically problematic or not chivalrous, but it was part of the conduct of conflict in many ways. It was not seen as something to denounce, it may have been ugly and unattractive, but it

wasn't seen in the way it is seen now. Going to you, I think this is this construct of right and wrong that has become more diverse in where these sources come from. But I also think we always need to very sedulously try to self-improve. I think we are kind of good at it, but we cannot lose sight of that.

MICHAEL COOPER: Thanks, Mark. I wanted to go back to climate change. I was thinking of our old friend Blackstone, who celebrated his 300th anniversary on July 10th. In the commentaries he makes the argument that for every right, there is a corollary remedy. So, I'm having difficulty wrapping my mind around the idea that there are rights that can't be vindicated in a court of law. The question arises, do young people really have a right to inherit a planet that can sustain life? Or is it a mere interest that they have in that if it can't be somehow vindicated, in a criminal court perhaps in some other court. It seems to me that it's not fair to call it a right if it can't be vindicated.

MARK DRUMBL: I think that's a great question because it touches on something else that I think is under-thought-of and profoundly important, and those are these ideas of intergenerational equality. Right, so I think we are really in a place now where, in some Rawlsian sense we accept the fact that certain immutable characteristics should be recognized, and we should combat unfavorable or discriminatory treatment of them. But we are really deeply rooted in the present. I teach contract law, and one of my favorite concepts in contract law is the idea of presentiation, it's actually a word in contractarian theory, to presentiate is the verb for putting the future in the present, and it riffs off the idea that we make a deal: I'm going to sell you a hundred coffee cups for your café, and we negotiate, and the idea of contract is to put down now in writing in the present an understanding of what I will do for you and what you will do for me that tries to foresee all sorts of consequences. So you might say "Dude you need to put something in the contract in case you don't deliver that day." That's the idea of presentiation. And I think we still, in our conceptualization of

accountability, are not all that comfortable with the idea that there are intergenerational rights that might emerge, and what do we do about those? I think we to some extent in international criminal law have become more comfortable with the idea of intergenerational harm, which is certainly in a medical sense, in a scientific sense are a really interesting topic. But it also goes to a really interesting question: what are the rights of the unborn? That's the center of very conversation about international equality or justice, right because if you really want to extend it out, it's not just those who are young now, what are we going to leave them in 40 years—it goes beyond that. And this going full circle is actually one reason why I think Kirsten Fisher, she is a professor at University of Saskatchewan that I mentioned to you before on the rebuke of agism. I think there is something powerful in that because what she is basically saying is your ability to be accountable should not only depend on the physical form you as a defendant assume in the present. Everything shouldn't hang on today when you're finally brought to justice, how well your kidneys function, how well are your synapses functioning. That shouldn't be the only thing, and I think there's something in that to begin to think conceptually about that kind of framework and the kinds of responsibility and the kinds of things that factor into our decision-making today when we are powerful as to what might happen. And I think if you extract her point a bit further it would be even in the mind of the perpetrator, he or she should not only be thinking about tomorrow but should also if you commit a serious wrong, it shouldn't necessarily be unpalatable that when you're very aged you should be held to account. It doesn't interface well with due process in law and as I said before I think if law loses due process, I'm with you all, it loses everything—that is the one thing we've got. Then maybe we should begin to think about other ways and institutions in which this can be processed. I also think the last thing is there's a lot to be learned in international criminal law from private law theory. Moreover, I find this idea of intergenerational equality really, really interesting. But we are a bit

skittish about the dealing with it for a number of reasons, and one is the question of whether the unborn have rights philosophically.

Thank you.

Magnitsky Lecture

Anton Korynevych*

The Sergei Magnitsky Lecture was delivered by Ambassador Anton Korynevych on Thursday, August 29, at 12:30 p.m. following introductions by David Crane and Jennifer Trahan.

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Thank you, Jennifer and David. As you have both emphasized, Ukraine strongly believes that we need to have the special tribunal for the crime of aggression against Ukraine established. It is a part of Ukraine's peace formula by President Volodymyr Zelensky, which includes point seven, on accountability and justice.

Why does Ukraine implicate and work on an international-level full establishment of the special tribunal? I would say that we have started this job at the end of February 2022, and it was our legal reaction to the full-scale invasion by the Russian Federation to the people of Ukraine. We understood that we need to try to hold the betrayers of the crime of aggression against Ukraine accountable. And that the best way to do that would be to hold them in court**.** And then we try to analyze what are the possibilities for us to get the representatives of the crimes, political and leadership of the Russian Federation to report for the crime of aggression.

Of course, we found out as everyone in this room, that currently there is no war tribunal which can bring Russian political and military leadership to accountability for the crime of aggression. We might recall that Ukraine does not have jurisdiction in the ICC. The ICC jurisdiction exercises the situation in Ukraine in relation to the commission to the three categories of international crimes:

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* Ministry of Foreign Affairs of Ukraine.

crimes of genocide, crimes against humanity, and war crimes. But unfortunately, under the current jurisdiction and regime, for the crime of aggression, the ICC cannot exercise jurisdiction over Russian aggression against Ukraine. It would have been manageable to do this only if both Ukraine and Russia would have signed the Rome Statute and had filed the amendments on the crimes of aggression, or the UN Security Council will refer the situation in Ukraine to the International Criminal Court. We of course understand that currently neither of these conditions can be applied. That is why we need to try to look at alternatives and to try to establish a special tribunal which would be able to close this accountability gap.

This is a very important issue for our government because Ukraine, since 2014, the very outbreak of the Russian aggression against Ukraine, has used each and every possible international legal instrument and tool. Ukraine has made applications to each and every international war crimes tribunal, to which we could file our applications against the Russian Federation, in particular the International Court of Justice, the International Tribunal for the Law of the Sea, Arbitration Tribunals on the United Nations Law of the Sea, the European Court of Human Rights, and recognizing the jurisdiction of the International Criminal Court–but we can assume these existing groups are not enough and we need to close at least two existing gaps in order to be able to say that full, comprehensive accountability for all the violations of international law is ensured.

In short, these two gaps are accountability for the crime of aggression and establishment of the compensation mechanism for reimbursement of damages. The compensation mechanism is a different story, so today we'll talk about the special tribunal. At the end of February 2022 we started to work on this matter. From the very beginning a lot about partners and friends told us maybe we shouldn't do that and we should try to use all the existing tools under international law and we should not invest anything. But we understood that we

needed to keep pushing this issue, and I hope that today we may say that we have reached intermediate results on the way toward establishing the special tribunal.

At the beginning of this road, we even couldn't have imagined that we might have this desire. One immediate result is the establishment of the International Center for the Prosecution of the Crime of Aggression against Ukraine—ICPA in the Hague. It started its work in the beginning of July, and the Office of the Investigation Team where Ukraine, six members of the European Union, officers and prosecutors of the ICC and Eurojust reached out to participate. The ICPA is the center that works as the coordination platform on the evidence and conduction of investigation into the crime of aggression against Ukraine. This is a place in The Hague in the headquarters of Eurojust, where Ukrainian prosecutors, together with prosecutors from other states, like Poland, Australia, Latvia, and Estonia together make the investigation into the crimes of aggression against Ukraine. But of course we understand that this standard is only the first step, and the next step should be the tribunal itself because there is no need to conduct investigation and prosecution if there will be no tribunal established. But, we believe this Center itself is of value, this is the first international effort in the investigation and prosecution of the crime of aggression of the second cold war. Moreover, we also have quite a lot of political support from the international arena, in particular, we have several resolutions for the Council of Europe. Five solutions from the European Parliament, one of them being special and indicated specifically for the need to establish a special tribunal. Several resolutions of Parliament call for NATO to oversee the resolutions of National parliaments which strongly call the international community to establish the special tribunal for the crime of aggression against Ukraine.

Moreover, in the European Union there is a very important instrument with all European Council conclusions, which are the decisions of the

European Union, European Council. All the recent European Council conclusions call for the establishment of the special tribunal and support for the progress on this tract. Decisions of the Committee of Ministers of the Council of Europe also support the need to establish the special tribunal. Now, with this political support, with this Staff of Operations of the ICPA, we are on a very important track of getting the things done in the legal sense and establishing the tribunal. For that reason, the core groups meet quite often in different states to discuss the possible moments and the other possible legal technical issues in relation to establishment of the special tribunal. It is important to notice that different states, different members of the core group might have different views on how the tribunal should be established. But, all the states are united in the value that we need a magistrate for a crime of aggression against Ukraine.

Now the things that you have probably discussed, or will discuss after having such great professionals as Jennifer and David in the company: how to establish a special tribunal? Of course, for us, the best way to establish the tribunal, will be to establish it as an international tribunal as Jennifer just now referred to how it should be fully international. Of course we may say there might be hybrid international or international hybrid, but I also consider that now that we need to make a distinction between these modalities. A full international tribunal, means a tribunal that is based on international law and may be considered as acting on behalf of the international communities. It is now one of the possibilities to establish such a tribunal and the principal one is to create a tribunal on the basis of the Ukraine United Nations agreement.

The resolution of the United Nations General Assembly which will instruct, or invite, or request, however we will call it, the United Nations Secretary General to have an agreement with Ukraine on the issue of establishing the special tribunal. We consider that this option might be the most legitimate and credible one, and again, this

may be the option which may work on the name and the behalf of the whole international committee. And last but not least, it might have good results on the issue of overcoming both functional and personal immunities. And when we talk about personal immunities, of course we are talking about personal immunities of so called Troika—sitting heads of state, heads of government and Minister of Foreign Affairs, persons who are able to represent their government in international relations without any credentials and by this they are considered through customary international law to have personal immunities, but personal immunities do not apply before international courts and tribunals.

The other option for the establishment of the special tribunal, which is supported by some of our international partners in France, is the establishment of the tribunal on the basis of Ukraine's judicial system and the Ukrainian legal system. This, of course, would be a hybrid tribunal. A tribunal which arises from the national legal system, national judicial system, but also has international allies like international prosecutors and international financial administration support. We are not so keen on looking into this option on the basis of Ukraine's legal system, due to the issue again which Jennifer very correctly mentioned. As you are well aware, we are now in a war so we have martial law going on back in Ukraine; this means that we cannot have any amendments to the Constitution of Ukraine currently, whenever we still have this martial act. And, we will need amendments to the Constitution of Ukraine if we establish a hybrid type of tribunal, specifically to deal with the fact that under the Ukrainian Constitution, only nationals of Ukraine can be judged in the court system. And we do believe that whenever we establish a special tribunal we should have foreign nationals as judges as we don't want to have this tribunal perceived as being biased as a victim state trial—bias that one state party to the international armed conflict, is conducting investigation and prosecution of the leadership of another state party to an international armed conflict. These are the things

which we are concerned with. Moreover, if we establish such a hybrid tribunal inside the Ukrainian legal system, it may not be called a court which will be acting on behalf of the international community, and both legally and politically there are reasons and concerns whether it will be enough to have a court which will be acting only on behalf of Ukraine, and not on behalf international community in this case—whether this is an appropriate reaction to this matter.

The discussions on the modality continue, and these discussions are very sensitive, specific, and particular ones. We will continue our efforts with finalizing to establish this special tribunal, which will be able to do this job. The Tribunal shall be effective and when I say this I mean it should be able to break through direct responsibility of representatives of the top political leadership of the Russian Federation, or those who are engineers of this war of aggression. We should be able to do this on a credible, legitimate and justifiable basis. To finish up my introduction and maybe open the floor to questions or comments I'll say that we guarantee we understand this trial for the special tribunal for the crime of aggression is important for us, for Ukraine, for Ukrainian people, for Ukraine's government because we need accountability. And of course accountability is not only the matter of the crime of aggression. Accountability is also the national proceedings of war crimes, or alleged genocide. Accountability is also actions of international criminal protocol and investigation into alleged war crimes, crimes against humanity and the crime of genocide; and we praise the actions of the International Criminal Court issuing arrest warrants for Mr. Putin and Ms. Lvova-Belova. These are really historical moments in international justice.

But whenever we talk about war crimes, crimes against humanity, and the crime of genocide, these are still episodes committed during this war which lasts for years. If we want to have responsibility and accountability for the war itself, this would be accountability for the crime of aggression. Only the crime of aggression can

cover accountability for this whole war. And moreover while we understand completely that the establishment of the special tribunal is of particularly great importance for us, we understand that the results are beneficial for the international community because we do believe if in this particular case when you have at least the biggest war of aggression in Europe since 1945, this crime of aggression is left without legal response, then it might do substantial damage to the concept of the crime of aggression itself and to the concept of the foundational principle for the conviction of the use of force. That is why, I think, we have the support for this endeavor—because this situation may not be left without response.

As the International Military Tribunal in Europe may recall, the crime of aggression, or how it was labeled at that time as 'crimes against peace,' is accumulated. This is how we, Ukraine, understand it. This accumulation of the crime of aggression, covers all mass atrocity crimes, which were committed and are committed in our soil. There are different conflicts, there are different situations in the world. There are situations that are non-international armed conflicts with war crimes and crimes against humanity being committed. But in Ukraine, the situation is clear. Before Russian aggression, before 2014, my country didn't know what a war crime was. My country didn't know what a crime against humanity was. And the outbreak of Russian aggression brought these horrible mass-atrocity crimes to our soil. This is why we believe we need to keep the ball rolling, we need to pursue accountability for the crimes of aggression, we need to establish a special tribunal which will be able to do its job. And I am really grateful for all the assistance and support from academics, experts, lawyers, judges of the world who support us on this all.

I thank you and I'm happy to try and answer your questions.

JENNIFER TRAHAN: Thank you Anton for that great talk. David wants to ask the first question, you can stand up and ask him, let's see if Anton hears it.

DAVID CRANE: Anton, Thank you my friend, and really well said. We are proud to be associated with you, your colleagues, and of course Ukraine itself. I just want to clarify something here because, at first when Hans Corell and David Scheffer and Irwin Cotler and I put this working group together, looking at practical aspects of setting up a tribunal, we were initially interested in creating something that was more 'hybrid,' but we have not advocated that for well over six months.

We are now fully advocating—you have a copy of the resolution, a copy of the statute, we have seven steps on how to create it. I just want to clarify, frankly for the record, that really we are completely together with all our colleagues that it has to be a purely international step up to fight tyranny and show the world it cannot commit aggression, and the international community is going to hold you accountable. I just want to, for a matter of record, yes we were first hybrid, now we are fully international and lets go ahead and put some Russians in jail.

JENNIFER TRAHAN: Do we have additional questions? While you think of your additional questions, I can ask Anton a question.

In New York we are well aware that for an international tribunal, if we are going to get the UN's recommendation through the general assembly, we need many countries of the world to be on-board and my fear is that so far, African countries and South American countries, they are sitting on their hands. They are saying "oh this is Ukraine's world, this is NATO's world, this is the US' world." So how can we change the narrative, what can we as academics do more to help you? How can Ukraine work to change this narrative to explain that when a powerful country feels complete impunity that it can invade a neighboring state and get away with it? That the countries

of, the borders of no states are safe? So when this happens the whole global order is at issue, it was a move of imperialism–and this should resonate for Central and South America but somehow we haven't. Admittedly, how do we get that? Any thoughts? How do we help you work, what more can we do? Thanks.

ANTON KORYNEVYCH: Thank you so much Jennifer, thank you so much David for the clarification.

If I may just briefly comment, we of course totally understand the issue. I think this is a matter that really, that people look at such a court that is created, a special court for Sierra Leone. We might call it international or hybrid because it had national elements there. But this court proclaimed itself to be international and had the possibility to overcome perks of immunity of the Troika**.** In that case, really making it worthy was okay but now we see that there are two different modalities for the establishment of the special tribunal, one being international and the other one being hybrid. Moreover, as colleagues know, we aren't so eager to go to the second modality hybrid tribunal because we are totally aware that for the US, the UK, Germany, France, hybrid is a normal word. So you can use hybrid vehicles but for Ukraine unfortunately hybrid is about warfare, hybrid peace agreements, hybrid Russian peace. So that is why the second modality, we might often call the 'international alliance tribunal,' meaning that this is a national tribunal, national court, international life by international allies, but of course we do understand the position which David and Hans Corell advocate for.

So in relation to your question, Jennifer. I wish I knew the ideal answer. The fact that, really the matter of support of the social Global South is of big importance and as of now when we look at the map of the states which are involved, in the matter of the special tribunal, they are mainly European or North American, and several other states from Asia and two states from Central America. We try hard to get

more states from the Global South, Central America, Latin America, and North, but this is not really an easy task. And of course, whenever we talk about some movement in the United Nations we need to have support for that movement. We are already really grateful for all the support we get from expert community from practitioners, professors, academics, experts and we do believe that the outreach most in general to the public with the help of online sessions, webinars, is important, but also maybe trying to target persons who are close to those who make decisions, who can decide whether or not to support any kind of things. Maybe outreach in New York, I know this is already done by other friendly state countries. This outreach to the United Nations, I think there are a variety of options. And the outcome, the result of them will be of course if we can have more states from Central America, Latin America, and Asia together with us on this endeavor.

JENNIFER TRAHAN: Thank you, are there additional questions?

ATTENDEE: I wanted to ask, you said earlier that if Putin would be tried, it would be best to have an international team on the case so that there wouldn't be a Ukrainian bias, but I wanted to ask, don't you think that most of the countries who will form this international team would have a bias because a lot of countries have been affected, not as much as Ukraine, but they have been affected by Putin's actions in this war.

ANTON KORYNEVYCH: Thank you so much for the question. I think that the issue of having Ukrainian trials for international crimes is not a problem I anticipate. I mean, if Ukrainians have a trial over a Russian soldier or officer who committed a war crime and we have such cases a lot in our courts, inside our prosecutorial system. The metric here is to talk about aggression. The crime of aggression is such a specific and sensitive issue that if we do an investigation and the prosecution and the trial of this crime all with ourselves within our judicial system; it might really be seen, or it may be then proclaimed by the propaganda, manipulation, and speculation, as biased and as

the victim-state deciding to do some trial which the Russians may call it whatever they may call it. That is why I believe we need to get international judges on the bench.

Now, whether this should be a full international bench or nationals of Ukraine, I think this an idea to consider. But I think the majority should be international judges because then we will be able to say this is not only Ukrainian citizens, who now sit in the court and who had, I don't know, her or his house destroyed, her or his son on the front line in Donbas or in some region. That he is taking this case, but a foreign national who doesn't have this individual engagement to this conflict, and saying this I really don't want you to consider that it is about trust in our judicial system. No. We trust our judicial system. The capacity of our courts and our prosecutors on the matter of war, with war crimes and other correlated crimes has really increased since 2014, so they do a good job. Just the other morning I had a meeting with our Prosecutor General on the issue of war-related crimes who do this often. But for the crime of aggression we need to consider the option of having international judges, whether these may be national judges who also suffered from Russian aggression, why not? I think that this may be the case and I'm sure that we will soon look inside the process of selection of judges. There are so many possibilities to secure a legitimate and credible procedure for the selection of judges. I am sure this will not be an issue.

JENNIFER TRAHAN: Thank you. Are there other questions?

ATTENDEE: Hi, I just want to say thank you again, it has been really insightful. I am wondering if you can elaborate a little bit on the timeline you foresee? Are these proceedings that could happen during an active state of war, or are these more post-conflict?

ANTON KORYNEVYCH: Thank you so much for your question. Well, I think this is the matter of where we cannot prepare a road

map and a complete timeline. Yes, I often say in Ukraine, if it was all our decision, and if the war was dependent only on us, we would have already done this. But this is not the case within the support of the political group of the numbers of the international committee. So it is really very, very hard to talk about deadlines, timelines, and roadmaps looking at the sensitivity and sensibility of this issue.

Now to the issue of when should this tribunal start its operations. I think that the sooner the better. We know the historical precedent, which may guide—when the Allied Nations during the Second World War signed the Declaration of Banishment for War Crimes of Nazi Regime, in Europe, on January 13, 1942. London St. James Declaration on the Punishment for War Crimes. I believe that on January 13, 1942, there may not have been the final understanding of the Second World War for them, but they already decided this war may not end without punishing the crimes, and they started to prepare for that. The same goes for when we think about great international lawyers, like Raphael Lemkin for genocide, for Sergey Golubok and his concept of crimes against humanity.

Our job is to prepare now the work and to be ready to launch this tribunal as soon as possible. Some of the procedural work can start and has already done so, with the Center. The ball is rolling. The most important element in all this job is modality, because whenever modality is there, we may start the laws on this modality.

JENNIFER TRAHAN: Thank you so much, Anton and wishing you all the best.

JAMES JOHNSON: Thank you very much, and we will see you again soon.

ANTON KORYNEVYCH: Thank you, thank you, take care.

Panels

Benjamin B. Ferencz Prosecutors' Commentary and Update

This panel was convened at 10:30 a.m., Monday, August 28, 2023, by its moderator, Michael Scharf, Dean and Joseph C. Hostetler–BakerHostetler Professor of Law at Case Western Reserve University School of Law.

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MICHAEL SCHARF: Well, thank you, Jim. You know, looking out at these amazing academics, I have to say, I think what Dave Scheffer meant was that I organize annual academic conferences where I bring the top academics and practitioners together and create a lasting legacy by publishing their articles in our Journal of International Law. I really appreciate the shout out, Jim. Case Western has been pretty unique. Because right after Nuremberg, Sidney Jacoby, one of the Nuremberg prosecutors, joined the faculty. He recruited another Nuremberg Prosecutor, Henry King, who a lot of us knew, who was on our faculty for 30 years. Henry King recruited me, and I continued the war crimes work. When I became Dean, I recruited Jim Johnson, and Jim is now teaching our International Criminal Law and Procedure class and our War Crimes Research Lab, he created the Yemen Accountability Project, and he runs our Henry King War Crimes Research Office. So we have had, since Nuremberg, a steady stream of war crimes experts at Case Western, and we are very pleased for Jim to be one of the lead organizers of the IHL Roundtable, and for including Case Western in this incredible annual conference.

Welcome to the Ben Ferencz International Prosecutor Roundtable Session. As you know, I'm Michael Scharf, the Dean of Case Western Reserve University School of Law and it's my privilege to once again be chairing this extraordinary panel where we get to learn the latest developments in international criminal law as told by the individuals on the front lines of the fight against tyranny and war crimes.

Let's begin with a tribute to Ben Ferencz, in whose honor this session is named. [Pointing to the monitor]. You can see on the screen, these wonderful pictures of a young man who was just 25 years old when he served as the youngest prosecutor at Nuremberg. Let me say a few words about this amazing individual. He was the last living Nuremberg prosecutor, and he used to say that his fame is due to his longevity. As one-by-one all these famous prosecutors passed away, he'd become more and more in the spotlight, to the extent that when he finally was in his last few years, he was profiled on 60 Minutes, there was an award-winning documentary about him, and he was really the voice and the image of Nuremberg to a modern generation. At Nuremberg, he prosecuted the Einsatzgruppen case, the largest murder trial in history. But it was only a three-day trial because he used all documentary evidence to prove his case.

Inspired by Raphael Lemkin, Ben was the first person to name the crime of genocide in an international court. That went a long way toward creating the momentum for the Genocide Convention. Afterwards, he was a social justice lawyer, an author, a professor, an NGO founder, and a powerful advocate for the establishment of an international criminal court. In fact, his presence, along with Henry King and Whitney Harris at the Rome Diplomatic Conference, provided the moral impetus for adding the crime of aggression to the Rome Statute at the time. In the early years of the International Humanitarian Law Roundtable, Ben's financial support through his NGO, the Planethood Foundation, was crucial to the success of this conference. Also, he sent us his son Don, an expert in IHL in his own right, who brought his guitar, and that's why we play music on Monday evenings at this Conference. From those early sing-alongs with Don and me on our guitars, we now bring an entire Faculty-Student rock band to the Roundtable.

Finally, I have to mention that, thirty years ago, Ben wrote the introduction of my first book and helped me obtain a publisher,

literally launching my career. So, I owe pretty much everything to the start that I got from him. For all of you who are further along in your careers, I implore you to follow Ben's example—find a student or a young academic and help launch their career. You never know where that will end up.

Let's now take a moment of silence to pay our respects to Ben, who passed away this past year. Though small in stature, he was a giant in the field of international criminal law. [Pause] Thank you.

Now, let's begin by introducing the international prosecutors, past and present, who make up our panel today. I love the idea of not just having current prosecutors, because our past prosecutors, as I learn every time I get together with them, are continuing to do amazing things in the field and moving international criminal law forward. You're going to find out some really exciting things today. Going in alphabetical order, let's begin with Fatou Bensouda. We all know Ambassador Bensouda, who was a member of Time Magazine's 2012 list of most important people in the world. She was the Deputy Prosecutor and then the Prosecutor of the ICC, and she continues to do important work, especially with her most recent report and investigation in Ethiopia. It's good to see you again.

Next is Andrew Cayley, who served as Senior Prosecuting Counsel at the Yugoslavia Tribunal and at the ICC, Chief Prosecutor of the Cambodia Tribunal. He is currently the Chief Inspector of His Majesty's Crown Prosecution Service Inspectorate in the UK.

Then we have David Crane. He was not only the co-founder of this wonderful conference, but the founding prosecutor of the Special Court for Sierra Leone. And he and Laila Sadat and I put together a book called *The Founders*, which is about the founding prosecutors of all the international tribunals. It's a fun read if you get a chance.

Next, we have Norm Farrell. who was the Prosecutor from the Special Tribunal of Lebanon.

Then we have Brenda Hollis, who I first learned about when I visited the Yugoslavia Tribunal during the *Tadic* case, the first international criminal trial since Nuremberg, and got to watch her in action. She was a JAG Colonel then, and she then went to the Special Court for Sierra Leone where she was ultimately the Chief Prosecutor, and then served as the Chief Prosecutor of the Cambodia Tribunal. Now she is, very importantly, the Chief of the investigation of the Russian war crimes in Ukraine for the ICC, and we're going to hear some interesting things about that today.

Next, is James Johnson—Jim. I'm going to tease him in a minute about his song choice. But at our school, the students call him "Yoda" because he's so wise and unflappable and he's got the wisdom of the ages when he teaches. He is the Chief Prosecutor of the Residual Special Court for Sierra Leone.

Next to Jim is Matthias Markeson, Officer in Charge of The Hague branch of the Office of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, which continues the work of the Yugoslavia and Rwanda Tribunals.

Finally, we have Stephen Rapp, who was Chief Prosecutor of the Special Court for Sierra Leone, and also Ambassador at Large for Global Criminal Justice at the State Department, and continues to hopscotch around the globe on important projects.

Now to the substantive questions. I've created some questions for each of the prosecutors that will tell you something new that you may not know about what's going on in international criminal law. Then tomorrow, we'll have Mark Drumbl put it all together for his Year in Review presentation at nine o'clock, which I never miss.

Let's begin with Fatou. After concluding your stint as the Prosecutor of the International Criminal Court, you led the UN's recent investigation into the atrocities committed in the conflict in Ethiopia. Can you tell us about that experience and what is happening now with investigation?

FATOU BENSOUDA: Thank you, Michael. That commission is still on, unfortunately, at some point, I had to resign because I was appointed by my Government as High Commissioner to the Court of St. James, UK, and as non resident Ambassador Extraordinary and Plenipotentiary covering 8 (eight other European Countries) which makes me therefore a senior government official. This I believe was in contravention to this clause on conflict of interest for a senior government official chairing such a commission.

I do believe now and even then that with The Gambia, there would really not be any conflict of interest if you strictly look at it. But word on the street rightfully or wrong, and a lot of talk around this issue, there were rumblings about 'it's not fair.' I did not want this to overshadow which may even undermine the work of the commission. I was concerned that the work of the Commission succeeds without anything distracting it.

I did not want it clouded by controversy over whether I should sit, continue to sit or not. So I decided to write to the President of the Commission and explained the issue clearly and eventually resigned after some discussions and objective considerations, and then completely focus on my current work.

But before my resignation I had already done a few months with the commission in Geneva and several meetings online setting out our plan of work. In Geneva I arranged together with my team to meet the Ethiopians representatives. The Minister of Justice of Ethiopia was in town and I presented to him the importance of their cooperation with the Commission. Perhaps you already know

that Ethiopia had already taken the Stan e not to cooperate with the commission and where already lobbying friendly states not to support and even urging them to vote against the budget of the Commission. Because we envisaged refusal of Ethiopia to deploy to their territory we already started thinking about neighboring countries. After meeting with the MoJ and the PR of Ethiopia we arranged to meet the ambassadors of Kenya and Sudan.

Because these were neighboring countries that you know, are very close to and even shared borders with Ethiopia where you could find many people involved in the conflict, whether as perpetrators or as victims who have gone to these countries to seek refuge. And it was important to get to them, to collect the information that we needed. Again because Ethiopia still had not fully accepted and were already generating a lot of controversy around the commission to stop its work from going on. As a result Ethiopia had started rallying other countries to support its position at the UN High Commission during debates.

And unfortunately there were quite a few African countries that started arguing against or voting against the commission being set up. So I think the commission was finally set up with a very narrow margin, and the support that was expected for the commission wasn't there.

In fact Ethiopia actually started to sabotage the work of the commission and openly declared that they were not going to cooperate with the commission at all because they do not want it– they had other ways of dealing with it with the same old rhetoric of African problems, African solutions.

And as I said, they unfortunately were able to convince quite a few people to vote with them. So you can see that even with respect to the budget of the commission, it was already a big problem. The commission was not given the resources that it needed to really do its work effectively. So from the beginning we had to engage in lobbying

and trying to get the budget at least to take off to do initial travels to enable us talk to the relevant people or even able to get them over to a safe place to talk with them.

As I said, one of the main reasons of going to Geneva was at the time an high level international meeting was going on at the time and many ministers of justice were there together with other high level government officials, but I targeted especially those officials who are around Ethiopia and I was able to meet them and discuss ways they can support the work of the Commission. We made ourselves available to answer any questions they may have.

My meeting with the Ethiopian Attorney General was after a bit of lobbying. At first, they did not want to meet with anybody, but somehow, I was able to talk to a few people who talked to a few people, and then he finally agreed to meet with me. And it's surprising that we had an amazingly interesting meeting. I confronted the issue of their reluctance to cooperate head on. an I explained, I said, look, this is a commission; now it's set up, it's established. Whether you want it or you do not want it, it is going to work, it is going to do its work. So I think it will be to your advantage and in your interest to be part of it rather than to be outside of it. Because I said, if I gather my information and to present it as I should, your narrative should be there as well. If it is not there, it's not our fault and you will fail entirely to put your story out there. So I'm just inviting you to work with the commission and then give us your narrative and your information, and we will incorporate that. I assured him that we are working with absolute fairness and objectivity.

Surprisingly, he said yes–then he welcomed the commission to visit Ethiopia. I saw that the ambassador was not quite happy initially, but eventually he yielded and even invited us to Ethiopia himself. He said that he was going to make announcements.

So our work started, and they actually welcomed it. I had also tried to convince him to talk to others supporting them who are still very much against the commission and inform them that they are going to cooperate to help bring them on board.

Having done all the biggest challenge of having enough resources to do our work effectively and efficiently remained. We made several pleas for the matter to be revisited, but up to the time I resigned it was still under consideration. I do know however that the team was eventually able to deploy to Ethiopia.

It has to be emphasized that we cannot set up these kinds of commissions to do this important work and not give it the budget required to have the resources at their disposal. The Commission should be supported to organize and gather the information that they should have. Otherwise it is setting it up for failure from the very beginning.

Just to mention that even the issue of renewing the mandate of the commission was also a problem. Eventually they did, but after serious lobbying by HR groups and states in favor.

So the commission is at the moment according to my former colleagues have been working hard and are in the process of writing the report to be able to present it. They have informed me however that they have proceeded with a lot of difficulties to get information. The commission is going to submit its report and I hope that it will receive the support that it needs.

MICHAEL SCHARF: This is a familiar story that repeats over and over. The effort to obtain support and resources for accountability is an ongoing battle. I think this is what Dave Scheffer was referring to as lawfare. The key is to convince countries to engage rather than to stay out so that they can make their case.

Now, let's turn to Andrew Kaley. It's been a few years now since you were the Chief Prosecutor of the Cambodia Tribunal (the ECCC), and it has concluded its trials. Now that you've had a chance to step back, how would you describe the legacy of that tribunal? I know it's a complicated legacy, but what do you think?

ANDREW CAYLEY: Well, first of all, let me explain and give them some context to the young students present here. Between 1975 and 1979, so over 40 years ago now, an extreme Maoist communist group took over the governance of Cambodia and over the space of three and a half years murdered, worked to death, or starved to death, as Ambassador Scheffer said earlier, upwards of nearly two million of their own citizens. If you put that in some kind of perspective, the population of the country was eight million. So, actually 25 percent of the population was murdered, worked to death, or starved to death. When I was there as the Chief Prosecutor between 2009 and 2013, so for four years, I met many, many people who had suffered under the regime.

Most families had missing members of their immediate family. There was a gap in the family. Brother was dead. Father was dead. Mother had been killed. So it really was an absolutely horrific set of crimes. As Ambassador Schaeffer said—and I actually didn't realize the story with Madeleine Albright who really pushed for this court—it was a very difficult court to set up for a whole variety of reasons, but it eventually became operational in 2006. The first prosecutor was a man called Robert Petit from Canada who was here last year but is not here this year. I was followed by Nicholas Koumjian from the United States of America, and then Brenda Hollis, who you know, was the final chief prosecutor. I would say the legacy is a mixed story. I think while I was there, I found it a very frustrating and challenging place to work. I think on reflection, looking back, it was essential that we did something, and I think what actually resulted, the cases that we did properly, met international standards.

If you look at the first case, which was Duch, Kang Guek Eav. I didn't do the trial, Robert led the trial on that, so Kang Guek Eav, alias Duch, was the head of essentially a concentration camp, in Phnom Penh, the capital of Cambodia, where between '75 and '79, they tortured and murdered 18,000 people. The really shocking thing about that, and I can actually feel it now in my tummy, when I think about these things, but the Khmer Rouge government at the time was meticulous about taking photographs of all of the people who entered that camp. So, there were thousands of photographs that survived the Khmer Rouge of the people who had entered this camp. Many of them are young families. Mothers with babies. You know, I can see these images in my mind now. Extremely shocking. It was a terrible place. Duch was the commander of that camp. He was tried in 2010, and found guilty of a number of grave breaches of the Geneva Conventions and crimes against humanity. He was sentenced to 19 years imprisonment. There was national uproar as a result of that very low sentence, but there were actually good reasons for that sentence at the time. First of all, he had suffered a period of unlawful imprisonment prior to his trial, and he had been detained in pretrial custody; he had to be given credit for that period. That was a small victory in a developing country. There's no rule of law. It's extremely corrupt. The government just imprisons people at a whim.

I should have said to you, the court was a hybrid court. It employed both people from the United Nations and also lawyers, judges, and prosecutors from the Cambodian side. So, we were working together with Cambodian nationals, which had its challenges. But it also gave the court a degree of legitimacy because Cambodians were actually involved in the process and not all of the courts had that. The Special Court for Sierra Leone, that had Sierra Leoneans working within the court, giving the court legitimacy. The Yugoslav tribunal did not have that in the same way.

There were people from the region, as there were in the Rwanda Tribunal, but it wasn't deliberately structured to bring in nationals. Now, I think, you know, there are benefits around that. There are also problems. Anyway, I did the appeal on that first case with Duch. I had actually asked for 46 years imprisonment, because he was then in his late 60's, and that would make sure that he basically would have a life term. He would never be released from prison, which I thought, frankly, having sort of orchestrated the murder of 18, 000 people, you should actually spend the rest of your days in prison.

Because I wanted to retain the fact that he was being given credit for being unlawfully imprisoned, and the time that he spent in pretrial custody—I wanted the Cambodians to recognize within their own domestic system, that they had to recognize these things as basic rights. In the end, the Supreme Court Chamber gave him a full life-term. Life imprisonment.

I always remember very foolishly being interviewed by the media. I was very disappointed because they dismissed these two human rights points on the unlawful detention and detention. I remember a journalist asking "Are you pleased with the result?" I said, "Well, I've actually gotten more than what I asked for." That was then plastered all over the media. And I just thought, "Oh, what a stupid comment to make, Cayley." It was true. Yeah, it was. But it wasn't the best thing to say. He died in prison in 2020.

The next case involved the leadership of the Khmer Rouge. I mean, I won't go into too much detail because we could be here all day, but these were the four remaining leaders. You can imagine, because this happened in the mid seventies, these were all very elderly people, most of them in their eighties. We lost one individual early on, a woman called Ying Terit, who'd been Minister of Health. Actually, again, within losing her amongst the accused, we also achieved something. She was suffering from dementia, so she was unfit to stand trial. The

Cambodians wouldn't accept this because they said well, you know, so what? And, and so, we're saying well, yeah, but you cannot try somebody who can't basically instruct their own lawyers. In the end actually, the Cambodians accepted that. And that was a small victory that I hoped would then be transmitted into the domestic legal system. They wouldn't be trying people in the courts who lacked capacity. So she was basically severed out of the trial and eventually was actually released. She died, I think, in 2017.

Her husband's—Yang Seri, who was the Foreign Minister in the Khmer Rouge regime—trial started in 2011. He died of a heart attack in 2013—you know, these are the risks of trying very elderly people. The final two were Nuon, who was the deputy to the leader of the Khmer Rouge Pol Pot Ambassador. Nuon was a very important figure. And then you had Khieu Samphan, who was the President of what was called Camp Chi. Both of them were ultimately convicted in two sets of trials. The trials were split into two because the trial chamber worried that they would die. If it was a very long trial, going over five years, they would die. In fact, the Trial Chamber was right about that because Nguyen Chia, in fact, did die, but after the end of the second trial.

So basically, they were both convicted of genocide. That was really important. Within Cambodia the genocide concerned an Islamic community called the Muslim Cham: a Vietnamese minority. I mean, if you look at a map, if you Google it, you'll see, Cambodia is sort of a teardrop at the bottom. Vietnam runs alongside it, and Laos, and then Thailand to the northwest. But within Cambodia there was this Islamic minority that had been converted by Muslim missionaries in the 14th century, and there was a Vietnamese minority as well. The members of those two communities were completely wiped out by the Khmer Rouge. They just exterminated all of them. I recall, as my memory serves me, by 1979, there were two Vietnamese people left living within Cambodia. Everybody else had been murdered. There

weren't any Muslim Chams at all in the country. People had fled, but most of them had been killed by the regime.

Also, obviously, it's a strong Buddhist country, and the Khmer Rouge had also effectively wiped out the Buddhist community, particularly targeting religious leaders and monks. So, they were found guilty of genocide. In respect of the Muslim Chams, the Vietnamese, and the Buddhists, basically was found guilty of genocide in respect of the Vietnamese only. Nuon Chea died between the end of the second trial and the appeal, and the Appeals Chamber found, in respect of him, that even though he had not had his final appeal, the Trial Chamber judgment still stood against him.

Khieu Samphan went on appeal. They confirmed, yes, genocide in respect of the Vietnamese and the crimes against humanity and the war crimes. Both of them received life terms. So the only person remaining in prison there on a life term is, Khieu Samphan, who must now be in his early 90s, essentially.

Now, some of the positive things about the court, and I'll only be another minute, Ambassador David Sheffer was the Special Representative of the Secretary General. He had to run all the interference between the government and the court. There were two other cases, Cases Three and Four, which never ended up in the courts because the government simply did not want them to take place. They involved five individuals, I won't go into the details. You know, everybody tried. Brenda tried very hard. Nick Koumjian tried very hard. I tried hard. Ambassador Sheffer tried hard to basically convince the government that we should go ahead. In the end, those cases simply stopped for a whole variety of reasons. One, I think for some legitimate legal reasons where an investigating judge effectively dismissed the case. I'm not sure it was the right decision, but I think that was an international judge. He knew that these cases were never going to go ahead. We could not have tried these cases because the

Cambodian judges would never have shown up for the trials. That's a failure of the court in the sense that political interference killed off two sets of cases. But, I think the success of the Court was that it was an example of a hybrid court working together with the nationals of the country where the crimes took place. It was very challenging, but people did it, and it worked for the best part of nearly 22, 23 years.

We had literally thousands of Cambodians coming to the court to view the proceedings. I mean, I can't remember the exact number, but it's tens of thousands. People were interested. They were bused in on a daily basis to watch justice taking place. I think that was a really, really positive aspect of this. Then, ultimately I think, going back to the genocide, people often ask the question "Well why was it not genocide of the entire population? Why was it only genocide of these small groups because two billion people were killed?" Well, the problem was they were really killed for political reasons. The mass killing of the Cambodians themselves, other than the Cham, the Vietnamese, and the Buddhists, was, if you look at the Genocide Convention, you have to be part of the group. One of the groups that is not represented within the Genocide Convention is political groups. The reason that was done is because I believe, and the academics and professors here will correct me if I'm wrong, is because Stalin would not agree to a convention which basically condemns the genocide of people who identify as a political group, for obvious reasons because he was busy killing off political opposition within the Soviet Union. So, we couldn't prosecute the mass crimes as genocide, but there's a word in Khmer that begins with P within the Roman alphabet—pro, plath, they talk about the genocide in Cambodia. They view the entire population and murder as being genocide, and I spend a lot of time, I'm sure Brenda does as well, trying to explain these were very, very serious crimes. Yes, there was genocide in the country, but against the population as a whole there were crimes against humanity and war crimes committed. But I do think overall, on balance even with the problems, you know, it was worth doing I think and I know you

know people like David Scheffer work very hard to make it happen. It was probably the most difficult four years of my life working that. But I think sort of looking back now, after 10 years, it was something that needed to be done and, as Brenda keeps saying, a team of people got together and they did it. I think overall it was successful. The only lesson, finally is that if there is a hybrid court set up for Ukraine, the lessons of the Cambodia court and the things that worked and the things that didn't need to be looked at very carefully. I'll finish there.

MICHAEL SCHARF: Back in 2008, I had a sabbatical where I spent a semester as Special Assistant to Robert Petit at the ECCC, writing the briefs on Joint Criminal Enterprise Liability. I remember Robert saying publicly that if someone set out to create a tribunal whose statute was going to make it destined to fail, they couldn't do a better job than the way the ECCC statute was written with all of its checks and balances. In the end what Andrew just said about the ECCC's legacy, is very uplifting. I'm glad that he said that. It makes me feel a lot better about the whole endeavor. I think that there's a common thread for all the tribunals. One step back, two steps forward and they are not a straight shot. There are a lot of challenges and Robert, Andrew, and Brenda overcame many of those.

ANDREW CAYLEY: Yeah can I just add, it's important that prior to the tribunal, and Dave Scheffer knows this, because of the nature of society, in Cambodia, nobody understood what happened. It wasn't really like Bosnia where people could kind of see what happened, but because it was so long ago, there was a whole generation of people that said "what the hell happened?" And I think that is one thing we did achieve. We set out what the hell had happened, and what they did, and why it can't happen again. As a result of that, (pointing to Scharf) Youk Chhang, who runs DC-Cam, there's a massive education program there, in Cambodia. Where school children of a mature age, like thirteen-fourteen years old, learn about it, and it's to some degree sterilized. It's not too violent, but they understand what's

happened. So, the generation now, growing up, at least know the truth of what happened during that four year period. And I think, honestly looking back, I've been very cynical about the court as you know over the years. That was really, really important—the outreach.

MICHAEL SCHARF: Andrew mentioned that in the second ECCC trial, one of the defendants was dismissed from the case because of her dementia, and I want to stay with that theme and ask Mathias about a recent decision of the Residual Mechanism. In June of this year, your tribunal rendered a trial decision in the case of Kabuga, who was accused of bankrolling the Rwandan genocide. The judges said "Well, Kabuga is unfit to continue standing trial because of his progressive and irreversible dementia, but we're going to go forward with the trial anyway. We're just not going to convict him or say anything about his guilt or innocence at the end of the proceedings." Can you tell us about that decision? What happened on appeal, and what does that say about the modern principle of fitness to stand trial before international tribunals?

MATHIAS MARCUSSEN: Thank you and now that we are in the more official part of the program I should maybe say that I am here on the behalf of Prosecutor Brammertz who unfortunately couldn't be here, but he passes on his regards and thanks for the kind invitation. I'd like to thank you for the promotion [looking at Dean Scharf]. I'm only the Officer in Charge of the Senior Legal Office in The Hague branch of the Office of the Prosecutor, not the Deputy Prosecutor. They list the Deputy Prosecutor so if you could maybe work on that with David Crane and other people and think of me when the time comes, that would be great.

[Laughter]

Anyways, so Kabuga again. For maybe those who aren't so familiar with him, he was a very important businessman from Rwanda who,

among other things, was one of the founders of a very influential radio station that played a very important role in the genocide in Rwanda; during which around 800,000 or one million people were killed in only 100 days. He's also charged with a number of other things that involved funding militias that perpetrated a lot of these crimes. He was a fugitive for 25 years. He was apprehended in Paris 2-3 years ago. He went to The Hague, and it always takes some time before trials start. Because of his health situation already at the beginning—the decision was that the trial would be conducted in The Hague, although it actually is a case that belongs in Arusha. So, we had a three-location trial where when the judges were in The Hague, some witnesses were heard in The Hague, others from Arusha, and yet others again from Kigali.

I think I mentioned also, last year the trial modalities, because of his health, were really quite peculiar. The court sat only for two hours, three days a week. With these international trials, we know how long it takes. When you have that kind of a schedule, it's bound to take a very, very long time to complete the case. The Prosecution really did a lot to get evidence admitted in an expedited way, notably, through the use of admission of written evidence—using witness statements, not bringing too many actual live witnesses, and these sorts of things. We made it pretty far along in the case; and there have been issues about Kabuga's health, so there have been a lot of medical reports of different kinds coming into the record over the time the trial has lasted. That's coming from our detention unit who have reported on the daily life of Kabuga. When you do this sort of work, you get insight into the health condition of old people. And in addition to that, there have been questions about his mental capacity.

At one point, the trial chamber appointed three medical experts who had divergent views on Kabuga's mental state and the judges kept the trial going for a long time until this spring. The three medical experts agreed that Kabuga could only understand rudimentary things about

the proceedings, and mainly were only able to make decisions about his immediate personal life. The conclusion was he has dementia, and that the situation will not improve. So, the trial chamber found that he was unfit, but made a decision to continue with an alternative fact-finding process, although the decision does not define the details of how it actually should work. But it's supposed to be as close to a trial as possible. The Prosecution would have to present evidence, you would have to meet the burden of proof on both on *mens rea* and *actus rea* of the crimes, and the standard of proof would be beyond reasonable doubt, but there would not be a conviction at the end. For some of us, that is a very alien kind of process, to be honest. But for others, like Andrew, it's not, because in some common law jurisdictions, there is something, what, what's your model on the facts?

ANDREW CAYLEY: Trial on the facts.

MATHIAS MARCUSSEN: Trial on the facts, yes, so you can actually do these things. The trial chamber decided Kabuga is not fit, but that we would do a "trial on the facts." The precise process would have to be worked out. It was a two-to-one decision, and there was a very, very articulate dissenting opinion, both on the fitness issue, and on whether the Mechanism could come up with this alternative process. Both the Prosecution and Defense appealed, and on the 7th of August, the Appeals Chamber dismissed the prosecutors' appeal on the fitness issue. It confirmed the finding that Kabuga is not fit, and ruled out the fact-finding process. The decision basically hinged on the Trial Chamber that went, "Okay. Let's look at the bigger picture. Let's look at the interests of the victims. This is important. We have to find a way where this can be done."

The Appeals Chamber said "No, no, no, no. We have to look at the statute." It's true that judges have discretion to fill gaps, but you cannot just up with stuff on your own whenever there is a gap. So it looked at the statute. It talked about *trials*, it looked at the roots

of procedural framework; looked at the reference to "convictions" and its provisions about "appeals." On this basis, there was no room for this new procedure. The Chamber had concerns about the new process because, yes, you're not going to enter a conviction, but you're basically going to potentially make findings on all the facts—including *mens rea* beyond a reasonable doubt—and then conclude that all of these things happened and that Kabuga had intent, which basically is a conviction, but you just don't say that. And Kabuga will not have a right to appeal. So, this is a no-go. That has meant that the case is over. The Appeals Chamber has remanded the case to the Trial Chamber with an instruction to permanently stay the proceedings. Which means the Mechanism will still have jurisdiction, but we need to figure out what this will mean in practice, and then an instruction for the Trial Chamber is necessary on what to do with Kabuga, who is detained. There will be a hearing next week on some of these issues, on what to do with a former accused when proceedings are stayed. We have jurisdiction over him. He probably should go somewhere, but where is he supposed to go? That's going to be interesting. I initially wondered why don't you stay the proceedings and decide what's going to happen to Kabuga? But, the more I think about it, the more I think it makes sense. I mean, somebody should figure out what to do with Kabuga, and it seems right that with something as serious as this, there should be a way for him and the Prosecution to appeal, whatever came out with this. So, there will still be some proceedings, but basically that means that the Mechanism has completed its *ad hoc* work; completed the trials and appeals from the ICTR and the ICTY. Because last summer, we got an appeal decision in the Stanisic and Simatovic case.

Let's just quickly pick up some of the highlights. We've got a decision in the Stanisic and Simatovic appeal. This was a case where Stanisic and Simatovic were acquitted by the ICTY in the first instance, but on appeal the acquittal was reversed and the case was remanded for a new trial, which took place in the Mechanism. The Mechanism convicted,

on a very narrow basis, for just some incidents in one village in Bosnia. The Prosecution appealed, and we won. To some extent, or a large extent, they were found to be members of a joint criminal enterprise, covering Bosnia together with Bosnia and Serbian leadership. They were convicted for a large amount of crimes committed in Bosnia. They had also been charged with crimes in Croatia. But, those crimes were found to fall outside the JCE. Nevertheless, the crime base grew enormously. The sentences were increased from 12 to 15 years.

So, we're done with our judicial work. You may have heard that we located a fugitive recently in South Africa, Kayishema. He is detained in South Africa. He is to go to Kigali, Rwanda, to be tried. The order is that he first comes to Arusha. We will see how long that takes. So then are still three fugitives being tracked and there may be news about that later. So, we are now, after a long time, at a stage where we will be focusing on our truly residual work. That includes enforcement of sentences—continued sentencing enforcement—protection of witnesses, and a number of these things that nobody thought about when they created the tribunals that would also have to take place because it was not just a *tribunal* that was created. It was really an administration of justice system. Much to some countries' dismay, we are difficult to kill off. We're still here, and there is still stuff that has to be done.

For the Office of the Prosecutor, we may be the most acutely aware of this, because we know as prosecutors that there's still a lot of justice that hasn't been done. There are many, many cases still at the national level, both in Rwanda, in the former Yugoslavia and a number of other countries including the U.S. and Canada. We get requests for assistance from different authorities who seek access to our evidence and increasingly other types of help. We really hope that, although our cases are over, we can get the support to continue, and the work to fill impunity gaps that are out there. We get about 300 requests for assistance a year; not quite so many in Arusha. That's a lot of work,

but it should be done, because that means that there are way more than 300 people out there that are being tried. Bosnia alone has about 9,000 outstanding cases that they want to prosecute, or at least deal with. So, there's a lot of work.

We have seen that the requests become increasingly complex because, especially in Bosnia, they are starting to move up the chain of responsibility. They tried direct perpetrators initially. Now they're moving up. That means their requests to us become bigger and they become more complex. They are also difficult cases to do, so with the knowledge we have about cases and methodologies and techniques is increasingly on demand. We get more requests that are more of an analytical nature. We engage a lot more directly with a number of counterparts, especially in the former Yugoslavia. Now, we're building case files. When we interact with others, and we understand that somebody is working on an area that may have been prosecuted by the ICTY, we have in some instances built quite comprehensive files at their request and said, "look, if you have to kind of go into this, here is what our understanding of the military units or the, whatever units in Kosovo, or in whatever place, is. If you're looking into this, maybe you want to look at this, this, this, this, and this, and here's a whole bunch of evidence. And here's basically a big analytical memorandum that can help you to find your way through all this material." This is mandated in our Statute, Article 28, 3m which mandates us to assist national authorities. We spend a lot of resources on that, but from our perspective, it is really a natural continuation of the work of the ICTR and the ICTY. It has always been embedded in the Mechanism's statute, and it was part of the completion strategy of the ICTY and ICTR that work should be transferred from the international level to the domestic level.

Thank you.

MICHAEL SCHARF: Mathias, when you were talking about the Kabuga case, I was thinking about last night when I was eating dinner at the Jackson Center, and I was facing the portrait of Nuremberg Defendant Rudolf Hess with those haunting eyes. At Nuremberg, Rudolph Hess claimed that he was unfit for trial. The judges dismissed that claim, but afterwards Winston Churchill said one of the greatest criticisms of Nuremberg is that they should have dismissed the case against Rudolph Hess. Hess spent the rest of his life in Spandau prison, and they could never could get him to talk. I'm glad that there is now some clarity from the Kabuga and Thiriths cases about unfitness to stand trial for these elderly war criminals, because this is going to come up over and over again.

Andrew mentioned the precedent of the ECCC for its relevance to the Ukraine situation because there is discussion about creating an ad hoc tribunal on the crime of aggression. I want to turn to David Crane. You've been involved in the effort to create this ad hoc tribunal for the crime of aggression relating to Russia's 2022 invasion of Ukraine. David, can you tell us about the status of those efforts? Tell us what's going on behind the scenes and what your thought are about the likelihood of success?

DAVID CRANE: Well, thank you. You know I was just sitting here listening to my colleagues and I was struck by a couple of things, one of which, you know, even though I liked that we weren't Rocky, you know, I was getting ready to leave Sierra Leone after three years. I went to the Milton Margai School of the Blind, where I met with them quarterly for over three years. We got to the point we were quite close. They called me Uncle Dave, and I would come and I'd bring Coca-Cola and candy bars to these wonderful children who had been intentionally blinded by the Revolutionary United Front. It was run by a wonderful lady from England who got an OBE for her efforts.

I went to say goodbye to them because I was leaving the next day shortly after I'd been made the Paramount Chief by the civil societies of Sierra Leone, and so we held a town hall meeting, as we did all the time. I would sit like this and they'd be right there, and a couple of the younger kids would come and sit on my lap and we would have a conversation. I told them I had to say goodbye, and so they said, "Uncle Dave, we have a song for you to sing before you go." They had a wonderful, wonderful choir. In fact, they actually performed in Westminster Abbey before Queen Elizabeth. That song was 'It's a small world after all.' That's also kind of one of my favorites.

We are at an inflection point. 2023 will go down as important a year as 1938. As far as democracies of the world, we're once again, facing down tyranny. That's how I've approached it, along with my colleagues, how we're going to deal with this. We have to deal with Putin's aggression in Ukraine. We can't whitewash it, we can't do Syria or half stop measures related to it. We have to have a legitimate international, special tribunal to prosecute Putin and others for the crime of aggression. If we do not, we will set the trajectory politically or geopolitically for the rest of the century, and it is not a good look by a factor of a whole lot. There are a dozen strong men around the world. Some of them are very dangerous. They are watching what we do with Putin, like crocodiles. Just watching. If we walk away from Ukraine without really firmly dealing with his aggressive acts, not by some kind of political half measure like a hybrid tribunal in Ukraine to deal with aggression which has no jurisdiction over the very person by which you actually created the aggression, Vladimir Putin. Or even a regional approach with the European Union and others dealing with it in a half measure because there's no real jurisprudence on whether a regional court would have jurisdiction over the head of state immunity issue. But we can, by an international tribunal, a special tribunal for Ukraine on the crime of aggression. We do have the jurisprudence that shows in *Prosecutor v. Taylor*, that a head of state who commits international crimes while he is head of state can be prosecuted. We

did that in Sierra Leone, and Charles Taylor is spending the rest of his life in a very bad place, actually. His Majesty's maximum security prison near Berwick Upon Tweed, I believe it's a nasty place. The bottom line is we have to deal with this internationally.

The good news is that we have done this before. Where have we done this before? The Special Court for Sierra Leone is the perfect model by which we can deal with this at the international level. So, over a year ago, a group of us got together—those who had actually helped create the Special Court for Sierra Leone. We reviewed the model, looked over my strategy, which is a ten phase plan on how to create it, manage it, and finish it, and brought together the likes of David Scheffer, Hans Corell, who was last year's Heintz award winner, along with Irwin Cotler, the former Minister of Justice for Canada. We worked with another group, Jennifer Trahan, Christian Wenaweser. We just sat back and said, "How could we do this?" So over the past year, with the support of great students and practitioners from the Global Accountability Network, we have put together a package that explains the only way we can actually do this is outside of the Security Council—which would be the normal way you would probably approach creating an international tribunal. We have to go to the General Assembly, which is kind of an unusual approach, though there is precedent of creating international organizations to deal with atrocities. We've created a General Assembly Resolution that would recommend, to the Secretary General, that he enter into a bilateral agreement with Ukraine to set up a special tribunal for Ukraine and the crime of aggression. We've also created the statute by which that would be negotiated as far as creating this special tribunal.

We then created seven steps, from the creation of the tribunal, all the way to the indictment of Vladamir Putin for the crime of aggression. Again, that package was reviewed by President Zelenskyy last September. He bought off on it. He said, "This is the way we generally want to go." He has very publicly stated that, and we have

to understand, we have to appreciate, even though the bright red thread of creating a tribunal is politics, we have to respect what the Ukrainian people want. I'm known for this question, "Is the justice we want the justice Ukrainians want?" We said the same kind of things in Sierra Leone. "Is the justice we seek the justice they want?" We have to respect their perspective in creating this special tribunal for Ukraine on the crime of aggression.

The other options are out there. They are validly being argued, but they are really politically worthless as far as actually dealing with the crime of aggression. This is not a regional attack. Even though it is a problem for Europe, obviously it is a problem for Ukraine, but the aggressive act by the Russian Federation on Ukraine is an attack on an almost 80 year old paradigm that we settle our disputes peacefully. The question I would ask you is, "If the international community via the United Nations does nothing about this aggression, then why the hell do we have a United Nations?" It's what we set the organization up to deal with if we have to. That is why it's important, but the key is we've done this before, we've created an international tribunal to deal with a head of state who has gone off the rails, and we have successfully managed it, created, and concluded with the Special Court for Sierra Leone. We can do this again, and we have to do this now.

The concern that we have, and I've written about this extensively, is that Vladimir Putin is playing the long game. Time and distraction are Vladimir Putin's ultimate weapons. He knows this better than we know ourselves to be quite honest with you, and he is just waiting us out. Waiting for the American election, knowing that Europe is very fickle and wanders off to do other things. Look at Syria, anybody talking about Syria anymore? Bottom line is no. He is waiting for us just to kind of get tired of it. I am concerned that next year when we convene for the 16th International Humanitarian Roundtable, we won't be talking about Ukraine because we've moved on. Remember, Syria was in everybody's mouth. I'm the co-author of the report,

and after we issued that report, the world was aghast, wanting to do something. Well, we don't talk about Syria. I am so deeply concerned from a practical level, for someone who's been doing this a long time, that we're going to have the same damn thing to Ukraine and we're just going to move on from this.

It is going to be a very, very dangerous century—the rest of this century—if we do nothing. The bottom line is, we've done this before, and it has been successful. We have a plan, we have a step-by-step guide to do that. Now it is a political decision by the General Assembly, hopefully in September, to consider doing something about this because this time, next year, I'm not sure what it's going to look like. That's where we are; that's where we're going. That's all I have to say about that.

MICHAEL SCHARF: Thank you, David. You can see that these international prosecutors, after they leave their tribunals, they continue with extremely important work. We wish you the best of luck on that endeavor and all the people that are helping you out that are in the room. Let me turn to Norm Farrell, another prosecutor who has gone on to important work. You went from Chief Prosecutor of the Special Tribunal for Lebanon, Norm, to Senior Legal Advisor at the Crimes Against Humanity and War Crimes section in Canada. In that capacity, you recently represented Canada at the international negotiations for The Hague-Ljubljana Convention on Cooperation Among States in Relation to Atrocity Crimes. Can you tell us about that Convention? What it does, where things stand, and what's likely to come of it?

NORMAN FARRELL: Very briefly, there was a Conference in Ljubljana which ended on May 26, to establish a multilateral treaty, or Convention, for cooperation between states on mutual legal assistance. If states sign become a party to the Convention, states agree to mutually agree to share evidence, cooperate and facilitate the prosecution of persons for serious international crimes, such

as crimes against humanity, genocide, war crimes plus three other crimes that are listed. The importance is that the Convention sets a framework that is in addition to individual bilateral agreements among states. For example, Canada already has a bilateral agreement with the United States, which includes arrangements and legal mechanisms for extradition, cooperation, and requests for evidence from the other state. If, for example, the United States is requesting the extradition of a fugitive who escaped to Canada—such as in the Kindler case or the Ng case, the two states would rely on the bilateral agreement on mutual legal assistance. The recent Convention in Ljubljana was to create a treaty that all states could jointly agree to the mechanisms and rules for cooperation in the investigation and prosecution of individuals accused of serious international crimes. Where it went beyond and where it has relevance to us as both international and domestic prosecutors, is that instead of just making it about mutual legal assistance, in other words, "How to make all of the states that signed this convention cooperate," it actually defined the crimes as one of the bases upon which states would cooperate. Secondly, it created an obligation for states who ratified it to extradite or prosecute those on their territory.

I would like to quickly refer to two issues arising from the Convention: first, is that the definition of the crimes for which states are to cooperate were taken directly from the Rome Statute. Is this problematic? At first it would seem the most logical. It is consistent with the crimes in the ICC Statute, and it is consistent, generally, with the crimes that states must prosecute domestically under the principle of complementarity of the Statute. But, despite this, there are some serious concerns with this wholesale adoption. First, states who were not members of the Rome Statute obviously had hesitation immediately about signing something which would render them in a multilateral context of cooperation based on the definition of crimes to which they have not yet agreed under the Rome Statute. Second, some definitions in the ICC Statute are not consistent with customary

international law. The codification of the definitions as taken from the Rome Statute would result in the further development, or at least the binding nature of these definitions for those who become bound by this Convention. In other words, if the definitions are more restrictive or limiting, that means conduct that would be illegal under customary international law would not be captured by this Convention (for the purposes of cooperation).

Let me give you an example under Canadian law, since that's now where I'm working, though I am not representing them here. I'm still representing the STL. Canada has jurisdiction to investigate, prosecute or take civil/administrative action against those who come to Canada but who are alleged to have committed war crimes, genocide, or crimes against humanity abroad. The legal basis for what crimes can be prosecuted, and what the definitions are of those crimes, is based on customary international law. As you know, all states are bound by customary international law. Now, let's compare the definition of crimes that Canada can prosecute under customary international law and restrictions on the ability to prosecute crimes if Canada signs the Convention on mutual legal assistance and this creates the basis for cooperation with other states.

For crimes against humanity, it is required that there is an attack directed against a civilian population. Under the Rome Statute, to prove a crime against humanity it is required that the attack against the civilian population is pursuant to a "state or organizational policy." This is not required under customary international law. Therefore, to prosecute someone in Canada you would only need to show that there was an attack against a civilian population, but not that it was pursuant to a state or organizational policy. But, the mutual legal assistance Convention originally required all states to act upon and cooperate based on the definitions of the Convention. In other words, if Canada sought assistance from other states or the extradition of a national to Canada, it would have to demonstrate evidence of an element of the

crime which is not required under customary international law, and not required under Canadian law.

A second issue to consider is that these definitions in the Convention regarding crimes against humanity will most likely now transfer over into the Crimes Against Humanity Convention that is being negotiated at the Six Committee in the United Nations. This would again be problematic for states that follow definitions under customary law not based solely on some of the more narrow definitions in the Rome Statute. Fortunately, Canada with the support of other states, was able to have the language in the Convention amended so that a state can implement the crimes within their domestic jurisdiction in accordance with customary international law. As a result, Canada will be able to maintain its law that relies on the definitions under Canadian law and under customary international law.

I know some people take a different view, but speaking based on our prosecutions that we've been doing in Canada and based on our experience, at least when I was the Deputy Prosecutor at the ICTY, there are some concerns that some of the additional elements found in the Rome Statute will be implemented directly into the Crimes Against Humanity Convention. Hopefully there will be no spillover of the jurisdictional limitations placed amongst the definitions of crimes which are found in the Rome Statute so they are not in the Crimes Against Humanity Convention. So, the bottom line about the mutual legal assistance convention is that it is progressive, helpful, and creates obligations such as certain responsibilities of states if a person alleged to have committed such crimes is on their territory.

MICHAEL SCHARF: Thank you, Norm. This is the first many of us are hearing about that new Convention. I'm extremely curious to hear what our next speaker has to say, because for the last several years she has been in charge of the ICC's investigation into the Russian atrocities in Ukraine. She and her team were the ones that made it so

that there would be an arrest warrant for the Head of State of Russia, Vladimir Putin. I don't know what you can and can't tell us about your experience but please fill us in to the extent that you can.

BRENDA HOLLIS: I don't have much time and that's probably good because there's not a lot I can say.

[Laughter]

MICHAEL SCHARF: Well we are going to give you a few minutes because we're all curious.

BRENDA HOLLIS: Let me say that we have been very lucky that we've had a lot of cooperation from the officials in Ukraine. Let me also say that our mandate is to look at atrocities committed in Ukraine whether by Russians or others. It's not just Russian atrocities that we would be responsible for investigating.

In relation to Ukraine, we looked at deportation initially because it involved crimes against children, and we thought we could put the package together more quickly as a standalone crime. Another factor was that there were a lot of admissions, statements against interest by Russian officials, that we could use as proof of deportation. They very helpfully made statements to the effect that "yeah we took these children to Russia, we even put some of them up for adoption."

As we prepared the requests for arrest warrants, I realized that the pretrial procedure at the ICC is different from what I have experienced in other international criminal courts. That is, as we did, you can ask the judges to issue an arrest warrant before they confirm charges. So, you have an arrest warrant out for people against whom the charges have not been confirmed.

The next step in the process after the issuance of an arrest warrant is to hold a confirmation hearing before a three-judge panel. This, too, is unlike confirmation of charges procedures in the other international courts with which I am familiar. In those courts we would go to a single judge with our evidence, and that judge would confirm the charges in full, in part, or reject them. However, the ICC process is much like procedures in the U.S. military where we have what is called an Article 32 hearing for charges that will be referred to a general court-martial, the court which hears the most serious crimes. The Article 32 hearing takes place before a judge; defense counsel and the suspect are present; the prosecution presents its evidence which the defense can question; and the defense can present evidence.

Regarding other potential criminal conduct in Ukraine, some of these lines of inquiry may lead to interesting developments in law, albeit at the Ukrainian level, at another state level, or at the ICC. For example, depending on the evidence, the explosion at the Kakhovka dam that happened not too long ago may give rise to the prosecution of a war crime, not for the loss of life, but for long-term severe environmental damage. Such a charge would develop the law relating to crimes involving damage to the environment.

Another area of interest is what constitutes occupation of a territory. To what extent is the proof of occupation affected by evidence that local officials in the area taken over by the invading army are in favor of the occupation—are not hostile to the invading force but rather want to be part of Russia? To the extent there is a strong view that occupation requires proof that local officials are hostile to the invading force, we are going to have to do more research and deal with that issue straight on.

Those are some of the things about which I can talk. We have the exciting prospect of dealing with issues that will give rise to very

interesting discussions about the law, and perhaps give us the opportunity to present our positions on evolving areas of criminal law.

MICHAEL SCHARF: Brenda, thank you for being concise. We can continue these discussions in the margins. I do want to get to Stephen Rapp. Brenda mentioned the interesting things that are going on at the domestic level, and Stephen you've been involved in the effort to build up the capacity of Ukraine to undertake domestic prosecutions of Russian perpetrators of war crimes. Can you briefly tell us about those efforts?

STEPHEN RAPP: Well there are a lot of things that the United States government is doing helpfully in this area. Before we get to the domestic system, it's important to note we are assisting the ICC directly. The antiquated position the U.S. took about "no jurisdiction over the citizens of non-parties," has been abandoned, and now it's possible to assist Brenda and her team with evidence that was developed on the deportation of children and other issues. It's really important. It took many, many months to get that decision right, but that's an important first step to doing what David's talking about.

That obviously carries with it the implication that we're subject as well when we commit a crime in a place like Afghanistan for instance. So, that's important. I should note the U.S has also made a commitment to the investigative team working on aggression at The Hague by sending a young federal prosecutor, Assistant United States Attorney Jessica Kim on detail to work at a team at Eurojust that's based upon the joint investigative team of about seven different countries, of which the United States is an associate member, that is also working on universal jurisdiction cases like those that might end up in Canada or elsewhere. But then they are also developing the case on aggression for the tribunal, which we hope would be established in that area. I do not think that the U.S. position is correct at the moment as to

how we would establish such a tribunal, but at least we're working in the investigative phase of it.

As far as assisting the Ukrainian justice system it's important to note this situation is unlike so many that we've dealt with—the Syrians, the Ethiopians, the Myanmar military, the North Koreans—where atrocity crimes have been committed and there's no possibility at the national level. Here we have a competent national justice system, though it is under-resourced, there are a lot of vacancies, and it's not dealt with war crimes issues before. But the United States and other countries are deeply involved in assisting it, particularly through a body called Atrocity Crimes Advisory Group, the U.S. component of which is led by Clint Williamson, who was my successor as Ambassador at Large for War Crimes issues during the Bush Administration. Anna Cave who served in my office as a Deputy is co-leading from Georgetown Law. They receive funding from our former office, and they've been deploying teams to the field in Ukraine.

I was talking to a team that will be deployed next week, and it includes many of the young veterans of tribunal work. Now they are not imminently involved in building the files. They are not embedded, so to speak, but they are meeting constantly with the Ukrainian Office of the Prosecutor General, advising them on the investigation, on the elements, on the things that would be needed in order to build a solid case. I would note other countries are involved—the UK, through our friend Wayne Jordash, former defense attorney at the SCSL, who is now leading Global Rights Compliance, and deploying experts as well. The EU is also involved, as well as our friend, Fabricio Guariglia who was formerly with the ICC and leads the IDLO effort. Various other countries are doing a lot to work directly with the prosecution.

I would note the investigation phase needs much more work, particularly on linkage evidence. In that regard, I'm involved with an NGO that is receiving assistance from various Western countries on

developing battlefield evidence. This is to overcome the challenge in an armed conflict of the military gathering a great deal of evidence on the battlefield that is very relevant for operational intelligence, and they tend to hold onto it after they no longer have an immediate need for it. This can include documentation taken from over-run enemy headquarters and detained prisoners that provides vital information about the officers in the chain of command, about their orders, about the communications and knowledge of the chain of command. Frankly, there were tens of thousands of pages of those documents that had not been transferred to investigations and prosecutions and now there's a process for doing so. The NGO in which I am involved is digitizing, analyzing, and sharing the documentation so that it helps the Ukrainians who thus far have not prosecuted many higher-level cases. We all recall the case of the 21-year-old who shot the 62-year-old off the bicycle, which was a very direct case. It is particularly important that they have such evidence when they are able to detain high level commanders. Perhaps there's a breakout on the counteroffensive and they capture a lot of prisoners, they can identify a person as a major perpetrator and potentially not include him in a prisoner exchange, and instead move forward to an *in personam* trial. Meanwhile, they do have almost exclusively *in absentia* trials, something that we don't have at the international tribunals except for the Lebanon tribunal. They are beginning to put together some cases on sexual violence that are quite important, but for now those will be *in absentia* trials. Of course, if the perpetrators are ever found, they will need to be retried. So that, in a nutshell, is what's happening.

MICHAEL SCHARF: That was very concise. Well, Jim Johnson, why don't you conclude the panel with your remarks.

JAMES JOHNSON: I'll do that, and I'll just take a very brief update on the Residual Special Court for Sierra Leone. I don't need to cover, or go over what our core mission is at the Residual Court—Matthias has covered a lot of that. As their last trials wind down, they are pretty

much moving into the mode that we have been in for a number of years. We continue to look after witnesses and will continue to pursue contempt when needed for those that reach out to harass or otherwise wrongfully approach our witnesses. We are closely following the trial of one of our witnesses in Finland for war crimes that that witness is accused of committing in Liberia. We are following that trial very closely. In fact, my legal officer is in Finland right now, attending testimony in that trial.

As Matthias mentioned, we continue to receive, and respond to, requests from national authorities for information. Sentence enforcement is a huge undertaking of the Residual Court and our Registrar, Binta Masaray, deals with these issues daily. We also anticipate that there will be an application for review proceedings by one or more of those that were convicted by the Special Court. These are a few of our core residual issues that I've tried to highlight.

I will also say a bit about, and maybe a little bit of a teaser into what Binta will be discussing this evening, the legacy of the Special Court and the work that has been done by international tribunals over the last 30 years. When you look at what is going on in the world today and the move away from international justice, you have concerns about the legacy of the courts, and you need to take steps to ensure that the long term impact of their work will not be forgotten. This is kind of a lead into what Binta may be talking about this evening and giving a little teaser.

Therefore, we are trying very hard to put together a regional legacy conference early next year, in Sierra Leone, that can address the legacy of the Special Court for Sierra Leone, and in particular, how the lessons learned can be applied elsewhere—that maybe in The Gambia, in Liberia, elsewhere in the West African region and beyond. As David Crane mentioned earlier, the Special Court model of accountability is already being considered for use elsewhere.

Thank you.

MICHAEL SCHARF: My goal with the panel this year was for you all to get to know all the prosecutors better, with our icebreaker and to know what they are up to now. I think we have accomplished that goal. Can you please join me in thanking Fatou, Andrew, David, Norm, Brenda, Jim, Matthias, and Stephen.

Conclusion

Conclusion

Michael D. Cooper*

This year I had the pleasure of attending the International Humanitarian Law Roundtable in person for the first time. The beautiful Chautauqua Institute and the Athenaeum Hotel stood in sharp contrast to the state of the world and the somber issues being discussed at the Roundtable. But still, Roundtable participants remain optimistic and dedicated. As David Scheffer stated in his keynote address, ours is a "community of justice," of which we should be proud.

The theme of the Fifteenth Roundtable, "The Cutting Edges of International Humanitarian Law in 2023," featured frank discussions regarding the obstacles to establishing a UN-based tribunal to prosecute acts of aggression and the need to develop an alternative proposal. We have the Council of Europe's Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, and it is actively collecting evidence, yet we lack a forum to hold the perpetrators of this aggression to account. This was the focus of the presentation of Ambassador Anton Korynevych.

As is often the case at the Roundtable, the importance of victims and individuals was a focal point. Binta Mansaray spoke about how the Special Court for Sierra Leone worked with the local population to inform them about the role of the Court in helping them to vindicate their rights under international humanitarian law. Mark Drumbl's presentation focused on the theater of international criminal trials. He urged that we not lose sight of the atrocities committed by frail defendants who are, more often than not, elderly and unwell by the

* Executive Director and Executive Vice President, ASIL.

time they are brought to trial—providing such alleged perpetrators with an almost empathic quality that belies their heinous crimes.

What was clear—what is always clear—is that the need for a strong community of international humanitarian and international criminal lawyers remains high. Unfortunately, the situation in Ukraine has grown ever more vexing. At the convening of the Roundtable in August of 2023, the October 7 attack in Gaza was weeks off—unimaginable to Roundtable participants, although not to the perpetrators who must have then been deep in the final planning stages of the widescale atrocities they actively envisioned. The events of that day, and subsequent developments in Gaza and throughout the region will undoubtedly form much of the discussion at the Roundtable in 2024. The international community must double-down its efforts to achieve accountability in both Ukraine and the Middle East. They are equally deserving of our attention, as are other conflicts, such as that in Sudan which reignited in early 2024.

The Society is proud to partner with the Robert H. Jackson Center and other leading organizations in the field of international criminal justice and humanitarian law in convening the Roundtable and publishing the annual Proceedings. We are grateful to our sponsors who understand the importance of this annual event and to the Roundtable participants, many of whom have faithfully attended the Roundtable since its inaugural convening in 2007.

I suppose that fifteen years is not a major milestone, and yet it is an anniversary worth noting. I have no doubt that we shall find ourselves gathered here again in Chautauqua at the twenty-year mark and the twenty-fifth anniversary as well. Given human nature, it is difficult to conceive of a future with fewer bad actors than the present, fewer whose lust for power ignites the darkest shadows of depravity.

Holding such bad actors to account will always be controversial, especially so when they have, by whatever means, achieved heightened political power and position. Indeed, there may always be a demand for innovative, tenacious, and dare I say, courageous men and women who are willing to stand tall for the rule of law and to hold perpetrators accountable.

Can we hold out hope, though, that there will be no fiftieth anniversary of the International Humanitarian Law Roundtable, no one-hundredth anniversary? Despite all the evidence to the contrary, I shall cling to such hope.

Appendices

Appendix I

Agenda of the Fifteenth International Humanitarian Roundtable August 27-29, 2023

Sunday 27 August

4:30 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 Brenda J. Hollis Presented by Joshua Heintz and Kristan McMahon. Entertainment by the MahataMmoho Collective
8:30 p.m.	**Return to the Hotel** Informal Reception on the Porches

Monday 28 August

7:30 a.m.	**Breakfast with the Prosecutors**
9:00 a.m	**Welcome and Introductions**
	Keynote Address David Scheffer Introduced by Leila Sadat
10:00 a.m.	**Break**
10:30 a.m.	**Young Voices Against Atrocity Award** Awarded to Lucy Rados Presented by Andrew Beiter
	In Memoriam of Ben Ferencz and The Ben Ferencz Prosecutors' Commentary and Update Moderated by Michael Scharf
12:15 p.m.	**Roundtable Convenes** Chaired by Andrew Cayley
12:30 p.m.	**Lunch**
	Clara Barton Lecture Amb. Roger Carstens, Office of Hostage Affairs, Department of State Introduced by Arthur Traldi

1:45 p.m. **Subgroups Convene**

Sanctions and freezing individual assets/travel limitations of accused perpetrators
Co-chairs: Michael Newton and Paul Williams

Vulnerable Groups
Chair: Valerie Oosterveld

Ecocide and Environmental Crimes
Co-chairs Leila Sadat and David Scheffer

Cyber-attacks and the Rome Statute
Co-chairs Jennifer Trahan and Milena Stereo

5:30 p.m. **Reception and Dinner**

In honor of the 20th Anniversary of the Indictment and Removal from Office of President Charles Taylor

The Katherine B. Fite Lecture

Binta Mansaray, Registrar, Residual Special Court for Sierra Leone and Special Court for Sierra Leone
Introduced by Milena Stereo

8:30 p.m. **Informal Reception on the Porches**

Entertainment by Razing the Bar

Tuesday 29 August

7:30 a.m.	**Breakfast with the Prosecutors**
9:15 a.m.	**Year in Review** Presented by Mark Drumbl
10:00 a.m.	**Break**
10:15 a.m.	**Roundtable Reconvenes** Subgroup co-chairs report, compilation of reports and draft of the Roundtable Principles
12:30 p.m.	**Lunch**
	Magnitsky Lecture Amb. Anton Korynevych, Ministry of Foreign Affairs, Republic of Ukraine, by Zoom Introduced by Jennifer Trahan
1:45 p.m.	**Global Accountability Network Informational Session and Update**
2:15 p.m.	**The Issuance of the Chautauqua Principles Document and Conclusion of the Roundtable** Moderated by Brandon Silver
2:30 p.m.	**Porch Time with the Prosecutors for Students**
5:00 p.m.	**Lake Cruise**
6:30 p.m.	**Closing Dinner** Informal reception on the porches follows

Appendix II

The Third Chautauqua Principles
August 29, 2023

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:

I. Justice is an Inviolable Part of Any Peace Process.

- ICC warrants of arrest remain and individual criminal responsibility cannot be negotiated away in any bilateral or multilateral peace negotiations.

II. Those Pursuing Justice Must Properly Identify, Protect, and Support Vulnerable Groups.

- A victim-centered approach is required to address the harms suffered by vulnerable groups.
- Such an approach must evaluate the context and the diversity of victim experiences.

- Justice and humanitarian aid for vulnerable groups cannot be mutually exclusive. Victims must be entitled to both.
- Identities of victims are often intersectional and should be considered with nuance and sensitivity on a case-by-case basis.

III. Cyber Attacks Both Alone and Part of Other International Crimes Can and Must be Prosecuted Under International Humanitarian Law.

- Cyber attacks have accelerated across the globe.
- Cyber operations can be a modality by which actors may facilitate acts of genocide, war crimes, crimes against humanity, and aggression.
- Cyber attacks are regulated by the regime of international humanitarian law, international criminal law, international human rights law, and jus ad bellum law.
- The Rome Statute applies to cyber attacks.

IV. Current Laws and Existing Judicial Mechanisms Must be Relied on and Should Evolve to Adequately Secure Justice for Victims of Ecocide and Other Environmental Crimes.

- Ecocide and other environmental crimes must be prosecuted by national and international bodies with jurisdiction relying on preexisting provisions of domestic law and international criminal law, including war crimes, crimes against humanity, genocide, and the crime of aggression.
- Those with jurisdiction should develop policies and practices to identify environmental crimes and harms during armed conflict, and in peacetime, to ensure that ecocide and environmental crimes become part of "mainstream" domestic and international criminal law prosecutions.

- Where gaps exist in the law States and civil society should consider additional measures to assist in the prevention and punishment of environmental harm, including by adopting a new treaty on environmental crimes, enhancing State responsibility for the commission of such acts; formal adoption of the crime of ecocide in the Rome Statute or in national legislation; adding environmental crimes to the proposed new treaty on crimes against humanity; adopting enhanced civil penalties or administrative remedies; and enhancing corporate responsibility doctrines.

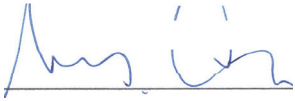
V. Sanctions Must be used Effectively and Flexibly to Prevent Wrongdoing by a State and to Adequately Compensate the Harmed State and Its Victims.

- Any sanctions imposed on a state must be supported by clear and specific legislation.
- In order to be acceptable to all states the repurposing of State-owned assets for reparation and victim compensation will need to be done while recognizing the entitlement of every state to sovereign immunity.
- The permanent seizure and repurposing of frozen state assets which must be linked to criminal activity in most states and requires domestic legislation to be developed and implemented such legislation not contradicting existing domestic legislation or sovereign immunity.
- Different types of assets are afforded different levels of protection under the law and thus require different approaches and solutions to be repurposed.
- The evasion of sanctions must be criminalized.
- Bilateral investment treaties often bar States from taking foreign property from its original owners without adequate compensation, in line with customary

international law. It is important that any new or amended legislation is aware of the state's obligations under its existing bilateral agreements.

- Separate specific mechanisms need to be created to ensure affected states receive seized assets.
- Any State responsible for an internationally wrongful act, including aggression, may be subjected to a lawful proportionate, reversible and temporary counter-measures by the State affected by the wrongful act to induce the responsible State to comply with its legal obligations. The lifting of such countermeasures may be conditional with the payment of reparations.
- States that are not the directly affected state may choose to put in place their own collective or third party countermeasures to induce payment, such countermeasures being contingent on the paying of reparations to the injured state.

As chair of the Fifteenth 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.



Andrew T. Cayley
Chair, 15th International Humanitarian Law Roundtable

Appendix III

Biographies of the Prosecutors and Participants

PROSECUTORS

DR. FATOU BENSOUDA – *THE INTERNATIONAL CRIMINAL COURT*

Dr. Fatou Bensouda served as Prosecutor of the International Criminal Court from June 2012 to June 2021. Dr. Bensouda was nominated and supported as the sole African candidate for election to the post by the African Union. She is the first woman to serve as the Prosecutor of the ICC. Through her work, she has strived to advance accountability for atrocity crimes, highlighting in particular the importance of addressing traditionally underreported crimes such as sexual and gender-based crimes, mass atrocities against and affecting children, as well as the deliberate destruction of cultural heritage within the Rome Statute framework.

Between 1987 and 2000, Dr. Bensouda was State Counsel, Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney General and Minister of Justice of The Republic of The Gambia. Her international career as a non-government civil servant formally began at the UN International Criminal Tribunal for Rwanda, where she worked as a Legal Adviser and Trial Attorney before rising to the position of Senior Legal Advisor and Head of the Legal Advisory Unit, after which she joined the ICC as the Court's first Deputy Prosecutor. Dr. Bensouda has served as delegate of The Gambia to; *inter alia*, the meetings of the Preparatory Commission for the ICC.

She is the recipient of numerous awards, including the distinguished *ICJ International Jurists Award* (2009); the 2011 *World Peace*

Through Law Award, the American Society of International Law's *Honorary Membership Award* (2014), and the *XXXV Peace Prize* by the United Nations Association of Spain (2015). In 2018, Dr. Bensouda received the Bled Strategic Forum's Distinguished Partner Award for the continuous commitment and her part, and on the part of the ICC, to international peace and justice. In the same year, she was invited and joined the eminent roster of *International Gender Champions*.

Prior to the end of her mandate, Dr. Bensouda was awarded *l'ordre national du Lion du Sénégal* by the President of Senegal for her dedicated service in the advancement of international criminal justice, and her native country, The Gambia, announced that she will be awarded the country's highest civilian honour for her principled service as ICC Prosecutor.

Dr. Bensouda has been nominated for the 2021 Nobel Peace Prize in recognition of their accomplishments and work in advancing international criminal justice, without fear or favour.

Dr. Bensouda currently serves as The Gambian High Commissioner to the Court of St. James's and Ambassador Extraordinary and Plenipotentiary to the Kingdoms of Denmark, Norway, Sweden, the Republics of Austria, Ireland, Finland and the State of Israel and the Vatican City.

ANDREW T. CAYLEY – *THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA*

Andrew Cayley currently serves as His 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. 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 Kings's Counsel, one of His 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. He attended officer training at the Royal Military Academy Sandhurst graduating in 1991.

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. Serving 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 entitled, "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.

NORMAN FARRELL — *THE SPECIAL TRIBUNAL FOR LEBANON*

Norman Farrell is currently the Senior Legal Advisor in Canada's Crimes Against Humanity and War Crimes Section. Previously he served as the Chief Prosecutor for the Special Tribunal for Lebanon. Prior to his appointment as STL

Prosecutor, Mr. Farrell was the Deputy Prosecutor since 2008 at the International Criminal Tribunal for the former Yugoslavia (ICTY). He was also the Head of the Appeals Section and a Senior Appeals Counsel from 2002 – 2003 at the International Criminal Tribunal for Rwanda (ICTR). He held the same post at the ICTY from 2002 – 2005, and previously was Appeals Counsel from 1999-2002. After being the Head of the Appeals Section, he was appointed Principal Legal Officer at the Office of the Prosecutor from 2005 to 2008. Before his involvement in international law, Mr Farrell prosecuted cases in Canada and argued cases before the Ontario Court of Appeal and the Supreme Court of Canada. He has a Master of Laws specializing in International Law from Columbia University in New York and was admitted to the Law Society of Ontario in 1988. He also has a Bachelor's in Laws as well as Arts from Queens University in Canada.

BRENDA J. HOLLIS – *THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA; THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE; THE SPECIAL COURT FOR SIERRA LEONE*

Ms. Hollis has been appointed Principal Trial Lawyer (D-1 level), Office of the Prosecutor, International Criminal Court, in which capacity she leads 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 US Peace Corps volunteer in West Africa, and served as an officer in the US 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.

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.

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 US State Department. In that position he coordinated US 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 US universities in recognition of his work for international criminal justice.

SPEAKERS AND SPONSORS

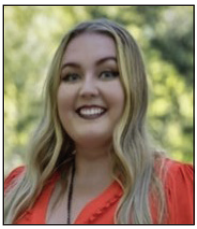
ANDREW BEITER – *THE ACADEMY FOR HUMAN RIGHTS*

Andrew Beiter is the Co-Founder and Executive Director of the Academy. An 8th grade Social Studies teacher at Springville Middle School, Drew also co-founded the Educators' Institute for Human Rights, a Washington, D.C. organization designed to provide Holocaust-based human rights training to teachers around the world. In addition to co-establishing the www.iamsyria.org and www.teachingaboutnorthkorea.org websites, Drew has been a Regional Education Coordinator for the U.S. Holocaust Memorial Museum, a Teacher Fellow for the Lowell Milken Center, and a consultant for the Robert F. Kennedy Center's Speak Truth to Power program. In the past fifteen years, he has spoken in front of thousands of educators both nationally and globally on the power of education to heal the world. In September 2021, he was inducted into the National Teachers Hall of Fame in Emporia, Kansas.

AMB. ROGER D. CARSTENS – *U.S. DEPARTMENT OF STATE*

Roger D. Carstens is the Special Presidential Envoy for Hostage Affairs (SPEHA) at the U.S. Department of State. Prior to assuming this role, Mr. Carstens was a Deputy Assistant Secretary in the Bureau of Democracy, Human Rights, and Labor. He previously served in Amman, Jordan, as the Country Director for a U.S.-based international nongovernmental organization (INGO) that provided humanitarian assistance to Syrian refugees and internally displaced persons. Prior positions include Senior Civilian Advisor on the Commander's Advisory and Assistance Team (CAAT) in Afghanistan; Project Director for an INGO based in

Somalia; Senior Fellow at the Center for a New American Security; and Special Assistant for Legislative Affairs in the Office of the Secretary of Defense. Mr. Carstens is a retired Army Lieutenant Colonel who served in Special Forces and the 1st Ranger Battalion. He is a graduate of the U.S. Military Academy and holds master's degrees from the U.S. Naval War College and St. John's College. Mr. Carstens is the recipient of the 2023 Robert A. Levinson Excellence in Government Service Award and was selected as a Distinguished Member of the Special Forces Regiment.



JESSICA CHAPMAN – *THE GLOBAL ACCOUNTABILITY NETWORK*

Jessica Chapman is currently a 3L at CWRU School of Law with a concentration in international law. She is the Executive Director of the Yemen Accountability Project, a Reviewing Editor for the Canada-US Law Journal, and the Technical Editor in Chief of War Crimes Prosecution Watch. Jessica spent this summer in The Hague working with the Residual Special Court for Sierra Leone where she gained experience working with the OTP, Registrar, and Archives while also working on an independent research project centered around Holocaust memorialization and post-atrocity transitional justice.

MICHAEL D. COOPER – *AMERICAN SOCIETY OF INTERNATIONAL LAW*

Michael D. Cooper is the Executive Director of the American Society of International Law. Before joining the Society, Mr. Cooper served as Associate Vice-President at the University of Oxford. A licensed attorney, Mr. Cooper has worked for other leading agencies, including Mercy Corps, Médecins du Monde, the International Rescue Committee, and Human Rights

Watch. Michael has served with the U.N. High Commissioner for Refugees as a Protection Officer, and he was Director of the Human Rights Office for the Roosevelt Institute. In New York, he directed the Human Rights Watch Council, launched the Human Rights Watch Young Advocates, and served on HRW's international advocacy team. Michael also worked in the first Obama Administration where he advised senior U.S. Department of Labor officials on legal issues related to terrorism and the protection of federal facilities. Mr. Cooper is admitted to practice in New York and the United States District Court for the Southern District of New York (SDNY).

MARK A. DRUMBL – *WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW*

Mark A. Drumbl is the Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute at Washington and Lee University, Virginia, USA. He has been Visiting Professor at Oxford, Université de Paris, Free University of Amsterdam, University of Melbourne, and Queen's University Belfast. He has written over 100 articles and book chapters. He is additionally the author of Atrocity, Punishment, and International Law (CUP, 2007) and Reimagining Child Soldiers in International Law and Policy (OUP, 2012), both of which have been widely reviewed and cited. He is co-editor of the Research Handbook on Child Soldiers (with Jastine Barrett, Elgar, 2019) and The Sights, Sounds, and Sensibility of Atrocity Prosecutions (with Caroline Fournet, Brill, 2023). Together with Barbora Holá he is currently writing a book called Informers Up Close: Stories from Communist Prague (OUP, 2024), which hinges upon extensive archival work in the secret police files from the former Czechoslovakia. He holds a doctorate in law from Columbia University in New York, USA (2002). His work has been relied upon by courts, he has served as an expert witness, and he has consulted inter alia with the United Nations and the Organization for Security and Cooperation in Europe. He has worked as a lawyer

in genocide and crimes against humanity prosecutions; and has researched the domestic criminalization of hate, the metastasis of xenophobia into collective violence, complementarity between international-national-local layers of authority, the limits of criminal law as a mechanism to promote equity and justice, and the intricacies of punishment and sanction and remedies.

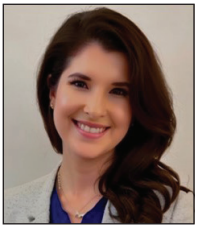
PHOEBE JUEL – *INTERNATIONAL HUMANITARIAN LAW ROUNDTABLE*

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 Office of the Prosecutor 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 with a concentration in Agricultural Health and Safety at the University of Iowa. She is the Executive Director of the Global Accountability Network and is also in private practice in Pittsburgh, Pennsylvania, where she is active in her church and a voting delegate to the general convention of the Episcopal Diocese of Pittsburgh. In her spare time, she writes haiku, is staff to a house rabbit, and attempts winter sports with varying degrees of success.

AMB. ANTON KORYNEVYCH – *MINISTRY OF FOREIGN AFFAIRS OF UKRAINE*

Dr. Anton Korynevych is a Ukrainian lawyer specializing in public international law, international humanitarian, and international criminal law. He is Ambassador-at-large in the Ministry of Foreign Affairs of Ukraine (since

25 May 2022). He is the Agent of Ukraine before the International Court of Justice in the Allegations of Genocide and the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination cases (Ukraine v. Russian Federation). Dr. Korynevych is the Head of the Task Force Working Group on freeze, seize and confiscation of Russian assets within the Prosecutor General's Office of Ukraine. He served as Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea. He received his PhD in International Law in 2011 in Taras Shevchenko National University of Kyiv, and is also an associate professor of the International Law Department of the Institute of International Relations of Taras Shevchenko National University of Kyiv. Dr. Korynevych currently works on legal consequences of Russian aggression against Ukraine since February 2014. He has worked a lot with Ukrainian prosecutorial authorities providing trainings and advice to them. He also provided trainings on international humanitarian and international criminal law to Ukrainian human rights non-governmental organizations, worked a lot with international partners on these issues, participated in drafting of relevant national legislation. He heads the working group on reintegration of temporarily occupied territories within the Commission on Legal Reform of Ukraine, and is a member of the working group on the development and implementation of international legal instruments of reimbursement of damage caused to Ukraine by armed aggression of the Russian Federation within Office of the President of Ukraine and the member of the working group on the establishment of the Special International Tribunal for the Crime of Aggression against Ukraine within the Office of the President of Ukraine. Dr. Korynevych is coordinating the issue of the establishment of the Special Tribunal for the Crime of Aggression against Ukraine in the Ministry of Foreign Affairs of Ukraine.



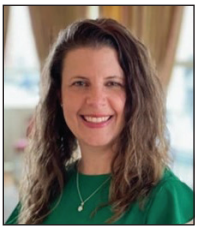
ALEXANDRA LANE – *THE GLOBAL ACCOUNTABILITY NETWORK*

Alexandra Lane is a rising third-year law student at Suffolk University Law School in Boston, MA where she concentrates in International Law. Prior to starting her law school career, Allie graduated from the State University of New York at Geneseo where she completed a degree in International Relations with a concentration in War and Peace Studies. Following graduation, she joined the United States Peace Corps as a TEFL volunteer in the Kyrgyz Republic. Allie serves as the Director of Development for the Academy for Human Rights and just completed summer internships at the Robert H. Jackson Center and Synergy for Justice. She currently is the Executive Director of the Ukraine Accountability Project and a member of the Human Rights and Indigenous Peoples Clinic at Suffolk.

BINTA MANSARAY – *THE RESIDUAL SPECIAL COURT FOR SIERRA LEONE*

Binta Mansaray was appointed Registrar of the Residual Special Court for Sierra Leone by the Secretary-General of the United Nations in 2014. She previously served as Registrar of the Special Court for Sierra Leone, a post she held from 2009 (initially Acting) to December 2013, when the Special Court closed upon the successful completion of its mandate. Prior to that, she served as Deputy Registrar and, beginning in 2003, as Outreach Coordinator. As Outreach Coordinator, Ms. Mansaray designed the Court's widely acclaimed Grassroots Programme to keep the people of Sierra Leone informed about the Special Court and its trials. As Outreach Coordinator, Ms. Mansaray built on her experience as an advocate for victims of Sierra Leone's civil war - women, girls and adolescent ex-combatants - while working with several prominent civil society and non-governmental organizations and as a consultant

to the United Nations Mission in Sierra Leone (UNAMSIL). Ms. Mansaray is a graduate of the University of Sierra Leone, with master's degrees from Fordham University and the American University in Washington, D.C.



KRISTAN MCMAHON – *THE ROBERT H. JACKSON CENTER*

Kristan McMahon has served as President of the Robert H. Jackson Center since April 2019. McMahon 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 helped guide 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. Before joining Verizon, McMahon served as a Staff Attorney for Howrey LLP, where she was part of the antitrust team leading government investigations and litigations for numerous global Fortune 500 companies. McMahon received a B.A. in Journalism/Mass Communication and Political Science from St. Bonaventure University, a J.D. from The Catholic University of America, Columbus School of Law, as well as a Certificate from its Communications Law Institute. She serves as a Trustee and Chair of the Franciscan Mission Committee for St. Bonaventure University. She previously chaired the Student Affairs Committee. She currently serves as Secretary and Governance Chair on the board of Youth for Understanding, an international student exchange organization, and is a board member of Sitar Arts Center, a youth arts education center in Washington, D.C.

MICHAEL A. NEWTON – *VANDERBILT UNIVERSITY LAW SCHOOL*

Mike Newton came to Vanderbilt after serving in the Department of Law, United States Military Academy. Professor Newton helped negotiate the Elements of Crimes document for the International Criminal Court as part of the U.S. delegation and coordinated the interface between the FBI and the ICTY while deploying into Kosovo to do the forensics fieldwork buttressing the Milosevic case. Professor Newton served in the Office of War Crimes Issues, U.S. Dept. of State during both the Clinton and Bush Administrations and was Senior Advisor to the Ambassador-at-Large for War Crimes Issues. He was the U.S. representative on the U.N. Planning Mission for the Sierra Leone Special Court and serves on the Advisory Board of the ABA International Criminal Court Project. After helping establish the Iraqi High Tribunal, he served as the International Law Advisor. He remains active in documenting Da'esh atrocities and assisting Iraqi authorities. He is active in supporting Ukrainian judges analyzing atrocity crimes committed during the Russian aggression and currently serves on the Consultative Council at the National School of Judges of Ukraine in addition to litigating human rights issues arising from the conflict. At Vanderbilt, he teaches courses relating to terrorism, international criminal law, and the laws of warfare. He has supported governments, NGOs, international organizations, *inter alia* UNODC, the Conduct and Disciplinary Unit, the World Bank, the International Bar Association, U.S. Departments of State, Defense, and Homeland Security, and advised the governments of, *inter alia*, Ukraine, Uganda, Israel, Kosovo, Iraq, Afghanistan, Saudi Arabia, and Peru. During his distinguished military career, Professor Newton served as an armor officer after graduation from the U.S. Military Academy at West Point and later graduated from the University of Virginia School of Law. Professor Newton earned his L.LM. from University of Virginia Law School,

and a second L.LM. from the Judge Advocate General's School, where he later served as Professor of International and Operational Law.

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.

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 global expert in international law, international human rights, and international criminal law, she served as Special Adviser on Crimes Against Humanity to the ICC Chief Prosecutor from 2012-2023. Sadat is a prolific scholar and teacher and 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, Chairwoman of the International Law Association (American Branch), and a leader of the American Society of International Law. Sadat 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. She was recently appointed as a U.S. expert to the OSCE Moscow Mechanism, tasked with investigating human rights violations in OSCE countries.

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.

DAVID SCHEFFER – *ARIZONA STATE UNIVERSITY (WASHINGTON DC)*

David Scheffer is the former U.S. Ambassador at Large for War Crimes Issues (1997-2001). He was instrumental in the building of five war crimes tribunals and headed the U.S. delegation to U.N. talks creating the International Criminal Court. He served as a deputy on the National Security Council (1993-1997) and was senior adviser and counsel to Dr. Madeleine Albright during her tenure as the U.S. Permanent Representative to the United Nations. Scheffer was the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law (2006-2020) and

the U.N. Secretary General's Special Expert on U.N. Assistance to the Khmer Rouge Trials (2012-2018). He is Professor of Practice at Arizona State University (Washington, D.C.) and Senior Fellow of the Council on Foreign Relations. Scheffer is the author of *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton, 2012) and *The Sit Room: In the Theater of War and Peace* (2019).

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".

JUSTINE N. STEFANELLI – *AMERICAN SOCIETY OF INTERNATIONAL LAW*

Justine Stefanelli is Director of Publications and Research at the American Society of International Law. Prior to joining the Society, she worked as a Senior Research Fellow at the British Institute of International and Comparative Law in London, where she worked on issues including the rule of law and immigration

detention, cross-border delivery of international disaster relief, the impact of Brexit on the United Kingdom and the European Union, foreign direct investment and the rule of law, and several other EU-oriented studies. She also served as Acting Deputy Director of the Bingham Centre for the Rule of Law, a part of the Institute in London. She has presented the results of her work to the European Parliament, the European Commission, and the United Kingdom Parliament, among other places. She received her Juris Doctorate from the University of Pittsburgh School of Law and both her LL.M. and Ph.D. from Queen Mary University of London. She is licensed to practice law in the state of Pennsylvania.

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 Associatoin. 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 US 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. Since the Spring of 2022, she has served as an advisor to States and others at the United Nations on the formation of a Special Tribunal on the Crime of Aggression for Ukraine.

ARTHUR TRALDI – *AMERICAN RED CROSS*

Arthur Traldi is a Senior Consultant with Lexpat Global Services and Global Rights Compliance, a Senior Fellow with the Technology Law and Security Program at American University, and an adjunct at Villanova University Law School and European University-Viadrina. From 2010 to 2017, Arthur served as a prosecutor at the International Criminal Tribunal for the former Yugoslavia where among other cases he was one of the primary prosecutors on the Ratko Mladic trial. Arthur has also served

on teams making submissions to the International Criminal Court, United States Supreme Court, European Court of Human Rights, and other courts in the U.S. and abroad. Before joining ICTY, he served in Chambers at the International Criminal Tribunal for Rwanda and clerked for Justice Debra Todd and Judge Arthur L. Zulick in Pennsylvania. Arthur received his J.D. from Georgetown University Law Center and his undergraduate degree from the College of William and Mary. He is certified to practice law before the state courts of Pennsylvania, the Kosovo Specialist Chambers, the Special Tribunal for Lebanon, and the United States Supreme Court. He is an expert panelist with TrialWatch, a member of the American Bar Association's International Criminal Justice Standards Advisory Group, and a past co-chair of the International Criminal Law Committee.

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. 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 shifted 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 dogsits, works at a PureBarre studio, and is an active member of the D.C. Liverpool Supporters Club.

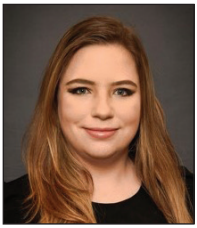
PAUL R. WILLIAMS – *PUBLIC INTERNATIONAL LAW AND POLICY GROUP*

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. 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.

STUDENT RECORDERS

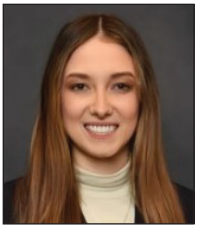
WILL BAKER

Will is a rising 3L at CWRU. I spent this past summer working as a summer associate at Squire Patton Boggs in Cleveland. I will be returning to Squire as an associate following graduation. I have encountered international humanitarian law in several different areas throughout law school including coursework, law journal work, and especially through moot court. I have been an oralist on the Jessup moot court team each year of law school and I will be competing again this year.



KAYCEE BETHEL

Kaycee is a law student in the Spring Start program at CWRU. She received a degree Security Studies at The Ohio State University, and also studied international law topics during her study abroad program, Semester at Sea. She learned about war crimes and their effects on individual while in Vietnam. This summer, Kaycee worked with survivors of human trafficking at the Milton and Charlotte Kramer Law Clinic.



KAITLYN BOOHER

Kaitlyn is a 2L at CWRU school of law. This summer I worked for the Mid-American Conference of the NCAA and focused on the applicants of NCAA Bylaws in relation to international student athletes. My interests in international humanitarian law grew from my thesis work regarding the 1977 Spanish Amnesty law.

MARGARET CROOKSTON

Margaret a rising 3L, joined CWRU as a Hugo Grotius International Law Scholar after graduating from Ohio State University with her bachelor's in criminology. At OSU, Margaret spent time in Rwanda as a sociological research assistant. Margaret also spent nine years in the U.S. Army. Margaret is involved in the Yemen Accountability Project and has interned with the Director of Public Prosecutions in Mauritius and the Cuyahoga County Prosecutor's Office's Major Trial Unit.

KELCEY DELMONTE

Kelcey is a rising third year at CWRU. Last summer she interned at INTERPOL in Lyon, France, and this summer she was a law clerk for the city of Westlake, Ohio working on both civil and criminal cases. Her interest in International Law has stemmed from taking a class on the history of the United Nations during her undergraduate. She intends to practice in either Cleveland or Columbus for a few years before working abroad following graduation.

HARPER FOX

Harper is a 3L at CWRU School of Law, spending his third year abroad at the University of Paris where he will obtain his LLM. Harper serves as the Deputy Executive Director of the Global Accountability Network and as the Chief Intelligence Officer for the Yemen Accountability Project, as Associate Editor of the Canada-US Law Journal, and as a Managing Editor of War Crimes Prosecution Watch. This summer, Harper spent his time working for the Residual Special Court for Sierra Leone and studying

Holocaust memorialization and transitional justice as a part of an independent research project.

SARA GODFREY

Sara is a recent graduate from Miami University of Ohio with degrees in Economics and International Studies specializing in the Middle East. Broadly, her work focuses on human rights, conflict resolution, gender, and international law. She currently works in association with the Global Accountability Network as a researcher on the prosecution of atrocity crimes committed against women and girls. Over the last year, Sara participated in an intensive language exchange program in Amman, Jordan, in pursuit of Arabic proficiency.

VICTOR IVAN

Victor is a rising third year at the University of Houston Law Center. This past summer he interned for the Harris County District Attorney's Office's Mental Health Division and at Alonso & de Leef, PLLC as an Immigration Law Clerk. His interest in international law is focused primarily on the criminal aspects and wants to use his interests and experience to pursue a career that would help others. Victor is currently serves as the Vice President for the Criminal Law Association and is a lead writer and Director for the Ukraine Accountability Project.

ELISE MANCHESTER

Elise is a rising third-year law student at CWRU. This summer, Elise interned with the Institute for Justice and Democracy in Haiti where she conducted research and analysis on a range of international human rights law topics, including transitional

justice mechanisms to combat impunity, the intersection between poverty and gender, and labor rights under US-Haitian preferential tariffs. Elise also competes on Case Western's Jessup International Law Moot Court Team. Elise received her B.A. in international studies, Arabic studies, and French from DePaul University.

MADELINE MCDANIEL

Madeline is a 3L at CWRU. Her interest in international law stems from a passion for cultural property. She wrote her student note about the destruction and looting of cultural property in Ukraine since Russia invaded. She currently is managing editor of Case Western's Journal of International Law volume 56 and competes on Case's ICC Moot Court team where they made it past regions and competed at the international competition in the Hague.

TYLER O'NEAL

Tyler is 3L at CWRU. He graduated from the George Washington University with a bachelor's in political science and history. He also earned a Master of Public Administration from American University. He previously worked at the White House, the Pentagon, Homeland Security, the Defense Health Agency, the CIA, and the National Geospatial-Intelligence Agency. He served in the National Guard and is a Military Intelligence officer and returned from a deployment to the Middle East working with Afghan refugees in 2021.

Appendix IV

Student Report of Breakout Sessions

1) Sanctions and the Freezing of Individual Assets

2) Ecocide and Environmental Crime

3) Cyber-Attacks and the Rome Statute

4) Vulnerable Groups: Women and Children

Prepared by Tyler O'Neal
J.D. Candidate, 2024
Fall Semester, 2023

I. Introduction

The 15th Annual International Humanitarian Law (IHL) Roundtable's breakout sessions were four simultaneously held one-hour-long discussions that included some of the world's foremost experts in the field of IHL. Attendees were dispersed throughout two breakout groups, each led by two moderators, an academic and a practitioner, to provide a balanced perspective on the topics addressed. Participants were able to engage in energetic discussions concerning the group's pre-assigned topics. Group One's topic focused on sanctions and the freezing of assets, with a particular focus on the freezing of Russian assets in light of the current conflict in Ukraine. Group Two's theme examined ecocide and environmental crime. Group Three looked at cyber-attacks and their potential prosecution under the Rome Statute. Lastly, Group Four explored the topic of vulnerable groups, particularly women and children. 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.

II. Roundtable Breakout Groups

A. Sanctions and the Freezing of Individual Assets

- *Current law provides for freezing of assets, but not does not offer mechanisms to seize and repurpose frozen assets into reparations.*
- *There are competing interests in repurposing frozen assets, including a tension between achieving peace and seeking justice.*
- *There are multiple roadblocks to crafting a new sanctions regime with the ability to repurpose frozen assets. These roadblocks include state sovereign immunity, issues of*

enforcement, and potential lack of political will to make such a regime a long-term, binding solution.

- *Questions remain as to how to effectively transfer resources to victims, without running into issues of corruption. There is a need to ensure that funds go towards needed reconstruction with proper international oversight.*
- *The international community may be at a point at which it is ready to rethink sanctions as a means of ensuring long-term peace. The world has fundamentally changed since the 1995 Dayton Accords. A multilateral approach to sanctioning could be an effective political tool, moving forward.*
- *The "Green Stamp" model, utilizing a contributory fund, could be an effective means of aiding in Ukrainian reparations. The Russian share of this pot could use seized assets.*

i. Background

Currently, the International Community has between $300 and $500 billion dollars in seized assets from sanctions against the Russian regime as a result of the 2022 Russian invasion of Ukraine.[1] The U.S. Treasury's Office of Foreign Assets Control (OFAC) has added over 2,500 Russian-related targets to the Specially Designated Nationals and Blocked Persons (SDN) list since February 2022, including an estimated 2,400 individuals and entities, 115 vessels, and 19 aircraft.[2]

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1 Anastasiia Zharykova, *The West Freezes Up to $500 billion Russian Assets*, Ukrainska Pravda (Sep. 23, 2022), https://www.yahoo.com/video/west-freezes-500-billion-russian-162206080.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAAfMBuyDFIOaKXS0EgKaztaSX9ElmYfYgjd26CGczI1a_IMR--vuYAcxIVZXgWQ_OV_wO94kHSOoXQQXbt61U3lcnP4ot4pK6C7553aYTovhC_EuovMN6jf-RmufDbynPdSMS1_A28MEEENPW6txNTerFhX_C9omhnu-X3Ifdqsi.

2 U.S. Department of the Treasury, *FACT SHEET: Disrupting and Degrading – One Year of U.S. Sanctions on Russia and Its Enablers*, Press Release (Feb. 23, 2023), https://home.treasury.gov/news/press-releases/jy1298.

Those designated by OFAC range from senior Russian government officials, to include President Vladmir Putin, to high net-worth individuals whose wealth is tied to the Russian state, leaders in revenue-generating sectors, and supporters of the Russian military-industrial complex.[3] Multilateral efforts such as the Russian Elites, Proxies, and Oligarchs (REPO) Task Force, consisting of Finance, Justice, Home Affairs, and Trade Ministers from Australia, Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, and the European Commission have seized approximately $300 billion worth of Russian Central Bank assets since the beginning of the conflict.[4] Ukrainian Prime Minister Denys Shymhal, has pressed for these frozen assets to be confiscated and repurposed into reparations, saying, "We are also discussing the possibility of changing our partners' national legislation in order to allow for [Russian] assets to be confiscated in favor of Ukraine. The aggressor [Russia] must pay their price and their wealth must become the main source for our extensive rebuilding."[5]

In the United States, the Biden Administration has shown a willingness to support such seizure efforts, offering a legislative package in April 2022, which proposed new authorities granted to the U.S. government to seize Russian assets and transfer the proceeds to Ukraine.[6] The Biden plan offered six major proposals: establishing streamlined administrative authority to seize and forfeit oligarch assets; enabling the transfer of the proceeds of forfeited kleptocrat property to Ukraine to remediate harms of Russian aggression; reducing of sanctions

3 *Id*.

4 *Id*.

5 Zharykova, *supra* note 1.

6 Katherine Pompilio, *Biden Administration Releases Plan to Seize Russian Assets*, Lawfare Institute in Cooperation with Brookings Institute, (Apr. 29, 2022), https://www.lawfaremedia.org/article/biden-administration-releases-plan-seize-russian-assets.

evasion; modernizing the definition of "racketeering activity" within the Racketeer Influenced and Corrupt Organizations Act (RICO) to include sanctions evasion; expanding the statute of limitations to pursue money laundering prosecutions (and post-conviction forfeitures) based on foreign offenses; and leveraging foreign partners' ability to freeze and seize oligarch wealth.[78] Legislation reflecting many of these proposals has passed both Houses of Congress.[9,10]

Europe is more divided over potential seizure of Russian assets. The Eurpean Union has taken steps to potentially seize Russian assets, with the EU executive suggesting in September 2023, that Russian frozen assets be kept separate on balance sheets in preparation for possible seizure.11 In the United Kingdom, the government objected to a bill supporting the seizure of Russian assets within the House of Commons in February 2023.12 Internationally, proposals to

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7 *Id*.

8 Press Release, The White House, Fact Sheet: President Biden's Comprehensive Proposal to Hold Russian Elites and Oligarchs Accountable, The White House Press Office, (Apr. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/.

9 Catie Edmondson, *House passes bill urging Biden to sell seized Russian yachts to aid Ukraine*, The New York Times, (Apr. 27, 2022), https://www.nytimes.com/2022/04/27/us/politics/biden-russia-sanctions.html.

10 Azi Paybarah, *Senate backs plan to use money from seized Russian assets to aid Ukraine*, The Washington Post (Dec. 22, 2022), https://www.washingtonpost.com/politics/2022/12/22/senate-russia-ukraine-aid/.

11 Paola Tamma, *EU plays for time on plans to use Russian frozen assets to rebuild Ukraine*, Politico (Sep. 6, 2023), https://www.Politico.eu/article/commission-charts-cautious-way-forward-on-russian-frozen-assets/.

12 Daniel Franchini, *Ukraine Symposium – Seizure of Russian State Assets: State Immunity and Countermeasures*, Articles of War, The Lieber Institute at West Point (Mar. 8, 2023), https://lieber.westpoint.edu/seizure-russian-state-assets-state-immunity-countermeasures/.

seize and repurpose Russian assets have gained momentum, but no formal action has been taken.

ii. How Might Russian Frozen Assets Potentially Be Repurposed into Reparations to Aid Ukrainian Victims?

The breakout group looked at whether or not it is possible under current international law to take Russian assets currently frozen by the West and move them into a fund for victims of atrocity crimes in Ukraine. The group recognized that there are significant roadblocks to doing so. Current law permits only freeing and not seizure of assets. For instance, in the United States, the International Emergency Powers Act of 1977 authorizes the president to freeze certain foreign assets with the jurisdiction of the United States but does not give the power to seize or repurpose such assets.[13] In order to seize and repurpose frozen assets, there must be legal frameworks in place, particularly in the United States and European Union, to support such seizures.[14]

The greatest obstacle to implementing these new legal frameworks is the principle of state sovereign immunity, a bedrock of international law, which largely exempts state property used for sovereign purposes from measures of execution.[15] Respect for private property is a pillar of the laws which govern modern societies and international relations.[16] Customary international law requires States to provide immunity

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13 Congressional Research Service, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CRS Report at 13 (Sep. 28, 2023), https://sgp.fas.org/crs/natsec/R45618.pdf.

14 Veronika Melkozerova, *Blinken: US and EU need legal frameworks to seize Russian assets*, Politico (Oct. 5, 2023), https://www.politico.eu/article/us-ukraine-war-antony-blinken-thinks-russia-should-pay-for-restoration-of-ukraine-you-broke-it-you-bought-it/.

15 Franchini, *supra* note 12.

16 Jonathan Browning, *Seize, Not Just Freeze Russian Assets? Why That's Hard*, The Washington Post (May 30, 2023), https://www.washingtonpost.com/

from execution for the currency reserves of foreign central banks and near-absolute immunity from execution for all central bank assets.[17] This is consistent with Articles 19 and 21(1)(c) of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property (not in force).[18]

There are two main schools of thought on how State immunity applies to foreign state assets. One perspective holds that such immunity applies only to "measures or constraints in connection with proceedings before a court."[19] This is in line with the aforementioned UN Convention.[20] This interpretation excludes the application of state immunity to asset freezing, which are perceived as functions of the executive or legislative branches.[21] Under the second perspective, state immunity from execution applies to all measures of constraint, regardless of their judicial, legislative, or administrative nature.[22] This second theory extends to asset freezing and thus is not favored under customary international law.[23] Regardless of perspective, the freezing of foreign assets may be reconciled with international law under the countermeasures framework of the International Law Commission's (ILC) Articles for Responsibility of States for Internationally Wrongful Acts (ARSIWA).[24] Under that resolution, The wrongfulness of an act of a State not in conformity with an international obligation towards

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BUSINESS/2023/05/30/HOW-US-EU-UK-ARE-TRYING-TO-SEIZE-FROZEN-RUSSIAN-ASSETS-TO-REBUILD-UKRAINE/7345AB00-FEC1-11ED-9EB0-6C94DCB16FCF_STORY.HTML.

17 Franchini, *supra* note 12.

18 *Id*.

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*.

another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State.[25] Under this view, the rules of immunity safeguarding State assets from execution may be temporarily suspended if it is necessary and proportionate to induce the wrongdoing State to comply with its international obligations.[26]

Many countries allow for seizure of assets that are shown to be the proceeds of crimes, but a high bar exists for proving those linkages in court.[27] Prosecutors tasked with building such a case for seizure may frequently find themselves lost in a maze of shell companies and offshore trusts that oligarchs use to obscure their control over assets.[28] Using sanctions as a cover for asset seizure can prove problematic because such measures are designed to be temporary in nature, to force a desired outcome, and the solutions provided by seizure are intended to be permanent.[29]

Even if the seizure of assets and their use as reparations is feasible, there remain serious questions regarding the most effective means of conducting such seizures. The discussion group proposed that perhaps the funds should be put towards rebuilding infrastructure rather than into a victim's compensation fund, which has a likelihood of being impacted by corruption. Indeed, there has been some debate about whether states or individuals may be considered the victims of the Crime of Aggression under Article 8 of the Rome

25 International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, Y.B. Int'l L. Comm'n, vol. II, art. 22 (2001).

26 Franchini, *supra* note 12.

27 Browning, *supra* note 16.

28 *Id*.

29 *Id*.

statute.[30] In line with the discussion scholars have expressed concern regarding postwar reconstruction efforts which have historically been hampered by corruption across varied environments, political histories, and security contexts.[31,32]

iii. How Might Future Peace Negotiations Between Russia and Ukraine Look in Light of Potential Seizure of Assets?

As the breakout group noted, there are some precedents in favor of Russian asset seizure. Italy's Guardia di Finanza has previously seized large amounts of money and other possessions from members of the Mafia guilty of criminal acts.[33] Following the 2003 invasion of Iraq, US President George W. Bush ordered the seizure of $1.7 billion of Iraqi funds held in American banks, part of which was used to subsequently pay the salaries of Iraqi government employees.[34] In 1996, the United States also seized Cuban funds which were used to help compensate to the families of three Americans killed when their planes were shot down by Cuban military forces.[35] Presidents

30 Erin Pobjie, *Victims of the Crime of Aggression*, *in* The Crime of Aggression: A Commentary (Stefan Barriga and Claus Kress, eds., 2017).

31 Lilly Blumenthal, Caleb Seamon, Norman Eisen, and Robert J. Lewis, *History Reveals How to Get Ukraine Reconstruction Right: Anti-Corruption*, Brookings Institution (Oct. 20, 2022), https://www.brookings.edu/articles/history-reveals-how-to-get-ukraine-reconstruction-right-anti-corruption/.

32 *Also See* Eugene Z. Stakhlv, *How to Curb Corruption in Ukraine's Post-War Reconstruction*, Foreign Policy (June 22, 2023).

33 Elisabeth Braw, *Freeze – Don't Seize – Russian Assets*, Foreign Policy (Jan. 13, 2023), https://foreignpolicy.com/2023/01/13/putin-sanctions-oligarchs-freeze-seize-assets/.

34 Browning, *supra* note 16.

35 *Id.*

Reagan and George H.W. Bush also seized Iranian and Iraqi funds in 1980 and 1992, respectively.[36]

Many concerns exist, however, regarding the consequences of seizure of Russian assets. Experts have expressed apprehensions that Russian asset seizure without effectively linking that seizure to crimes under international law, would leave western companies open to future seizure.[37,38] Since 2014, Russia has also engaged in a campaign of "de-dollarization," a campaign intended to decrease the use of U.S. dollars in world trade and financial transactions.[39] The goal of de-dollarization is to erode U.S. global economic power and future leverage, which suggests there are other potential policy downsides for seizure of Russian assets.[40] Moreover, foreign policy analysts caution that seizure could also be used by Putin as a tool to stoke domestic support for the war effort or provoke a "Versailles risk" following the war, a reference to the heavy reparations burden imposed on Germany by the Allies following World War I, which set the stage for the rise of fascism.[41] These experts fear that seizure of assets could have unintended consequences in Russia in the future.

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36 Jonathan Masters, *How Frozen Russian Assets Could Pay for Rebuilding in Ukraine*, Council on Foreign Relations (Jul. 24, 2023), https://www.cfr.org/in-brief/how-frozen-russian-assets-could-pay-rebuilding-ukraine.

37 Elisabeth Braw, *supra* note 33.

38 Sanction evasion, itself, if proven might be grounds for evidence of criminality necessary to seize assets, but this typically would only result in only a seizure of a portion of the assets involved in evasion rather than the entire asset. To seize an entire asset typically requires further connection to criminal activity. *See* Elisabeth Braw, *supra* note 33.

39 Chimène Keitner, *Expert Q&A on Asset Seizure in Russia's War in Ukraine*, Just Security (April 3, 2023), https://www.justsecurity.org/85299/expert-qa-on-asset-seizure-in-russias-war-in-ukraine/.

40 *Id*.

41 Masters, *supra* note 36.

The moderators of the group also anticipated that there would be realpolitik objections to seizure once Russians are at the negotiating table, in which some parties would argue that achieving actual peace must take precedence over justice and reparations.

iv. Recommendations by Group

The group proposed that in order to be acceptable to all states the repurposing of State-owned assets for reparation and victim compensation should be carried out while still recognizing the entitlement of every state to sovereign immunity. The group further suggested that permanent seizure and repurposing of frozen state assets must be linked to criminal activity that most states find criminal. This requires domestic legislation to be developed and implemented, such that the new legislation does not contradict existing domestic legislation or violate sovereign immunity.

B. Ecocide and Environmental Crime

- *Ecocide is not a new concept, but renewed attention has been placed on ecocide and environmental crime in light of growing concerns about irreversible, global habitat degradation and climate change.*
- *Existing law can be re-interpreted as a basis used for prosecuting environmental crimes.*
- *Possible gaps do exist under current international law such as environmental crimes which do not occur in times of war.*

i. Background

The term ecocide is not a new term but has been used since the end of the Vietnam War era. Swedish Prime Minister Olof Palme used the term

at the 1972 United Nations Conference on the Human Environment.[42] Richard A. Falk, the former professor of International Law and Practice at Princeton University, used the term in 1973 to describe the environmental warfare used by the U.S. military in its "crop denial" programs in Indochina, writing that "just as counterinsurgency warfare tends towards genocide with respect to the people, so it tends towards ecocide with respect to the environment."[43] Ecocide was considered for inclusion in the 1998 Rome Statute, but was ultimately excluded when the International Criminal Court (ICC) was formed.[44] Despite ecocide's exclusion from the Rome Statute, Scottish barrister Polly Higgins campaigned from 2009 until her death in 2019 to have ecocide recognized as a crime against humanity.[45] Due to climate change, calls have grown in recent years to have ecocide reevaluated as a crime prosecutable by the ICC.[46] In 2016, former ICC Chief prosecutor Fatou Bensouda seemed to signal a move by the ICC in this direction, when she announced that environmental crimes would be among her investigative priorities.[47]

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42 Josie Fischels, *How 165 Words Could Make Mass Environmental Destruction an International Crime*, NPR (Jun. 27, 2021), https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court.

43 Richard A. Falk, *Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals*, Bulletin of Peace Proposals, 1973, Vol. 4, No. 1, at 80 (1973).

44 Fischels, *supra* note 42.

45 *Id*.

46 *Id*.

47 Brittany Felder, *ICC to Focus on Environmental Crimes*, Jurist (Sep. 16, 2016), https://www.jurist.org/news/2016/09/icc-to-focus-on-environmental-crimes/.

ii. Potential Sources of Existing International Law Under Which to Prosecute Environmental Crimes

The breakout group at Chautauqua largely seemed in consensus that there are already current means under the Rome Statute with which to prosecute environmental crimes, even with the exclusion of ecocide as a separate crime. The group agreed that existing law can be re-interpreted as a basis for prosecuting such criminal activity when harming the environment is used as a means of harming people. Article 6 of the Rome Statute, which defines the crime of Genocide, includes "[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part."[48] Group members suggested that destruction of a physical environment depriving a group of resources essential to live could meet the criteria of this section of the Genocide statute.[49]

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48 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 6, (c), ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html.

49 A contemporary example of this is the is the Kakhovka Dam destroyed in Russian-occupied southern Ukraine in June 2023, which is evolving into a long-term environmental catastrophe, impacting drinking water, food supplies, and ecosystems in the Black Sea region. Hundreds of thousands of acres of arable land were flooded following the destruction of the dam and experts indicate that long-term effects will be generational. The loss of the dam has caused a network of irrigation canals to become disconnected from the reservoir and to dry up, causing damage to the water supply that fed staple crops including corn, soybeans, sunflower, and some wheat. Martin Griffiths, the Emergency Relief Coordinator for the United Nations (UN) has predicted a "huge impact on global food security," calling the region a "breadbasket not only for Ukraine but also for the world." The Middle East and African countries have traditionally relied heavily on Ukrainian grain. In addition to the impact upon crops, the loss of the dam greatly impacted the natural environment, leaving hundreds of fish dead on the mud flats, drowning countless trees and plants, and destroying nesting habitats for fledgling water birds. The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has been confirmed as investigating the dam's breach and there is some speculation that the dam's destruction could become the ICC's first environmental crime case. *See* Lori Hinnant, Sam McNeil, and Illia Novikov, *Ukraine's dam*

The group also believed that environmental crimes might qualify as Crimes Against Humanity under the Rome Statute's Article 7. This view was previously expressed by Dr. Matthew Gillett of the University of Essex Law School, which was noted by the group's moderators. Gillett has argued that environmental crimes could result in prosecutions under Article 7(1)(a) for murder, when environmental harm serves as the direct means by which culpable homicides are committed.[50] An example of this would be if the forest habitat of a tribe were intentionally burned down in order to threaten or harm members of that tribe and deaths resulted from the deforestation.[51] Gillett likewise argues that environmental crimes might be prosecutable under Article 7(1)(b) regarding extermination, which essentially pertains to the large-scale killing of people.[52] Acts such as depriving a group of access to food or medicine could be perpetrated through physical destruction of that group's environmental habitat.[53] Similarly, 7(1)(d) which defines crimes of deportation and forcible

collapse is both a fast-moving disaster and a slow-moving ecological catastrophe, AP News (June 11, 2023), https://apnews.com/article/ukraine-dam-environment-disaster-753d1e03810e6bd2e4a26cf2dd3aa97b; Erwan Rivault, Mark Poyting, and Rob England, *Ukraine Dam: Satellite images reveal Kakhovka canals drying up*, BBC (June 22, 2023), https://www.bbc.com/news/world-europe-65963403.amp; Darryl Coote, *ICC team visits area of destroyed Ukrainian dam with intent to investigate*, UPI (June 12, 2023), https://www.upi.com/Top_News/World-News/2023/06/12/ukraine-International-Criminal-Court-investigating-dam-attack/9601686558241/; Thomas Obel Hansen, *Could the Nova Kakhovka Dam Destruction Become the ICC's First Environmental Crime Case?*, Just Security (June 9, 2023), https://www.justsecurity.org/86862/could-the-nova-kakhovka-dam-destruction-become-the-iccs-first-environmental-crimes-case/.

50 Matthew Gillett, *Environmental Harm as a Crime Under the Rome Statute*, Studies on International Courts and Tribunals, Cambridge University Press & Assessment, at 79, ISBN 9781316512692 (May 2022).

51 *Id*.

52 *Id*. at 81.

53 *Id*.

transfer might also occur as a result of environmental crimes.[54] Gillett used the *Al-Bashir* case as an example, in which Janjaweed forces in Sudan acting under the direction of the direction of Omar al-Bashir intentionally destroyed, poisoned, or polluted wells as a means of displacing populations of villagers.[55]

Another potentially applicable Crime Against Humanity outlined by Gillett is that of persecution under 7(1)(h) and 7(g)(2) of the Rome Statute. Persecution is defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity committed "on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law."[56] Gillett noted that the Human Rights Council in 2021 recognized that there is a human right to a clean, healthy, and sustainable environment, and while this right is not universally recognized, it is well established that the commission of serious environmental harm can gravely impact well-established, fundamental rights including those of life, security, healthy, private and family life and home, property, and rights to adequate food and water.[57] Finally, Gillett argues that environmental crimes might constitute Other Inhumane Acts outlined in Article 7(1)(k) if they cause the requisite great suffering or serious injury outlined by the statute.[58]

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54 *Id*.

55 *Id*. at 82.

56 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 7, (1) (h), ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html [accessed 29 October 2023].

57 Gillett, *supra* note 50, at 83-85.

58 *Id*. at 87.

Additionally, environmental crimes in addition to being prosecuted as crimes under Genocide and Crimes Against Humanity under Articles 6 and 7 respectively, could also potentially be prosecuted as War Crimes under Article 8. Article 8(2)(b)(iv) is the only Article of the Rome statute which explicitly mentions the environment.[59] The language describes launching an attack which causes "widespread, long-term and severe damage to the natural environment."[60] Thus, perhaps there is a strong case that environmental crimes might amount to war crimes, but the threshold for proving such crimes is stringent.[61] The proportionality, severity, and gravity requirements are difficult for prosecutors to achieve.[62]

iii. Possible Gaps Not Covered Under Current International Law

The breakout group acknowledged that there are possible gaps which are not covered by existing international law. Actions such as the 1989 Exxon Valdez oil spill or the ongoing deforestation of the Amazon might not be prosecutable because they did not occur in times of armed conflict. Others in calling for the addition of the crime of ecocide have likewise pointed out such gaps, arguing that the current prosecutable crimes are anthropocentric and thus limit prosecutions which are purely environmental.[63] An Independent Panel co-chaired

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59 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)* (July 17, 1998), Art. 8(2)(b)(iv), ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html.

60 *Id*.

61 Gillett, *supra* note 50, at 71.

62 *Id*.

63 Rachel Killean, *Prosecuting Environmental Crimes at the International Criminal Court – Is a Crime of Ecocide Necessary?*, INTLAWGRRLS (June 30, 2021), https://ilg2.org/2021/06/30/prosecuting-environmental-crimes-at-the-international-criminal-court-is-a-crime-of-ecocide-necessary/.

by University College London Professor of Law Philippe Sands and Senegalese jurist and legal scholar Dior Fall Sow, drafted a proposed a definition for the crime of ecocide in 2021.[64] The panel's proposed definition would enable the crime to be prosecuted in peacetime, a departure from Article 8(2)(b)(iv) and its emphasis on only times of international armed conflict, but this proposed new crime has not yet been adopted within the Rome Statute.[65] The breakout group, in considering adopting a crime of ecocide, recognized that the process of amending the Rome Statute is difficult and believed that the addition of ecocide as a crime might be more symbolic rather than effective.

iv. Recommendations by Group

The group proposed that given the urgency of the climate crisis and the growing recognition that harm to the natural environment can be as serious as other offenses in international law, national and international authorities with jurisdiction should endeavor to interpret their existing legislation to identify and prosecute environmental harm under existing provisions of international law including war crimes, crimes against humanity, genocide, and the crime of aggression. Furthermore, states should seek to fill gaps by adopting measures such as new environmental treaties on harm which promote state responsibility. The group also wanted to remain cognizant that humans are part of the natural environment and that any future efforts aimed at protection of the environment should not undermine precarious situations for indigenous groups or other populations struggling for resources.

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64 Mia Swart, *The Revolution does not happen overnight: Philippe Sands on ecocide and its links to Nuremberg*, Al Jazeera (June 29, 2021), https://liberties.aljazeera.com/en/the-revolution-does-not-happen-overnight-aj-speaks-to-philippe-sands-on-ecocide-and-a-life-in-environmental-lawyering/.

65 *Id*.

C. Cyber-Attacks and the Rome Statute

- *Cybercrime is a growing threat, a reality highlighted by Russian cyber-attacks launched against Ukraine since 2022.*
- *Only some cybercrime is currently prosecutable under the Rome Statute.*
- *Current limitations within the Rome Statute hinder full prosecution of cybercrimes.*
- *International Criminal Law must work to catch up with advan*cing technology.

i. Background

The group recognized that cybercrime is a growing international issue. During the first year of the Russo-Ukrainian conflict, the Center for Strategic and International Studies (CSIS) identified 47 publicly attributed cyber incidents indicative of a Russian cyber campaign against Ukraine.[66,67] One representative attack occurred on February 24, 2022, an hour before Russia launched its ground invasion of Ukraine, when an attack disabled modems that communicate with commercial communications company Viasat, Inc.'s KA-SAT satellite network,

66 Grace B. Mueller, Benjamin Jensen, Brandon Valeriano, Ryan C. Maness, and Jose M. Macias, *Cyber Operations During the Russo-Ukrainian War*, On Future War, Center for Strategic and International Studies (July 2023) https://www.csis.org/analysis/cyber-operations-during-russo-ukrainian-war#:~:text=Analysis%20of%20Russian%20Cyber%20Operations,%2C%20and%20May%209%2C%202022.

67 *Id*. This data was culled directly from Ukrainian government sources and Microsoft reports in an effort to avoid biases presumed in contemporary news accounts. This is likely a small but representative sample of the large number of cyber intrusions perpetrated by Russia. Additionally, the Computer Emergency Response Team of Ukraine (CERT-UA) has detected 1,123 cyberattacks occurring between February 24 and August 24, 2022. CSIS posits that there is a significant difference between an isolated cyberattack and cyber operations, such as those conducted by the Russian government and its proxies, which tend to comprise numerous attacks involving multiple intrusions.

supplying internet access to thousands of people in Ukraine and across Europe.[68] The British National Cyber Security Centre assesses that Russia was almost certainly responsible for the Viasat attack.[69] It is likely that cybercrime in armed conflict, such as that by Russia in the ongoing conflict, will become more prevalent in the future.

ii. Cybercrime Prosecution Under the Rome Statute

The Rome Statute, when originally developed in 1998, did not contemplate cybercrime and thus contains limitations which make prosecution of cyber-attacks difficult under the statute's current provisions.[70] The first limitation is that Article 17(1)(d) of the statute

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68 *Case Study: Viasat*, Cyber Peace Institute (June 2022), https://cyberconflicts.cyberpeaceinstitute.org/law-and-policy/cases/viasat.

69 National Cyber Security Centre, *Russia behind cyber attack with Europe – wide impact an hour before Ukraine invasion*, Press Release (May 10, 2022), https://www.ncsc.gov.uk/news/russia-behind-cyber-attack-with-europe-wide-impact-hour-before-ukraine-invasion.

70 While the Rome Statute did not originally contemplate cybercrime, International Humanitarian Law (IHL) has defined the principle of distinction, which is recognized in both the Geneva Conventions and the Rome Statute. The additional protocol added to the Geneva Convention in 1977 states, "In order to ensure respect for and protection of the civilian population and civilian object, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Article 8(2)(b)(iv) of the Rome Statute makes it a war crime to intentionally launch "an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." Distinction is one of the defining cardinal principles of *jus in bello*. Objectives often serve both military and civilian purposes, such as electrical grids, which have often been considered a valid military target if they support an enemy army's activities. Military law expert Michael Schmitt has argued that for such an attack to be valid, however, a military force must name a "definite" military benefit for that attack. The same likely applies to cyber-attacks, which likewise must discriminate between those serving legitimate

requires all cases to be sufficiently grave for purposes of admissibility to the court, creating a high gravity threshold which any potential prosecutions must overcome.[71] Additionally, ICC Prosecutors have discretion to consider gravity during the case selection and prioritization stage.[72] Gravity is assessed based on the whole case, and not on individual incidents. The ICC has clarified via several decisions that a case's gravity must be assessed holistically, considering both qualitative and quantitative factors, and that the number of victims alone is insufficient as a basis for gravity determination.[73] Rather, gravity analysis is tied to "the existence of some aggravating or qualitative factors attached to the commission of crimes."[74] Some legal scholars have argued that the ICC uses an expressivist approach to gravity which as Matthew E. Cross describes, "places an emphasis on the significance of criminal prosecution and punishment as symbolizing the legal and moral condemnation of the constituents

military purposes and those that do not. Hacking into an enemy computer for intelligence gathering, breaking through a computer's 'fire wall'; planting a 'worm' in digital software; extracting secret data; gaining control over codes; and disrupting communications do not necessarily meet the traditional gravity threshold in IHL, however if cyber-attacks shut down life sustaining programs or cause significant property damage, and there is no clearly identifiable military purpose, than such attacks could constitute war crimes under current international law. *See* Yoram Dinstein, *The Principle of Distinction and Cyber War in International Armed Conflicts*, 17 J. Conflict & Sec. L. 261 (2012), *Also See* Stephanie van den Berg, *When are attacks on civilian infrastructure war crimes?*, Reuters (Dec. 15, 2022), https://www.reuters.com/world/europe/when-are-attacks-civilian-infrastructure-war-crimes-2022-12-16/.

71 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)* (July 17, 1998), Art. 17(1)(d), ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html.

72 Milena Sterio and Jennifer Trahan, *Cyber Operations as Crimes at the International Criminal Court*, Articles of War, Lieber Institute, West Point (Oct. 4, 2023) https://lieber.westpoint.edu/cyber-operations-crimes-icc/.

73 *Id*.

74 *Id*.

of international criminal law."[75] Under the Court's approach, some cybercrime would likely surmount the gravity threshold, but questions remain whether cybercrimes which do not result in loss of life or serious destruction to physical property would achieve the necessary gravity under the ICC's approach.[76]

Another potentially limiting factor is the ICC's ability to exercise jurisdiction over cybercrimes. Even if the cybercrime constitutes genocide, a crime against humanity, or a war crime under the Rome Statute, if the crime is not committed by a state party of the statute or does not take place in the territory of a state party, the crime might evade ICC jurisdiction.[77] This might enable state-parties to outsource their cyber operations to non-state parties in order to avoid prosecution.[78] This issue also points to another challenge in prosecuting cybercrime, the issue of attribution. The Court may only exercise jurisdiction over individuals and not over States or other groups, and this might prove exceedingly difficult given states' abilities to use non-state actors or advanced technologies to mask their involvement in cybercrimes.[79]

Finally, there may be a limitation based upon the intent requirement. Cybercrimes may have a high likelihood of spillover effects and previous ICC rulings on intent appear to discount responsibility for unforeseen consequences or unintended foreseen consequences.[80] Thus, a broad

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75 *Id*.

76 *Id*.

77 *Id*.

78 *Id*.

79 *Id*.

80 *Id*. *See*, Mohamed Elewa Badar & Sara Porro, "Art. 30(2)(b), Intent in Relation to Result."

proliferation of effects beyond the intended target of a cyber operation, could foreseeably reach beyond the Court's jurisdiction.[81]

iii. Recommendations by Group

The group proposed that International Criminal Law is just one part of the necessary measures needed to combat cybercrime. They maintained that there is also a need for state-to-state solutions and for multilateral treaties. They argued that International Criminal Law must work to catch up with technology not contemplated under the Rome Statute's provisions, and that a significant investment in the technological expertise necessary to pursue and prosecute cybercrimes may be needed to overcome many of the limitations currently observed in the Rome Statute. Nevertheless, the group felt that the Rome Statute should be used where able to prosecute ongoing and future cybercrime.

D. Vulnerable Groups: Women and Children

- *International Law lacks a definition of vulnerability, and the concept of vulnerability is not explicit in core human rights conventions.*
- *There is a need for a victim-centered approach, which takes into account context and diversity of victim experiences.*
- *Identities are multi-dimensional, and investigators should employ nuance, on a case-by-case basis, when investigating crimes against humanity within communities.*
- *Victims should not be forced to prioritize or choose between humanitarian assistance, reb*uilding efforts, or the pursuit of justice.

81 *Id.*

i. Background

The International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) focused on the targeting of Tutsis and Bosnian Croats and Muslims as vulnerable groups, but the label of "vulnerable" has been more often attached to particular social groups such as displaced women and girls, who are seen as doubly vulnerable due to their sex.[82] Over time, a body of case law has developed which has further incorporated age, gender, and ethnicity as being key markers of vulnerability.[83] The *Ntagagna* case, decided in 2019, concerned the intersection of age and gender in regard to child soldiers.[84] In 2021, the ICC's Appeals Division's decision found Dominic Ongwen guilty of a wide range of sexual and gender-based crimes, including rape, sexual slavery, enslavement, forced marriage, forced pregnancy, torture, and outrage upon personal dignity.[85] The ongoing *Abd-al-Rahman* case concerns gendered violence in using boys as fighters.[86] Most significantly, ICC

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82 Amanda Klassen, *From Vulnerability to Empowerment: Critical Reflections on Canada's Engagement with Refugee Policy*, Laws, Vol. 11, Issue 22 (2022).

83 *See* 2020 statement by former ICC Chief prosecutor Fatou Bensouda on the International Day Against the Use of Child Soldiers saying, "Children are especially vulnerable. We must act to protect them." The statement also recognized the Ntaganga case, which extended the reach of justice to children who fall victim to sexual and gender-based crimes committed by the armed group that they are a part of. International Criminal Court Press Statement (Feb. 12, 2020), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-mrs-fatou-bensouda-international-day-against.

84 Case Information Sheet: Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06 (Updated July 2021), https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf.

85 International Criminal Court, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15A (Dec. 20, 2021).

86 International Criminal Court, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"),* ICC-02/05-01/20 (Sep. 11, 2023), https://www.icc-cpi.int/darfur/abd-al-rahman.

Prosecutor Fatou Bensouda's 2014 policy paper on sexual and gender-based crimes established a new precedent in protecting vulnerable groups under international law by committing the ICC to pursuing gender-based and sexual crimes.[87,88]

ii. Issues with the Concept of Vulnerable Groups

Despite advances in case law, issues with the concept of vulnerability and vulnerable groups persist in international law. The breakout group at Chautauqua expressed concern that every group might be considered vulnerable at some point in time. Unfortunately, International Law lacks a clear definition of vulnerability, and the

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87 Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 Wm. & Mary J. Women & L. 443 (2018) https://scholarship.law.wm.edu/wmjowl/vol24/iss3/2.

88 The ICC Policy Paper on Sexual and Gender-Based Crimes defined gender in accordance with article 7(3) of the Rome Statute which refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys. The paper also recognized the Committee on the Elimination of Discrimination Against Women's (CEDAW) General Recommendation 30, noting that "International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender." The paper further acknowledged the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity as well as the statement made on September 26, 2013, by UN High Commissioner Navanethem Pillay to end violence and discrimination against lesbian, gay, bisexual, and transgender (LGBTQ+) persons. This inclusion of men, boys, and the LGBTQ+ population further highlights the complications with more traditional views of vulnerability which view only women and children as vulnerable. *See* The Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, International Criminal Court (ICC) (June 2014).

concept is not explicit in human rights conventions.[89] Questions still remain regarding the extent of vulnerable groups. For instance, the *Ongwen* case, did not fully settle the question of whether boys forced into service as child soldiers are a vulnerable group.[90,91] Might

89 The concept of vulnerability is a feature across a range of areas of international and domestic law. Individuals, groups, communities, geographies, resources, and some States are increasingly described as being "vulnerable". In many areas of law such as that of human-rights law, vulnerability is often "group-based," in that particular groups are assumed to be vulnerable. This group-based approach has been the basis of much of the existing legal literature. In the human rights context, vulnerability is often invoked to point to protection gaps and to particularize States' obligations to respond to the specific protection needs of specific individuals or groups. Such an approach often ignores the situational and "imposed" vulnerabilities that arise due to legal, policy and practical decisions, structures and approaches. "Vulnerability" may in fact be inherent, structural, situational, or otherwise. See Dr. Jean-Pierre Gauci, Georgia Greville, and Dr. Noemi Magugliani, *Call for Papers: Vulnerability In and Across International Law*, British Institute of International and Comparative Law (June 5, 2023); Viljam Engström, Mikaela Heikkilä, and Maija Mustaniemi-Laasko, *Vulnerabilisation: Between Mainstreaming and Human Rights Overreach*, 40 Neth. Q. Hum. Rts. 118 (2022).

90 *Supra* note 85.

91 Even men, traditionally seen as the least vulnerable group, might at times be "vulnerable." An example of this is the forced marriage policy under the communist Khmer Rouge regime in Cambodia between 1975 and 1979 intended to increase the population of Cambodia (then known as Democratic Kampuchea). Under this policy, the Khmer Rouge forced men to marry women and girls. These marriages were generally coercive, impelled under threats of death, relocation, or re-education. The couples typically did not know each other, and sometimes were not even aware they were to be married until they arrived at the wedding destination, thinking they were there merely to attend a meeting. The wedding ceremonies were held in various non-religious settings, ranging from offices, houses, kitchens, classrooms, and worksites and were not carried out according to Khmer traditions, to include the traditional blessings by a Buddhist monk or having family members present. The weddings were typically en masse, with a large number of men and women lined up to be married. During the ceremony, rather than commit to each other, all couples were forced to swear allegiance to *Angkar* ("the Organization," the name the Khmer Rouge gave itself). After

the entire population of Ukraine be considered a vulnerable group? No clear answer emerges. The entire Ukrainian population is in a vulnerable situation, but there are subsets of that population which are certainly more vulnerable.

The group spoke of how certain more obvious conceptions of victims have taken precedence over more nuanced views of victimhood.[92] An argument was made that a more nuanced process should be deployed by

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the ceremony, couples were forced to consummate the marriage, surveilled visually or aurally by Khmer Rouge members. As this policy impacted both men and women, men might be seen in this instance as being a vulnerable population. *See* Melanie O'Brien, *Symposium on the ECCC: Forced Marriage in the ECCC*, OpinioJuris (Feb. 11, 2022), https://opiniojuris.org/2022/11/02/symposium-on-the-eccc-forced-marriage-in-the-eccc/. An argument has been made that the idea of vulnerability and who needs protection greatly impacts policy decisions such as acceptance of displaced persons or provision of aid. Dominant narratives construe women as paradigmatic victims in war even while men are disproportionately targeted in the most lethal forms of violence. *See* Anne Kathrin-Kreft and Mattias Agerberg, *Imperfect Victims? Men, Vulnerability, and Policy Preferences*, Am. Pol. Sci. Rev. 1 (2023).

92 Group members at Chautauqua discussed the common expectation that survivors of atrocities will display clear signs of trauma, but that in reality people respond to such trauma in different ways and that they are still victims regardless of if they display evident, outward signs of Post-Traumatic Stress (PTS). Indeed, although there is robust cross-cultural and historical documentation that exposure to extreme traumatic experiences carry the potential to trigger great psychological distress, such responses are not inevitable, and there is a growing awareness that traumatic events do not always produce the anticipated adverse psychological results. In particular, some traumatized populations not only demonstrate resilience, but also report Post-Traumatic Growth (PTG) in response to the experience of atrocities. The vast majority of individuals exposed to violent or life-threatening events do not go on to develop Post-Traumatic Stress Disorder (PTSD) and while many experience short-lived or subclinical stress reactions, these symptoms often abate spontaneously over time. *See* Orla T. Muldoon, S. Alexander Haslam, Catherine Haslam, Tegan Cruwys, Michelle Kearns, Jolanda Jetten, *The social psychology of responses to trauma: social identity pathways associated with divergent traumatic responses*, 30 Eur. Rev. Soc. Psych. 311 (Jan. 10, 2020).

international prosecutors which maintains a victim-centered approach, taking into account context and diversity of victim experiences.[93]

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93 Isha Dyan has argued that the process towards peace often follows two parallel paths. The first path is official peace negotiations by political leaders, in some cases mediated by external parties in an attempt to reach a formal peace agreement. The second path comprises a wide range of informal activities, usually orchestrated by heterogeneous groups of voluntary grassroots organizations who seek to draw attention to particular issues during the transition period and thereby influence the formal peace process. Vulnerable groups play a great role in this second path. An example can be seen in Sierra Leone, in which the civil war that occurred between 1991 and 2002 had a devastating effect upon the country's female population. More than 12,000 girls were pressed into armed service and another 257,000 women and girls were either raped or forced into prostitution. Many women in Sierra Leone endured forced pregnancies and contracted HIV/AIDS or other STDs as a direct result of the conflict. An estimated 72 percent of the country's women suffered human rights abuses, and at least half of these were seriously victimized. Thus, women had an important role to play in the peace process and the negotiations represented great potential to pursue greater gender equality within Sierra Leone. Women's groups participated in the two national consultative conferences -- Bintumani(1) in 1995 and Bintumani (2) in February 1996 – which, in combination, set the agenda for elections and the peace process. Women's participation and votes in these two conferences became the turning point in the national decision to proceed with multi-party elections and a negotiated settlement of the conflict. Following the Bintumani consultations, women stressed the urgency of addressing issues such as thirty percent representation for women consistent with the Beijing declaration, women's literacy, health care, and entrepreneurship to reduce poverty, along with the reform of laws detrimental to women on divorce, property, marriage and inheritance. *See* Isha Dyfan*, Sierra Leone Case Study*, International Women's Tribune Centre, United Nations (November 7, 2003). Similarly, in Liberia, the Women of Liberia Mass Action for Peace Campaign was instrumental in bringing about peace. During the conflict, the female activists demanded a meeting with then-president Charles Taylor and got him to agree to attend peace talks with the other leaders of the warring factions brokered by the

iii. Recommendations By Group

The group proposed that it should not be mutually exclusive whether victims desire access to humanitarian assistance, the rebuilding of infrastructure, or the pursuit of justice.[94] Post-conflict, victims are most likely to want their immediate needs met, such as locating children or securing property.[95] Later those victims may desire

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Economic Community of West African States (ECOWAS), a subregional grouping. The women engaged in corridor lobbying, waiting for negotiators as they entered and exited meeting rooms during breaks. Their actions paved the way for negotiations taking place in Ghana, where a delegation of about 200 Liberian women staged a sit-in at the presidential palace and applied pressure for a resolution. The group gained momentum until the country's first elections were successful in 2005, electing the country's first female president Ellen Johnson Sirleaf, who shared the Nobel Peace Prize in 2011 with Leymah Gbowee, a leader of the peace movement. *See* Franck Kuwonu, *Women: Liberia's guardians of peace*, Africa Renewal, United Nations (UN) (July 2018), https://www.un.org/africarenewal/magazine/april-2018-july-2018/women-liberia%E2%80%99s-guardians-peace.

94 The UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power addresses victims' needs with a series of rights including the right to respect and recognition, the right to protection, access to justice and fair treatment, assistance and support, redress for negative effects of crime in the form of restitution and compensation. *See generally* United Nations, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 (Nov. 29, 1985), https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse.

95 Other immediate needs may be healthcare for physical, mental, or emotional injuries suffered. Among the consequences of armed conflict, the impact on the mental health of the civilian population is one of the most significant. Research indicates a definite increase of mental disorders amongst post-conflict populations. Women are typically more affected than men and vulnerable groups such as children, the elderly, and the disabled also face higher rates of impact. Prevalence rates are associated with the degree of trauma, and the availability of physical and emotional support to victims. The use of cultural and religious coping strategies is a common response in developing countries. *See* R. Srinivasa

other less immediate but equally desired needs, such the execution of justice against perpetrators of atrocities.[96] The group stressed that identities are multi-dimensional and that investigators should look with nuance, on an individual basis, when investigating crimes against humanity within communities.[97]

Murthy and Rashmi Lakshminarayana, *Mental health consequence of war: a brief review of research findings*, 5 World Psychiatry 25 (2006). Victims' needs further removed from the conflict include the rebuilding of critical infrastructure and the administration of social services. The economic dimensions of post-conflict reconstruction historically include relief assistance, restoration of key infrastructure and facilities, and the groundwork for private sector development and macroeconomic stability.

96 After a conflict, the pursuit of justice may take many forms. One example could be the implementation of Truth and Reconciliation Commissions (TRCs). Thirty-four truth commissions have been established in twenty-eight different States from the 1970's to the present. Some of these commissions are officially named "Truth and Reconciliation Commission," like the one established in Liberia in 2005, while others have different official names. Truth commissions is the term commonly used to refer to these bodies generally. *See* Amnesty International, *Liberia: A brief guide to the Truth and Reconciliation Commission*, Amnesty International Publications (2006). One such group was assembled in South Africa after the end of apartheid and is commonly held up as the standard for TRCs since that time. The South African TRC invited witnesses identified as victims of human rights violations to document their experiences. *See* South African Government Truth and Reconciliation Commission official website available at https://www.justice.gov.za/trc/.

97 A concern here is "secondary victimization," in which additional harm can be caused by those who respond to the victim, including in the pursuit of justice. Adverse responses may arise within institutional settings such as healthcare, media exposure, or in legal environments. Victims may be retraumatized by the attitudes or modes of questioning that often occur after a conflict. For example, in police, judicial, and healthcare settings a victim's credibility may be questioned, and the victim may even be blamed, or their reactions of anger or anxiety may be misinterpreted. *See* Rebecca Campbell and Sheela Raja, *Secondary victimization of rape victims: insights from mental health professionals who treat survivors of violence*, 14 Violence Vict. 261 (1999). Victims frequently experience secondary victimization during the criminal justice process. Repeated and insensitive interviews or being forced to face the offender in the same waiting area prior

to a court trial can be sources of such secondary trauma. Thus, it is important to ensure protection of victims throughout criminal investigations and court proceedings. This protection has been found to be particularly essential for vulnerable victims such as children. Many criminal justice practitioners receive training on how to respectfully deal with victims and to teach them about victims' needs. In fact, scholarship on this subject has recognized that training and guidelines in institutions that work with victims is effective in reducing secondary victimization. *See* UN Office on Drugs and Crime, *topic three – the right of victims to an adequate response to their needs,* (July 2019) https://www.unodc.org/e4j/zh/crime-prevention-criminal-justice/module-11/key-issues/3--the-right-of-victims-to-an-adequate-response-to-their-needs.html#:~:text=The%20United%20Nations%20Declaration%20matches,form%20of%20restitution%20and%20compensation.

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