

Proceedings of the Sixteenth International Humanitarian Law Roundtable

August 25–27, 2024, Chautauqua Institution

Edited by Michael D. Cooper and David M. Crane



American Society
of International Law

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International Humanitarian Law Roundtable**

*August 25–27, 2024
The Chautauqua Institution*

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*Dedicated to all the professionals
who selflessly work towards accountability
in demanding times.*

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Prosecutors at the Sixteenth International Humanitarian Law Roundtable



*Left to right: Norman Farrell, David M. Crane,
Brenda J. Hollis, Stephen J. Rapp, James K. Stewart,
Andrew T. Cayley, Laurel Baig, James C. Johnson*

Participants of the Sixteenth International Humanitarian Law Roundtable



Foreword

Foreword

Michael D. Cooper

The Sixteenth International Humanitarian Law Roundtable convened at a time of profound reflection. In an era of conflict increasingly defined by belligerents who spurn well-established legal norms, this annual gathering once again provided a vital space for jurists, practitioners, scholars, and advocates to confront the brutal realities facing the global community. With the theme “Dirty Little Wars – Issues that Confront the United Nations Paradigm’s Viability in the Years Ahead,” participants examined the rapidly shifting nature of armed conflict and the corresponding demands on those who advocate respect for international humanitarian law.

Hosted at the historic Atheneum Hotel in Chautauqua, New York, and framed by the enduring mission of the Robert H. Jackson Center, the Roundtable opened with a celebration of legacy and courage, honoring Justice Richard Goldstone with the Joshua Heintz Award for Humanitarian Achievement. This recognition reminded all present that the pursuit of accountability is both timeless and pressing. Keynote addresses and moderated panels, featuring international humanitarian law champions such as Eli Rosenbaum, Fatou Bensouda, Andrew Cayley, Stephen Rapp, and Brenda Hollis, deepened the dialogue, connecting past achievements with present obligations and future ambitions.

What distinguishes this Roundtable from other academic or professional conferences is its commitment to both formal engagement and informal intellectual exchange. The annual breakout sessions on the porches of the Atheneum fostered honest, collaborative, and often impassioned discussions. These smaller groups addressed critical challenges: the legality and impact of attacks on civilians and civilian infrastructure; the use of force to settle disputes; the plight of children in conflict; and the tension between democratic and authoritarian governance.

These conversations culminated in the drafting of the fourth iteration of the “Chautauqua Principles”—an affirmation of shared principles and a roadmap for future action. The commitments articulated therein reflect the essence of the Roundtable: to hold violators accountable; protect the most vulnerable; prioritize diplomacy and reevaluate multilateral mechanisms; and to encourage robust collaboration across governments and civil society.

This volume brings together the rich content and insights that emerged over the course of the Roundtable. The Proceedings capture the spirit of inquiry, urgency, and hope that defined our time together. As you turn these pages, may you find both the weight of the challenges ahead and the strength of the community determined to meet them.

Lectures and Commentary

Keynote Address

Eli Rosenbaum

Good morning. It's wonderful to be back at Chautauqua for the 16th annual International Humanitarian Law Roundtable. I go all the way back to the second and third iterations, held here in 2008 and 2009, organized by the Robert H. Jackson Center. I well remember those two Roundtables, especially because four of the prosecutors who helped create modern international criminal law, at Nuremberg, were participants—the much-missed Whitney Harris, Ben Ferencz, Henry King, and Bill Caming. Just being in their presence was an exhilarating and deeply inspiring experience. Some of you in this room today were there and can no doubt back me up on that – including my friends Steve Rapp, David Crane, just to speak of fellow prosecutors.

Those were heady time indeed. Optimism abounded. The International Criminal Court and the Special Court for Sierra Leone had been established just a few years earlier [both in 2002], following on the heels of the creation about a decade earlier of the International Criminal Tribunal for the Former Yugoslavia [1993] and the International Criminal Tribunal for Rwanda [1994]. After decades of post-Nuremberg dormancy caused largely by the persistence of Cold War tensions, the life-saving promise of international criminal law seemed at last to be on the cusp of comprehensive realization. And these Roundtables, held each year in the very New York State county in which Robert H. Jackson spent his formative years, were on the way to becoming an indispensable vehicle for advancing international criminal law, especially by facilitating interactions between practitioners, scholars, and activists—thanks to the far-sighted leadership of Greg Peterson and other founders of the Jackson Center.

In the 15+ years since those first Roundtables (or “Dialogues” as they were originally called), much important progress has been made in enforcement of humanitarian and human rights criminal law, before

both international and national courts. Those developments have been catalogued, so to speak, on something of a rolling annual basis by speakers and discussions at the prior Roundtables.

Last year and this year have seen momentous positive developments, such as the March 2023 ICC issuance of an arrest warrant for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, who bears the Orwellian title in his office of Commissioner for Children's Rights, for the war crimes of abducting and deporting Ukrainian children in the wake of the Russian Federation's 2022 unlawful and unprovoked full-scale invasion of Ukraine. Pursuant to bipartisan legislation that was signed into law by President Biden just three days before the end of 2022, the United States was at last in a position to assist the ICC in its Russia investigations. The process of rebuilding the U.S.-ICC relationship, which had hit its nadir during the previous U.S. administration, made great progress—most prominently exemplified by U.S. Attorney General Merrick Garland's visit to the ICC in June of last year, the first time that a U.S. Cabinet official had ever set foot in the Court's headquarters. I accompanied AG Garland to other meetings he had with Prosecutor Khan in Washington and Europe. Meanwhile, the courageous and remarkably successful work of Ukrainian authorities to document Russian crimes—crimes that are ongoing even as we meet here today—continued apace. Together with Ukrainian investigative authorities and with assistance from European governments and multiple agencies of the United States government, the men and women of the Prosecutor General's Office, led by visionary Prosecutor General Andriy Kostin, are doing what no other law enforcement authorities anywhere have ever even attempted: namely, pursuing comprehensive justice for the victims of war crimes, crimes against humanity, aggression, and, I believe, genocide while their country is defending a large-scale, indeed existential war. They are the heroes who will continue to bear the heaviest investigative and prosecutorial burdens of these complex and emotionally taxing cases. And on a personal level, I must say that of

all the things I miss about working at the U.S. Department of Justice, it is the privilege of working closely with them that I miss the most.

Continuing on the theme of progress during the past year: in December, the U.S. Department of Justice charged four Russia-affiliated military personnel with committing war crimes in Ukraine, making the United States the first national jurisdiction in the world other than Ukraine itself to prosecute alleged perpetrators of war crimes committed by Russian forces in Ukraine. By the way: that case, was the product of an extraordinary investigation directed for the DOJ War Crimes Accountability Team I headed by my brilliant Justice Department colleague Christian Levesque and carried out in partnership with the Federal Bureau of Investigation and ICE's Homeland Security Investigations, and with important support from the Department of State. It also marked the first-ever use by U.S. prosecutors of the federal war crimes statute, which was enacted back in 1994.

This past February, Lithuania became the third country to charge alleged Russian war criminals. Lithuania is one of at least nine European countries to have publicly announced the initiation of investigations under their domestic laws. I am optimistic that prosecutors in at least some of those countries will soon join their Ukrainian, American, and Lithuanian counterparts in commencing prosecutions.

Also last year, on the historic initiative of the European Commission, the International Centre for the Prosecution of Aggression—the ICPA—was established. Embedded in Eurojust in the Hague, it facilitates international cooperation to locate and preserve evidence that could be employed before a proposed special tribunal to prosecute cases involving the crime of aggression committed against Ukraine—a crime that the ICC cannot prosecute in this instance without UN Security Council authorization—which the Putin regime would surely block with Russia's veto if an ICC referral were ever to be proposed. It was an unforgettable experience to be present at

a conference at Catholic University last year [March 2023] at which my friend and personal hero Beth Van Schaack made the historic announcement that the United States “supports the development of an [ad hoc] internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine.”

Also last year, Attorney General Garland named my gifted and tenacious Department of Justice colleague, Jessica Kim, to work at the ICPA, to which end he bestowed on her the title “U.S. Special Prosecutor for the Crime of Aggression.” She is thus the first U.S. prosecutor to be tasked with helping to build a prosecutable aggression case since the days of Robert Jackson and his U.S., British, Soviet, and French colleagues at Nuremberg. Jackson fought hard, including in communications with President Truman, to get the then-novel offense of aggression included in the Charter of the Nuremberg International Military Tribunal, and the crime made its world courtroom debut there in 1945. Jessica will join us here this evening—so very fittingly in Chautauqua under the auspices of the Robert H. Jackson Center!

Although it is good to note with approval and some satisfaction the positive developments of the past year, I would be remiss if I did not point out that we have seen developments this past year that are deeply concerning, even demoralizing, from the prospect of our shared goal of ending impunity for, and preventing the commission of, violations of international humanitarian and human rights law.

First of all, deterrence has plainly not been achieved against Russia, and so the Putin regime continues to decimate Ukrainian towns and kill and wound thousands of innocent Ukrainians, both civilians and the brave and outnumbered citizen-soldiers who are struggling to defend their country. According to updated figures distributed on Friday by Ukraine’s embassy in Washington, there have now been 35,265 civilian casualties [including 12,773 deaths], with, alas, no end in sight.

In the wake of this ongoing humanitarian nightmare, the Special Tribunal for Prosecuting the Crime of Aggression still has not been stood up. It has been well over two *full years* since the Parliamentary Assembly of the Council of Europe (PACE) called on all member and observer states to “urgently” set up an ad hoc international criminal tribunal [April 28, 2022]. Meanwhile, Russia’s aggression continues.

I don’t need to remind this audience—but I will—that the international Nuremberg tribunal declared that aggression is “the supreme international crime,” because it is the one that typically makes possible the commission of other criminal violations of humanitarian and human rights laws. It should be borne in mind that not only has the Vladimir Putin regime committed the crime of aggression in invading neighboring Ukraine, the largest country entirely in Europe, it has committed the worst kind of aggression, namely aggression for the purpose of territorial conquest. And in the course of this conflict, Russia has gained the ignoble and frightful distinction of being the first and only nation in history to threaten the use of nuclear weapons while waging aggressive war. Prosecutor General Kostin frequently points out that aggression is the one crime that has victimized every single citizen and resident of Ukraine and that, accordingly, the only way to achieve justice for all of them is to successfully prosecute those principally responsible for launching and waging the war of aggression. Honestly, the long delay in establishing the special tribunal reminds me of that expression “Nero fiddled while Rome burned.” Russia is killing Ukrainians every day and the main mechanism for achieving justice and, one might hope, some measure of deterrence too, hasn’t even been created.

Relatedly, one might also ask where is the ICC Office of the Prosecutor in pursuing comprehensive justice for Ukraine. It is good, to be sure, that arrest warrants have been obtained against President Putin and Commissioner Lvova-Belova for trying to steal Ukraine’s future by abducting Ukrainian children and, two months ago, that warrants

were issued against a former Russian defense minister, Sergei Shoigu, and against the country's highest-ranking military officer, Valery Gerasimov, for the war crime of directing attacks at civilian objects (as prohibited by Article 8(2)(b)(ii) of the Rome Statute), the war crime of causing excessive incidental harm to civilians or damage to civilian objects (Article 8(2)(b)(iv) of the Rome Statute), and the crime against humanity of inhumane acts (under Article 7(1)(k) of the Rome Statute) for "intentionally caus[ing] great suffering or serious injury to body or to mental or physical health" "against a civilian population." The judges evidently determined that these acts were "carried out pursuant to a State policy . . ." and that the conduct "appears to be ongoing." Those conclusions are without doubt correct. Why then has no arrest warrant for these crimes been issued for President Putin? The crimes have been committed almost continuously for more than two years, a fact of which he cannot be unaware. After all, he—uniquely—has the authority and ability to bring a stop to these crimes, but he doesn't stop them. How many more months or even years of such lethal criminality must Ukraine suffer before the individual who bears principal responsibility for the commission of those crimes, faces the possibility of arrest for those crimes? As in the case of the proposed aggression tribunal, international criminal law is moving too slowly while large numbers of innocent people are dying.

Nor has international criminal law deterred the commission of atrocity crimes in Sudan. As Secretary of State Blinken observed on 12/6/23, "In haunting echoes of the genocide that began almost 20 years ago in Darfur, we have seen an explosion of targeted violence against some of the same survivors' communities."

International criminal law has also done nothing, year after year, as the Chinese Government continues to commit genocide and crimes against humanity against predominantly Muslim Uyghurs and other ethnic Turkic minority groups.

Finally, and arguably most egregiously in this “parade of horrors” is the similarly undeterred attack commenced on October 7 in Israel by Hamas and its allies—and the aftermath of that attack. On that day, Hamas, then the de facto and previously elected governing authority in Gaza, broke an existing cease-fire with Israel in order to launch a surprise attack in which thousands of armed men crossed the border into Israel.

Israel responded with large-scale military force to discharge its legal and moral obligations to protect its citizens, among them some 7 million Jewish citizens and more than 2 million Arab citizens, and to carry out its treaty obligation under international law, specifically the 1948 Genocide Convention to “punish and prevent” genocide.

The Israeli government made the same basic demand of Hamas that the Allies made of Nazi Germany when that entity was the aggressor and the perpetrator of genocide, war crimes, and crimes against humanity, in World War II: namely, surrender, lay down your arms, give up your prisoners, and, in the words of an Israeli spokesperson on December 7, “the war will end tomorrow.” The Hitler regime ignored the Allied demand for unconditional surrender, with the result that the fighting continued for many months after it was clear that the Allies would prevail, and hundreds of thousands of German civilians died unnecessarily, particularly through Allied aerial bombing, along with an enormous number of Allied and German soldiers. Hamas is doing likewise.

Permit me to conclude with a personal observation based on my 38 years of investigating and prosecuting war criminals and human rights violators at the U.S. Department of Justice. When, in 1980, during some of the darkest days of the Cold War, I was 25 years old and began in that work—from which I retired earlier this year—the possibility that in my lifetime, international tribunals would again be established to pursue justice in these cases seemed well beyond

remote. Happily, however, this is exactly what happened. Indeed, important victories in important cases have been won at the ICTY, ICTR, SCSL, ICC, and other tribunals, all acting on the great legacy of Robert Jackson and Nuremberg. And the Jackson Center, Case Western Reserve Law School, and many of their partners have not only chronicled those achievements here at Chautauqua, they have helped make them a reality.

At the same time, however, we must acknowledge that progress has been too slow and that it has come in fits and starts rather than in linear fashion. Unfortunately, events of the past year have brought us to what I believe is an inflection point, where the very credibility of pursuing international justice for the victims of atrocity crimes is in peril, due, in part, to irresponsible conduct on the part of some entities that have engaged important mechanisms of the International Court of Justice and the International Criminal Court. So, it appears that prospects for continued international enforcement of IHL may now depend on how the judges of those courts handle these actions. There is, of course, precedent for judges coming to the rescue, so to speak, of IHL. I have in mind in particular the judges of the International Military Tribunal at Nuremberg. They rejected the importunements of Moscow's prosecutors that the Court find that German forces perpetrated the infamous 1940 Katyn massacre in Poland, when, in fact, it was the Soviet NKVD that committed that atrocity.

We can only hope that, as at Nuremberg, common sense and truth will again prevail, for the protection of vulnerable peoples throughout the world.

Thank you.

Katherine B. Fite Lecture

Margaret M. deGuzman

JAMES JOHNSON: We have an absolutely terrific lecture tonight, and with that, I will turn it over to Milena, to introduce our entire speaker tonight. Thank you.

MILENA STERIO: Thanks so much, Jim. My name is Milena Sterio. I'm a Professor of Law at the Cleveland State University College of Law, and one of six permanent editors of the IntLawGrrls blog. The IntLawGrrls blog was started back in 2007 by our colleague, Professor Diane Marie Amann, and it's traditionally open to female voices on issues of international law and practice. It is my pleasure and honor tonight to introduce Judge and Professor Meg deGuzman as the Katherine B. Fite lecturer.

Before I introduce Meg, let me just offer a few words about Katherine B. Fite. Katherine B. Fite was an American lawyer. She graduated from Yale Law School back in the 1930s, when she was one of just three female lawyers across the United States who graduated from law school, not just at Yale, but just across the United States. She's an inspiration to many of us. She later went on to work with Justice Jackson, most notably at the Nuremberg Tribunal. I'm sure that she would be thrilled to know that Meg is delivering her namesake lecture tonight.

Now, full disclosure, Meg is a dear friend, so I am totally biased, but she's absolutely amazing, and I'm sure that all of you will be objectively persuaded of that at the end of her lecture. Meg deGuzman is a Professor of Law and Co-Director of the Institute for International Law and Public Policy at Temple Law School, and also a judge at the Residual Mechanism for International Criminal Tribunals. She specializes in international criminal law, international law, human rights, international humanitarian law and transitional justice. She's the author of numerous books, as well as law review articles. Her

work has appeared in prestigious law journals, such as the *Journal of Criminal Law and Philosophy*, the *Yale Journal of International Law*, as well as the *Virginia Journal of International Law*. She is a Senior Peace Fellow at the Public International Law and Policy Group, a board member of the Center for International Law and Policy in Africa, and she also serves on the editorial board of the *African Journal of International Criminal Justice*.

Before joining the Temple Law School faculty, she clerked on the Ninth Circuit Court of Appeals and practiced law in San Francisco, specializing in criminal defense. She also served as a legal advisor to the Senegal Delegation at the Rome Conference of the ICC, and also as a law clerk in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia. And before this was a Fulbright Scholar in Senegal. She speaks five languages, including fluent Wolof, you know, just, just, you know, hashtag, all the rest of us are losers. [laughter] She got a PhD from the National University of Ireland in Galway and a JD from Yale Law School, and also a Master's from the Fletcher School of Law and Diplomacy and a Bachelor degree from the Georgetown University School of Foreign Service. So without further ado, it is my immense pleasure to welcome my colleague and friend, Meg deGuzman as the Katherine B. Fite lecturer.

MARGARET DEGUZMAN: Thank you so much, Milena. I love you too. And she's also amazing in many ways that someday I'll introduce you and get a chance to say. Well, it is a real honor, and I want to thank Jim and the other organizers for giving me the opportunity to give this Katherine B. Fite lecture. Of course, I have to say I'm speaking in my personal capacity and my professional capacity as a law professor, not as a judge at the IRMCT. Katherine Fite was the only senior woman lawyer at Nuremberg. So to honor her legacy, I'm going to make a feminist argument. I'm also going to try to be a little bit provocative, partly because of the hour, and you know, hopefully I'll keep you awake by being a little bit provocative. Many

of the comments that we've heard thus far in the conference have suggested that we need more international criminal law. I'm going to suggest to you that maybe we need less international criminal law. I recognize that I'm doing this to a room full of many prosecutors. So, the argument is that we should reconsider the duty to prosecute international crimes. Wish me luck.

The essence of the argument is going to be that a feminist approach to justice requires that we broaden our understanding of accountability beyond criminal punishment, even for international crimes. And by feminist approach to justice, what I mean is an understanding of justice that promotes women's rights, equality and well being. Okay, so that's my definition. Before I make that argument, however, I want to pay tribute to Fite and to all the other feminists who have worked in international criminal law by acknowledging the many ways in which that work has promoted those feminist goals.

First of all, of course, Fite's very presence at Nuremberg advanced feminist goals at a time when women were told that their place was to stay at home cooking dinner, Fite crossed the ocean to prosecute Nazi war criminals. Her name, spelling aside, was certainly appropriate. There's little doubt that she had to fight for every ounce of respect, responsibility and acknowledgement that she received. In preparing for this talk, I read a lecture about Fite that Jackson historian, John Barrett gave here, that I'm sure many of you remember, where he mentioned something that kind of stood out to me about Katherine's relationship with Jackson, whom we, of course, very appropriately honored yesterday. Jackson apparently called Katherine, sometimes Katie. He probably meant to be affectionate. It was also probably diminishing. She fought for everything, and we all now carry on her legacy.

Many of the women in this room have done that in the field of international criminal law by making sure that international crimes and the prosecution of international crimes advances feminist goals,

that is to say, women's rights, equality and wellbeing. At the ICTY and the ICTR and now the ICC, prosecutors like Brenda Hollis and Laurel Baig have worked to ensure that rape is prosecuted as a war crime, a crime against humanity and an act of genocide. At the Rome Conference of the ICC, advocates like Valerie Oosterveld and Beth Van Schaack demanded that women be given equal representation in hiring, including on the Bench, and they made sure that gender based persecution is a crime against humanity. Advocates in court registries like Binta Mansaray and at NGOs and in academia like Jennifer Trahan, Milena Sterio, and others have made sure that the voices of women victims and survivors are heard loudly in every step of the process. As chief prosecutor at the ICC, Fatou Bensouda, incorporated a gender perspective in all aspects of her office's decision-making, including ensuring that investigators are trained in how best to engage with victims of conflict-related sexual violence.

In other words, international criminal law, through the agency of many of you in this room, my friends and "sheroes," has done a lot to promote women's rights, equality, and wellbeing. I would be remiss if I didn't mention that many of our male colleagues, including those of you in the room, also helped to work toward these goals. Together, we've come a long way from a world in which rape was considered a spoil of war and there was one senior female prosecutor and no judges on the Bench. And yet, I would like to try to convince you that we have reached a place where international criminal law takes up too much space in the global imagining of what justice means and requires.

While ICL certainly can and will continue to promote women's rights, equality, and wellbeing, it can also undermine those objectives. How? First, as a general matter, systems of carceral punishment are ill-equipped to address the root causes of gender-based violence. Prisons tend to reinforce patriarchal power, promote toxic masculinity, and perpetuate cycles of trauma and violence. The criminal process itself, often harms victims, especially victims of sexual violence, by

deepening their trauma and alienation. And criminal proceedings and criminal systems require vast resources that could be allocated to life-affirming social services like education, housing, and food security.

More specifically, feminists have leveled criticisms at international criminal law (ICL), and how it operates to undercut women's agency and perpetuate gender stereotypes. For instance, in international court proceedings and advocacy efforts, women are often portrayed as victims, primarily, emphasizing their fragility rather than their strength. And there's a racialized dimension to these portrayals, as well. Christine Schwöbel-Patel has argued that ICL, in ICL, women are "racialized, feminized, and infantilized." Likewise, men are stereotyped as perpetrators, emphasizing their brutality and reinforcing a vision of masculinity, particular vision of masculinity, ignoring that men and boys are often also subject to sexual violence. By trading in these stereotypes, ICL risks perpetuating them, further entrenching the misogynist worldview feminists have long fought against.

Karen Engle has called this the "double-gendering agency," and argues it produces a narrative where political and military leaders are male and women are victims in need of outside military and police protection. Additionally, some feminist scholars have taken issue with ICLs "hyperfocus on sexual violence," which does not fully address, represent the range of gendered harms and risks women face, erasing the nuance of gendered experiences in conflict.

A third problem is that the global community's hyperfocus on criminal accountability crowds out other forms of justice. Criminal justice is not the only kind of justice. Criminal accountability is not the only kind of accountability. And yet ICL has increasingly come to dominate the discourse of how to respond to massive human rights violations. Karen Engle has lamented the negative consequences of what she calls the "anti-impunity agenda" for many years and others have begun to take up her call to revisit this framing. Philip

Alston, a prominent human rights scholar, recently published a piece warning that the hyper-focus on criminal accountability for ‘atrocious crimes’ is problematic in ways that I argue have special negative consequences for women.

First, it entrenches an atrocity-centered normative hierarchy that overlooks the structural causes of most violence against women, and perpetuates a public-private dichotomy that obscures the most widespread harms that women suffer. Second, it empowers judges and criminal lawyers at the expense of social movements, which means that most women who are not lawyers, have a weaker voice in shaping justice for the harms that they suffer and that their families suffer. It shines a spotlight on individual rather than collective accountability, which reifies social structures that perpetuate inequalities. It reinforces problematic North-South dynamics, further disempowering women in the Global South. And finally, allocating substantial resources to international prosecutions reduces the resources available to the kinds of justice programs that many women affected by international crimes identify as their highest priorities: social and economic justice, including access to food; education and security for themselves and their children.

So, if I’m right, that a course correction is needed, and to be clear, I’m not advocating that we give up on the enterprise of international criminal law, just that we correct the course that has brought so much energy, so much attention, so many resources, so many of the brightest minds to focus on this form of accountability, this form of justice, that a course correction is needed. Then I think that means revisiting the duty to prosecute international crimes. This is an idea that emerged in the 1980s, in part in reaction to efforts in Latin America and elsewhere to address the massive harms of dictatorship and civil wars. So, we have recognized the duty to prosecute international crimes, and the United Nations has made criminal accountability one

of the pillars of transitional justice. Criminal accountability, right? A pillar of transitional justice.

Today, the duty to prosecute international crimes is accepted wisdom. I'm fighting perhaps an uphill battle here. But if I'm right that global *criminal* justice sometimes undermines feminist goals, it can't be true that States always have a duty to prosecute every international crime. Of course, we also should not go back to the days of impunity for international crimes. Instead, I think we should start to think about something that my colleague Rachel Lopez and I are tentatively calling a "duty of reckoning." I'll give her credit for that terminology. States and perhaps other organizations should have an obligation to reckon with harms and injustices, but that duty should be conceived more broadly than criminal prosecution and punishment. Second, if the duty to punish is to be replaced with something like a duty to reckon, more resources need to be devoted to understanding what forms of reckoning particular communities want, and to supporting them in those endeavors.

For a long time, "the global community," those of us who have been active in this and I started, as Milena said in law school, and at the Rome Conference at the ICTY as an intern in '97, so I've been part of the enterprise for a long time. But there hasn't been as much of an emphasis, I think, as there needs to be, on understanding what the affected communities want, the kinds of justice that they want. For some communities, restorative justice mechanisms should be given greater priority and more resources than they currently are. We might revisit the power of truth commissions, which were much more popular post-South African TRC and others, than they are now. We might even invest more in people's tribunals. We might support the movement towards state accountability that we're now seeing emerging more and more at the International Court of Justice and elsewhere. And sort of as a practical note, and aside to the ICC folks in the room, I think that we should interpret the complementarity

requirements more broadly to include other forms of justice, and I think there are ways that this can be done, through the interests of justice and the interpretation of that provision. I think there's some movement in that direction, incidentally, in particular, in regard to the Columbia situation and how the ICC closed out that situation.

So, in conclusion, I honor the contribution that Fite and many of you have made to ensuring that international criminal law promotes women's rights, equality, and wellbeing, and I also hope that as we look to the future, we'll start to be more creative and see more diversity in the ways that the global community seeks to address, and redress, serious harms to women and to all people. And, in particular, I hope that we see more emphasis on restorative justice and more energy and resources placed on healing and reconciliation. Thank you.

[Applause]

JAMES JOHNSON: Questions, please.

MARGARET DEGUZMAN: Questions, comments, objections. The floor is open.

UNKNOWN SPEAKER: Hi, thank you so much for what you had to say this evening. I guess I'm just a little curious. I have limited experience when it comes to understanding what truth commissions look like, and it's in the sole area of indigenous people's truth commissions. What does it look like on a broader international criminal law, international humanitarian law spectrum?

MARGARET DEGUZMAN: Sure, that's a great question, and there are many here who have been involved in truth commissions, so I would hesitate to be the one to speak about truth commissions, having not been involved myself, but, and please chime in those of you who have actually been involved. But there have been numerous

truth commissions around the world that brought forward the experiences of harm in particular situations and shine a spotlight on what had happened in ways that I think was, has been very important for accountability. It's a form of accountability. Truth is a form of accountability. And, you know, a number of years ago, I, and many others, were talking a lot more about transitional justice. I had a course in transitional justice. I think a lot of people had courses on transitional justice, not that many people right now are talking about transitional justice, right? International criminal law has been the currency of the day for a number of years recently. And so truth commissions, I'm not surprised that you're not hearing that much about truth commissions, right? Whereas we talked a lot about them maybe 10 years ago eve.

MILENA STERIO: Any other questions? Yes.

UNKNOWN SPEAKER: Thanks so much Meg, that was fantastic. Can you say a little bit about how the duty to reckon compares to the concept of reparations?

MARGARET DEGUZMAN: Yes, reparations would certainly be part of it, right? Reparations are, as I view it, a form of restorative justice, right? In fact, I should have mentioned that as one of the modalities that I would like to see more of, and I think there's some movement in that direction. I mean, as you probably sensed, my remarks draw on the anti carceral feminist movement, on the abolition movement, on the movement for reparations. And we are seeing, in the United States, we're seeing some greater openness to talking about reparations for slavery, for example. And I think that, that momentum, I hope that that momentum, can be brought into the discussions of international criminal law. Of course, the ICC already has a whole system for victim participation and for, you know, reparations and so that, it's not that this is *new* to international criminal law. My call is for more attention, more resources to be put into it.

JAMES JOHNSON: With no further questions, we can adjourn. Thank you.

Year in Review Lecture

Valerie Oosterveld

The past twelve months have been extraordinary ones, in a number of ways, for international criminal law. It has been a year of highs and lows, and everything in between. My aim today is to shine a light on a handful of developments that have not been discussed very much so far in this 2024 International Humanitarian Law Roundtable. I will do so on two themes: increased engagement with international criminal law, and setbacks within international criminal law.

I'll begin with engagement. I will touch on something that both Margaret DeGuzman and Norman Farrell mentioned yesterday. That is, that the International Court of Justice (ICJ)—which adjudicates cases between countries based on *state* responsibility as opposed to holding *individuals* criminally accountable—has recently become a busy forum for consideration of international crimes.

This turn toward international law by many states is happening at the very moment that certain states seem to be turning away from international law—such as Russia, in its full-scale invasion of Ukraine in 2022. This turn toward international law is certainly changing the ICJ's traditional caseload from one based on, for example, longstanding border delimitation disputes, shifting it somewhat toward cases situated in considerations of international crimes.

Yesterday, you heard mention of a number of these cases. I will briefly outline those that had activity over the past 12 months.

- (1) The most well-known case – one which has been reported at length in the media—is *South Africa v. Israel*, officially titled the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*, which was launched in December 2023. The case, as the official title indicates, is based on questions relating

to the Genocide Convention. The Court held its provisional measures hearing on January 11-12, 2024, and issued a number of provisional measures orders on January 26, as well as in March and May 2024. There have also been a number of requests for intervention by states, as part of an ongoing trend of such interventions at the ICJ.

- (2) Nicaragua launched a case against Germany in March 2024. This case is titled *Case Concerning Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory*. It is also based in the Genocide Convention, as well as the Geneva Conventions and their Additional Protocols and other norms of international law. In April, the Court declined to indicate provisional measures. The case is now in the written pleadings stage. There are no intervenor states at this point in time.
- (3) Another case situated in the Genocide Convention, *Gambia v. Myanmar*, is focused on the mass atrocities committed against the Rohingya. Originally launched in November 2019, the case is currently at the merits stage of written pleadings, with seven states intervening.¹
- (4) The case brought by Ukraine against Russia shortly after its 2022 full-scale invasion was the subject of discussion at last year's IHL Roundtable. In September of last year, the Court held public hearings on the question of jurisdiction, involving not only the parties, but also 32 intervening states.

The Court ruled on this question of jurisdiction in February of this year. In a blow to Ukraine, the Court found that it only had jurisdiction to consider one of Ukraine's multiple requests to the Court, namely the request in which it asked

¹ Canada, Denmark, France, Germany, Maldives, the Netherlands, and the United Kingdom.

the Court to “[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine”.

Given this narrowing, the Court then asked the intervenors to indicate whether they wished to file a new declaration or maintain their original declaration (with or without adjustments).

A number of the intervenor states filed new declarations of intervention, others indicated that they wished to maintain their previous declarations without modification, while a third group made adjustments to their original declarations.² The number did reduce from 32 states to 23. The case is now focused on evaluating the merits of this particular claim.

- (5) The last ICJ case I’ll mention is the case brought by Canada and The Netherlands against Syria in June 2023, titled *Case concerning alleged violations of the Convention against Torture*. Provisional measures were issued in November 2023, ordering Syria to take all measures within its power to prevent acts of torture and other cruel, inhuman or degrading treatment or punishment, and to prevent the destruction and ensure the preservation of any evidence related to allegations of acts of torture.

² A number of States filed new declarations of intervention under Article 63 of the Statute (Austria, Czechia, Finland and Slovenia (jointly); Bulgaria; Estonia; Germany; Poland (which also filed an Application for permission to intervene under Article 62 of the Statute); and Spain). Others indicated that they wished to maintain their previous declarations without modification (Canada and the Netherlands (jointly), France, Italy, Portugal and Romania), while a third group made adjustments to their original declarations (Australia, Denmark, Latvia, Lithuania, Luxembourg, New Zealand, Sweden and the United Kingdom).

Each of these cases raises interesting and complex issues related to the application and interpretation of international criminal law in the realm of state responsibility, and presents new opportunities for both the interpretation and clarification of international criminal law, as well as—of course—the potential for fragmentation of this field of law.

Also on the theme of increased engagement, I wanted to reiterate one of Laurel Baig’s comments of yesterday: the International Residual Mechanism for Criminal Tribunals—the successor to the International Criminal Tribunals for the Former Yugoslavia and Rwanda—continued to support national cases. When the Prosecutor of the Mechanism reported to the United Nations (UN) Security Council a few months ago, he indicated that his office supported 27 national cases in Rwanda, and 67 national cases in the former Yugoslavia from November 2023-May 2024. This is an important form of international-national cooperation, and it helps with national capacity-building.

The Mechanism is continually breaking new ground—just as the Residual Special Court for Sierra Leone is doing—since we have not had a residual court prior to these. And the Mechanism is doing exactly what one would hope an international residual mechanism would do in strengthening the connection of international to domestic law, and doing it successfully.

Lastly on the theme of increased engagement with international criminal law, as Norman Farrell mentioned yesterday, the Sixth (Legal) Committee of the UN General Assembly discussed, in October 2023 and April 2024, the draft Crimes Against Humanity Convention. Our very own Leila Sadat—who is normally at this Roundtable—has been in the forefront of efforts to draft and adopt

a new treaty on crimes against humanity for many years, and those efforts are entering a turning point.³

Over the course of the past year, significantly more states and regional groups intervened, and the number supporting the draft increased. For example, in April, more than 70 States from all regions of the world urged the adoption of a new CAH treaty. Leila Sadat notes that the total number of positive States is now at 120.⁴

Additionally, the number of civil society groups focused on these discussions, and coordinating with each other, also increased significantly—they issued a “Joint Statement in Support of Progress toward a Crimes Against Humanity Treaty”, involving more than 400 organizations and individuals from around the world.⁵

And the range of proposals on how the text of the treaty—which was drafted by the International Law Commission—might be amended also grew.

Many of these proposals by states focused on the definition of the crime. For example, Sierra Leone and the African Group supported adding the slave trade to the list of prohibited acts. Rwanda suggested adding starvation of a civilian population. Others suggested including ecocide, terror-related acts, and crimes against Indigenous peoples. Other suggestions related to sexual and gender-based violence, such

3 See, e.g., Leila Nadya Sadat and Akila Radhakrishnan, *Continued Positive Momentum on Crimes Against Humanity Treaty*, JUST SECURITY (Nov. 9, 2023), <https://www.justsecurity.org/90024/continued-positive-momentum-on-crimes-against-humanity-treaty/>.

4 Leila Sadat, *A Draft Treaty on Crimes Against Humanity Draws More Engagement from States*, JUST SECURITY (MAY 22, 2024), <https://www.justsecurity.org/95850/crimes-against-humanity-draft-treaty-states-engagement/>.

5 See: <https://cahtreatynow.org/joint-statement-in-support-of-progress-toward-a-crimes-against-humanity-treaty/>.

as recognizing gender apartheid, adding forced marriage, or deleting the definition of the term ‘gender’ as it relates to gender persecution.

States also focused on other aspects of the draft treaty, with some recommending that the treaty create a monitoring mechanism to assist with prevention of crimes against humanity. Others were concerned about the dispute settlement clause—in particular that the adoption of this new treaty would lead to state-against-state cases at the ICJ as we see with the Genocide Convention, while other expressed concerns about the possibility of multiple or overlapping domestic prosecutions of crimes against humanity. Some states suggested (while others disagreed) that the treaty should prohibit amnesties for crimes against humanity.

In October 2024, states will once again discuss the draft convention, in particular whether it should be moved to the next step of formal negotiations on the draft treaty—so watch this space next year for news on what happened.

I will now draw attention to a few ways in which international criminal law has been engaged at tribunals and courts that receive relatively less attention than the ICJ or the International Criminal Court.

Take the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSC). The KSC was established pursuant to an international agreement ratified by the Kosovo Assembly, a Constitutional Amendment, and a domestic law. The KSC has jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law, which were commenced or committed in Kosovo between January 1998 and December 2000 by or against citizens of Kosovo or the Federal Republic of Yugoslavia. The KSC is located in The Hague, Netherlands. Its staff is international, as are the judges, the Specialist Prosecutor, and the Registrar.

The KSC has a number of ongoing and completed cases. For example, in July, Pjetër Shala was convicted by the Trial Panel. He was found guilty of three counts of war crimes—arbitrary detention; torture; and murder—and sentenced to 18 years in prison. In its judgment, the Trial Panel ruled that at least 18 people were held in inhuman and degrading conditions and subjected to psychological and physical abuse, and one victim was murdered. The crimes were committed in May-June 1999 against persons detained at a place called the Kukes Metal Factory.

Another court which often flies under the radar of many international criminal lawyers is the Special Criminal Court (SCC) in the Central African Republic. The SCC is based in Bangui, the nation's capital, with a mix of national and international judges and staff. The court investigates and prosecutes serious international crimes—genocide, crimes against humanity, and war crimes—committed since 2003.

Its first verdict was issued in October 2022, in which three accused - all members of the rebel group known as 3R—were convicted of crimes against humanity and war crimes for severe violence committed in a massacre of at least 46 civilians in May 2019. One perpetrator was convicted based on his responsibility for rapes of girls and women committed by his subordinates, amounting to crimes against humanity and war crimes—thereby adding to international criminal law jurisprudence on this topic.

Over the past year at the Special Criminal Court, cases have continued to be opened and prosecuted, and arrest warrants issued.

Now, the International Criminal Court also has jurisdiction over crimes committed in the Central African Republic, and the Prosecutor of the ICC had, and currently has, ongoing trials related to the Central African Republic. In recognition of this shared jurisdiction, in November of last year, the Office of the Prosecutor of the ICC signed a Memorandum of Understanding with the Special Criminal Court and

with the Central African Republic government. In the Memorandum, the ICC committed to working closely with the SCC, by sharing information and expertise. The Prosecutor of the ICC views this as a “dynamic approach to complementarity,” one “which will increase the impact of justice locally.”⁶

Complementarity is a key principle of the ICC under which domestic justice is meant to be the frontline of ICL. The Prosecutor’s current approach to this was recently articulated in his Policy on Complementarity and Cooperation issued in April.⁷

We see this also in Guinea, where the ICC’s Office of the Prosecutor has also been providing encouragement and assistance. On July 31 of this year, the Dixinn Court in Conakry, Guinea, convicted 8 perpetrators of the events of September 28, 2009, at the national stadium in Conakry in which between 156 and 200 people were killed or disappeared, and at least 109 girls and women were raped or subjected to other forms of sexual violence. Guinean judges indicated that no one who commits serious crimes is above the law, as the convicted individuals included the former head of state and other leaders. As well, the court’s decision to reclassify the events as crimes against humanity enabled the gravity of the crimes, including sexual violence crimes, to be recognized.

The ICC OTP welcomed this judgment, and also said that it will continue to follow the events in Guinea closely.⁸

6 See: <https://www.icc-cpi.int/news/deputy-prosecutor-icc-mame-mandiaye-niang-concludes-his-visit-central-african-republic>.

7 See: <https://www.icc-cpi.int/news/policy-complementarity-and-cooperation-2024>.

8 See: <https://www.icc-cpi.int/news/statement-office-prosecutor-otp-international-criminal-court-icc-occasion-judgement-trial#:~:text=Image-,The%20>

Yesterday, you heard Robert Petit briefly discuss the engagement of the International, Impartial and Independent Mechanism for Syria (IIIM) with the international community. Established in 2016, the IIIM has a mandate to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in Syria since March 2011.

The IIIM has received over 375 requests for assistance from states and others, related to 275 distinct investigations across 16 jurisdictions. It collects information from a range of stakeholders, particularly Syrian civil society actors. It consolidates and preserves the data, preparing and sharing on request, and proactively, information, evidence and analysis.

The results of this were seen in May 2024, when the Paris Judicial Court found three high-ranking Syrian officials guilty of complicity in crimes against humanity and war crimes committed against two French Syrian nationals,⁹ using information, evidence, analysis, and in-court testimony provided by the IIIM. This represents another form of increased engagement with international criminal law.

Let me turn now to challenges or setbacks in the world of international criminal law over the past year.

Yesterday, you heard former ICC Prosecutor, Fatou Bensouda, refer to press reports of the intimidation and interference in the form of spying and hacking she faced from powerful states in her role as Prosecutor.¹⁰ And the Presidency of the ICC's Assembly of States Parties issued a

Office%20of%20the%20Prosecutor%20(OTP)%20of%20the%20International%20Criminal%20Court%20were%20allegedly%20killed%20or.

9 See: <https://iiim.un.org/iiim-syria-welcomes-dabbagh-case-verdict/>.

10 See: <https://www.theguardian.com/world/article/2024/may/28/israeli-spy-chief-icc-prosecutor-war-crimes-inquiry>.

statement in May expressing concern over “any attempts to undermine the Court’s independence, integrity and impartiality.”¹¹

I will add another form of interference. In October of last year, the ICC issued a press release quite unlike its normal press releases, which tend to be about judicial proceedings. This one indicated that five weeks earlier, the ICC was subjected to a serious cyber-attack. It was “a targeted and sophisticated attack with the objective of espionage”, which the Court interpreted as a serious attempt to undermine the Court’s mandate.¹² It interrupted the Court’s work for some time. The Court, with the cooperation of the Netherlands (the state in which the ICC is based) and cyber security experts, carried out a forensic analysis. Dutch law enforcement authorities launched a criminal investigation.

This particular cyber-attack came at a time of what the ICC referred to as “broader and heightened security concerns for the Court,”¹³ as disinformation campaigns target the Court and its officials, as the Court is subjected to daily and persistent attempts to attack and disrupt its systems, and as at least one country—in this case, Russia—has attempted to place a hostile intelligence officer into the Court under the guise of an intern.¹⁴

All of this, of course, is an unwelcome diversion from the Court’s mandate of pursuing international criminal justice.

Let me end with another setback, also at the ICC. It related to the trial judgment in the case of *Al Hassan*, which was issued on June 26,

11 See: <https://asp.icc-cpi.int/press-releases/PR-20240517/>.

12 See: <https://www.icc-cpi.int/news/measures-taken-following-unprecedented-cyber-attack-icc>.

13 *Id.*

14 See: <https://www.cnn.com/2022/06/16/europe/dutch-catch-russian-spy-icc-intl/index.html>.

following a five month delay due to unexplained judge illness.¹⁵ It is a concerning decision. Let me provide some background context.

On October 6, 2012, more than one hundred women and one imam gathered in Timbuktu, Mali, to protest against the two jihadist groups that had taken control of the city and area six months before. These groups were Ansar Dine and Al Qaeda in the Islamic Maghreb (AQIM). Since taking power, these groups had become increasingly forceful in imposing their interpretation of Sharia law. They had banned smoking, alcohol, music, extra-marital sex (whether consensual or otherwise), and all religious and cultural practices that deviated from their interpretation of Sharia. They imposed dress codes, too. They also had destroyed Muslim shrines and mausoleums, some centuries old.

Their relentless policing of women's and girls' attire, their insistence that women and girls be chaperoned in public spaces by a male relative, their practice of berating and detaining those who breached these rules, and their teachings about the need for women to stay in their homes had taken a major toll on women's participation in trade and public life. Although a dress code applied to everyone (beards and short trousers for men, full body and head coverings for women), men were rarely punished for breaching it, while women and girls were severely punished.

To enforce their ideology, Ansar Dine and AQIM had created several law enforcement bodies in Timbuktu: an armed patrol called the

15 This section is based on Rosemary Grey and Valerie Oosterveld, *Al Hassan: The International Criminal Court's First Judgment on Gender Persecution (Part 1)*, OPINIO JURIS (AUG. 2, 2024), <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-1/>; AND ROSEMARY GREY AND VALERIE OOSTERVELD, *AL HASSAN: THE INTERNATIONAL CRIMINAL COURT'S FIRST JUDGMENT ON GENDER PERSECUTION (PART 2)*, OPINIO JURIS (AUG. 2, 2024), <https://opiniojuris.org/2024/08/02/al-hassan-the-international-criminal-courts-first-judgment-on-gender-persecution-part-2/>.

Hesbah and a larger Islamic Police force, neither of which included women in their ranks. There was also an Islamic Court, again with no women judges, which could impose a range of penalties, including floggings, amputations, and other corporal punishments.

In this climate, women and girls had become increasingly vulnerable to gender-based violence. Some girls and young women had also been coerced or forced into relationships with Ansar Dine and AQIM men that these groups referred to as “marriages”:¹⁶ a label that, in their worldview, gave “husbands” a license to rape and enslave their “wives.” In addition, the *Hesbah* had become more violent toward women and girls since September 2012, when a man named Mohammed Moussa became its *emir*. Under his leadership, women and girls had been detained in squalid conditions for even minor breaches of the dress code, and some had been gang-raped by Moussa and his men in detention.

The protesters were angered by this oppressive treatment and resolved to use what little power they had left to call for change. Unarmed, they marched toward the bank that the *Hesbah* had recently claimed as its headquarters, and where some of the rapes occurred, pausing briefly to take cover from shots fired by the Islamic Police. Eventually, they were confronted by Moussa and the Islamic Police commissioner named Al Hassan, who warned that if they held another march without permission, they would be punished.

The women dispersed, with their grievances unanswered. The occupation by Ansar Dine and AQIM continued until January 2013,

16 See: Melanie O’Brien, Kathleen M. Maloney, and Valerie Oosterveld, *Forced Marriage in the Al Hassan Trial Judgment*, OPINIO JURIS (JULY 23, 2024), <https://opiniojuris.org/2024/07/23/forced-marriage-in-the-al-hassan-trial-judgment/> [hereinafter O’Brien at al.].

when they left following a military intervention by French, Malian, and Chadian forces and the deployment of UN peacekeepers.

In 2019, the same Al Hassan who warned the women against further protest was charged by (then) ICC Prosecutor Fatou Bensouda for war crimes and crimes against humanity, in one of three known cases concerning Ansar Dine and AQIM's 2012-2013 operations in northern Mali.¹⁷ Charges against Al Hassan included torture, persecution, mutilation, rape, forced marriage, and sentencing without due process.

Making history, the charges included persecution on gender grounds against women and girls, as well as persecution on religious grounds against the civilian population at large. This was the first time that the ICC had considered the crime against humanity of gender-based persecution at trial. The gender persecution charges were supported by other charges, including of rape and forced marriage as an inhumane act.

After a three-year trial, in June, the Trial Chamber handed down its judgment. Confusingly, there were more decisions than judges. In addition to their joint judgment, all three judges also wrote an individual opinion, showing sharp divisions on the bench. As well, one of the individual opinions—which was absolutely key to understanding the outcome—was not released until several days after the main judgment. Colleagues and I have described this judgment as confusing, convoluted, complex, and even contradictory.¹⁸

And, even though this appeared to be from the outset a straightforward case of gender-based crime—as the entire system of control by Ansar

17 See the ICC arrest warrant against Iyad Ag Ghaly (<https://www.icc-cpi.int/news/situation-mali-icc-unseals-arrest-warrant-against-iyad-ag-ghaly>) and the judgement against Ahmad Al Faqi Al Mahdi: <https://www.icc-cpi.int/mali/al-mahdi>.

18 O'Brien et al.

Dine and AQIM, including that overseen by Al Hassan, was based on various forms of discrimination against women and girls—Al Hassan was acquitted of all of the gender-based charges, repeating an unfortunate and concerning pattern that has been seen many times before in international criminal tribunals.

Let me unpack the judgment a bit more on the gender-related charges. In the majority judgment, all three judges found that persecution on both religious grounds had been established beyond reasonable doubt. They found that Ansar Dine and AQIM severely deprived civilians of fundamental human rights in the name of their view of religion. They were subjected to Rome Statute crimes, and were deprived of the rights to bodily integrity, freedom of religion, freedom from torture, cruel and degrading treatment.

Two judges—Judges Mindua and Prost—also found that women and girls were deprived of those rights, and the rights to freedom of movement and freedom from discrimination on gender grounds, and were subjected to violence such as rape and forced marriages simply because they were female.¹⁹

Judges Prost and Mindua cited evidence that the two groups sought to control women and girls and subjected them to additional offences beyond those against the population at large, in line with their belief that women should stay home to take care of children and household affairs.²⁰ They noted that this control extended inside spaces such as hospitals and homes, which Ansar Dine and AQIM searched in order to impose “the correct implementation of the dress code” on women.²¹ This made the lives of women and girls particularly difficult

19 Al Hassan Trial Judgment: ¶¶ 1527-1556.

20 *Id.* ¶¶ 1568-1569.

21 *Id.* ¶ 1569.

and dangerous.²² This was gender persecution, in their view, and Al-Hassan was liable due to his knowledge of and deliberate involvement in the imposition and promotion of Ansar Dine and AQIM's system of surveillance and punishment.²³

Thus, there would have been a conviction on gender persecution, but for Mindua's separate judgment, which I will turn to now.

Judge Mindua found that Al Hassan was excused from all criminal liability for all charges due to the defences of duress and mistake of law. For Judge Mindua, the "duress" lay in the pressure Al Hassan felt to join Ansar Dine when Ansar Dine and AQIM took power. Judge Mindua found that a permanent state of threat existed against Al Hassan, and that Al Hassan only joined Ansar Dine as protection from AQIM. However, he did not identify a threat of imminent death or of continuing or imminent serious bodily harm, nor did he discuss whether Al Hassan intended to cause a lesser harm than the one sought to be avoided. In other words, Judge Mindua did not follow the standard of duress set in the ICC's *Ongwen* appeals judgment. Indeed, he set the standard for duress far lower. Under his standard for duress, virtually none of those within Ansar Dine could be held accountable for Ansar Dine's crimes.

Judge Mindua also found that Al Hassan "did not have the soul of an Islamic terrorist."²⁴ Normally, one's soul is not the subject of a judicial finding. In evaluating Mindua's decision, it is important to note that Al Hassan was an educated individual who held a prominent position in the Islamic Police, rising rapidly through the ranks, and ultimately becoming director of operations. He gave orders followed by police,

22 *Id.* ¶ 1570.

23 *Id.* ¶¶ 1727-1736.

24 Individual and Partly Dissenting Opinion by Judge Mindua, ¶ 114 (author's translation).

and participated in a wide range of police activities including facilitating the forced marriages. Judge Mindua’s “mistake of law” conclusion lay in the defendant’s belief that his actions accorded with Sharia law.

In my view, Judge Mindua’s reasoning and conclusions on both duress and mistake of law should be tested on appeal.

In her individual opinion, Judge Prost described Mindua’s conclusions as “devoid of legal reasoning and without any evidentiary support.”²⁵ In the case of these crimes involving sexual violence, she said:

I am of the view that there is not a scintilla of evidence that Mr Al Hassan or any member of Ansar Dine/AQIM faced any form of compulsion to commit or contribute to these violent acts, let alone that which would meet the definition of duress under Article 31(1)(d) of the Statute. The people under duress in this case were the vulnerable women and girls of Timbuktu who were forced against their wills, in a coercive environment and through the use of threats and violence, to marry members of Ansar Dine/AQIM; victims who were then deprived of their liberty, subjected to horrific sexual violence at the hands of the new ‘husbands’, and discarded afterwards. In the context of this case I fail to see how Mr Al Hassan – an important member of the Islamic Police, working daily to sustain the coercive environment created in Timbuktu, who actively supported and facilitated Ansar Dine/AQIM’s practice of ‘jihadi marriages’ and directly contributed, with knowledge, to the pressure brought to bear on women and their families which facilitated forced marriages—was under duress in contributing to this crime.²⁶

25 Separate and Partly Dissenting Opinion by Judge Prost, ¶ 3.

26 *Id.* ¶ 18.

She also emphasised the inseparability of gender and religious persecution in this case.²⁷

Judge Akane also rejected Judge Mindua’s findings, declaring that there is “neither a factual nor legal basis that makes the defence of duress or mistake of law applicable to the present case.”²⁸

Judge Akane’s dissent was key to the ultimate failure of the sexual and gender-based violence charges. She ruled that sexual violence against women and girls in detention, and forced marriages, along with the *Hesbah*’s practice of detaining and punishing women who violated the dress code when Moussa was *emir*, fell outside Ansar Dine & AQIM’s common purpose. Unlike the other judges, Akane did not regard the more extreme forms of violence against women as continuous with and enabled by Ansar Dine and AQIM’s ideology. Rather, she seemed to classify such violence against women and girls as simply “opportunistic.”²⁹

Judge Akane relied on the much maligned *Katanga* trial judgment for this point, stating: “the fact that rape was perpetrated in a coercive environment does not *per se* bring those acts of rape within a group’s common purpose.”³⁰ This is despite the fact that those who created the coercive environment appear to have done so with the *explicit shared* purpose of controlling sexual and other aspects of the lives of women and girls in Timbuktu.

She also said that the use of intermediaries (such as Al Hassan) to “facilitate” the marriages made them marriages by “negotiation” and

27 Separate and Partly Dissenting Opinion of Judge Akane, ¶ 26.

28 *Id.* ¶ 4.

29 *Id.* ¶ 28.

30 *Id.* ¶ 32.

not by force or coercion.³¹ This was despite the fact that some of the intermediaries were armed, and the families were terrified of what could happen to them if they rejected the request in a city occupied and controlled by these very intermediaries and “husbands.”

There were a number of other instances in which Judge Akane seems to have misunderstood or misconstrued the Prosecutor’s arguments, and seems not to have engaged with evidence (such as of the coercive environment surrounding the jihadi marriages, the very young age of some of the 12/13 year old victims, or the fact that Ansar Dine and AQIM ignored its own rules on extra-marital sex).³²

As a scholar whose primary lens is gender analysis, Judge Akane’s decision almost incomprehensible. “Almost” because her viewpoint is not an isolated example. Rather, and unfortunately, it continues with certain past approaches in international criminal justice in which gendered violence was routinely erased from narratives of conflict and genocide. These now-discredited approaches were rooted in outdated assumptions about the nature of that violence as separate from and unconnected to other crimes committed by armed groups,

31 *Id.* ¶ 54.

32 After noting that Ansar Dine & AQIM’s “official position” was to prohibit extra-marital sex, Judge Akane continued: “[t]he Prosecution itself has previously argued that the rape in detention ‘did not fit within the proclaimed ideology or the rules imposed by the [Ansar Dine & AQIM] Organisation in Timbuktu’ (¶ 28). This selective excerpt does not fully recognize the Prosecution’s argument: “Rape in detention did not fit within the proclaimed ideology or the rules imposed by the Organisation in Timbuktu. *Such rape, however, like forced marriages, was a direct result of the coercive and violent environment established and nurtured by the Organisation, aimed at asserting its power and authority over the population, including women.*” (OTP Trial Brief, ¶ 256, emphasis added), <https://www.legal-tools.org/doc/qfxy77/pdf>.

and inaccurate conclusions about the evidentiary weight of any ‘policies’ prohibiting that violence within those armed groups.

It is, in my view, impossible to separate the rape, detention and ill-treatment of women and girls by members of Ansar Dine and AQIM from these groups’ gender ideology, their belief in their entitlement to control the minutiae of women’s lives, their imposition of rules that made it impractical for women to participate in public life, and their enforcement of those rules through institutions in which no women held positions of power.

The primary reason that women’s rights advocates and like-minded states insisted that ‘gender’ be named as a ground of persecution in the Rome Statute was to correct centuries of blindness to the ways in which fighting forces use socially constructed gender norms, and gendered crimes, to control and punish civilian populations.

Let me end, however on a more positive note. The amount of positive and growing engagement with international criminal law outweighs the setback I just mentioned—indeed, the fact that the ICC is targeted for cyber-attacks—while not good, is evidence that powerful states view it as a potentially important means of justice.

Magnitsky Lecture

Mykola Stetsenko

It's an honor and pleasure to speak to you. It's a pity that I'm not there with you in person. I planned to come. I had a very advanced notice from David and Jim, but unfortunately, under the circumstances, you have to have a special exit permit for a man to leave Ukraine. That paper work is almost complete, so I will probably be able to travel, but not this time, unfortunately. I'm terribly sorry that I'm not there with you. I'll be very happy to answer as many questions as you have. Again, it's an honor.

I have been asked to speak about various things, about the rule of law and anti-corruption efforts. We have been talking within various associations about Russia's aggression and accountability, and we'll touch upon that later. I also thought that it's important to touch upon the successes that Ukraine has come through, and in particular touch upon the misconceptions about rule of law and corruption in Ukraine. I'm often asked at various conferences about how it is progressing, we have heard so many scandals, et cetera, and it's so difficult to do business in Ukraine and there's so much injustice and lack of protection of private property. I get to hear this so much that it almost became a mission for me to talk about these misconceptions and to put the record straight in some of the matters of corruption and the fight against corruption in Ukraine. Before I do that, and of course I will give you some figures, I wanted to take a step back and spend a few minutes on the history. I've recently read a book by Tom Bingham on the rule of law, and it was recently presented in Ukraine as an Ukrainian translation of it by the head of the Constitutional Court of Ukraine. It was an interesting discussion and there are a lot of historical passages there that made me think, "Well, how is Ukraine different from the West, and how is Ukraine different from Russia, and why are we fighting Russia, for that matter? What principles are so different for us than for Russians."

I came to the conclusion that a lot of it lies in history. Ukraine actually, at its roots, has a lot of natural propensity towards rule of law. If you look back in history in the 8th and 9th centuries, when the Vikings actually came to Ukraine, Ukraine has had a lot of proper governance, local councils, and generally it was a medieval type of democracy, but it was rather a democracy than a monarchy or autocracy. Of course, then, many centuries passed, and Ukraine dissolved within other nations— within Poland and then the Russian Empire, and of course the Turkish Empire, and later in the 19th century, the Austro-Hungarian Empire. But the rules were there, they were always there. This natural desire to be independent, to be free, to have justice, to have human rights, to have basic rights, but also to have justice. Unfortunately, what people often miss is that, for the last 300 years, roughly, Ukraine has not had its own government except for the last 33 years. We just celebrated the 33rd anniversary of Ukrainian independence, and for the last 33 years, indeed, Ukraine has had a post-Soviet and truly independent Ukrainian government. For the 300 years before that, Ukraine has never had its own government. It was always a government of the colonial power, be it Russia, be it the Turkish Empire, or Austro-Hungarian, or Polish. Ukrainians have learned to mistrust the government because the government has never been our own. That's not the justification for what is happening right now, but that's an important history lesson to understand where Ukrainians are coming from and what is our natural tendency. The natural tendency is actually very similar to that of Americans: to have as little government as possible, to have little intervention of the government, to have maximum freedom and liberty to do its own thing. Be it farming, be it engineering, be it education or, these days, IT Ukraine has actually been quite successful. I mentioned IT for a good reason. The IT industry, especially new in Ukraine. It's about 10-15 years old. It flourished. It became one of the top three Ukrainian export industries, for good reason. The government did not notice it for a very long time. It wasn't heavy machinery. It wasn't steel or mining. It wasn't agriculture, and certainly it wasn't banking. Young

geeks are doing something, and maybe they're earning something, but no one really cares until these young geeks actually created so many huge companies that then became part of international corporations. Nonetheless, it became a truly big industry that actually managed to secure special regimes for some of the companies. We call it Дія Сіті (Diya Siti). Diya means "action," so it's an "action city" if you translate it, which is a virtual city that has a certain regime for contracts, for employment, for taxation, etc., but this is a deviation.

We often hear that doing business in Ukraine is so difficult. There is so much talk about corruption in Ukraine. Ukraine has inherited corruption, and again this is not an excuse, this is the reality. It has inherited corruption from the Russian Empire, not only from the Soviet Union. It dates back to Tsar times in Russia and the history with the relationships between the Mongol and Asian people that ruled Muscovy and then Russia for centuries. This is like a disease. This is like a virus that you need to treat, and Ukraine has been doing that. Actually, in the last 10 or 12 years, Ukraine has been completely rebuilding its anti-corruption framework and judicial system with the help of the best international experts. So when people say that, "Oh, Ukraine is still very much corrupt." I usually tend to say "Well, you have to have trust in the system that has been built with the best international help."

In fact, I may dare to say that this is probably in Ukraine, at least on paper, the best and most robust anti-corruption framework that has been built in modern society. Of course, a lot of things need to be improved and tested and then implemented, and this is what Ukraine is doing right now. To give you some examples, Ukraine in the last two years has significantly progressed in the corruption perception index by Transparency International. It has scored 11 points over the last 10 years, and you will say "well, it's still lagging behind a lot." You have to bear in mind, when you look at these indexes, you're talking about perception, and there is a natural tendency for people and businesses

to remember those problems that have existed in the past and think that things are not improving as fast as they wish. In reality, things are improving, and I mentioned the anti-corruption framework. At the moment, Ukraine has four agencies that deal with various aspects of corruption prevention and corruption prosecution. In particular, there is a national agency for corruption prevention, and I'll talk about it later. There's a national anti-corruption bureau, which is somewhat similar to the FBI, the special anti-corruption prosecutor's office, and the high anti-corruption court. Only in 2023, at the national anti-corruption bureau, the special anti-corruption prosecutor's office, and the anti-corruption court achieved the following statistics: more than 100 criminal proceedings, more than 250 suspects, 100 indictments, 65 sentences, 83 convictions, and 6 acquittals. In just the first half of 2023, there were more indictments on corruption generated than in each of the years of 2022 and 2021, and I'm sure 2024, the current year, will beat that as well.

If you look at the prevention aspect, I mentioned that there is an agency that is called the National Agency for Corruption Prevention that also deals with how to prevent corruption. Ukrainian legislation now requires all public officials to submit their annual public declarations on their financial interests, properties, sources of income, and significant changes in wealth. As I mentioned, these declarations are accessible online, and there is an independent verification mechanism that involves the civil society and the agency to verify whether the information is true. The way of life of public officials is subject to continuous scrutiny, including data that is collected from independent sources and then compared to information in the asset declarations. Of course, there are very high sanctions for inaccurate financial submissions, not to mention completely false information. Apart from that, Ukraine has done a lot in terms of transparency and accessibility of information online. Ukraine now has more than 50 public registers that deal with various aspects of business and private life. For example, if you want to open a business, you

can have a company register completely accessible online, register of real estate property, of mortgages and pledges, court registers, registers of power of attorney, etc. There are specialized registers of various licenses. A lot of things are available on a daily, hourly, every minute basis and you can get that information. Moreover, the Ukrainian law specifically says that the information that is contained in these registers is verified information that a third-party can rely on, which is a very important legal principle. Apart from that, there are registers such as the register of assets seized in criminal procedures. There is a unified state register of political party reporting. You may have heard that there is a separate public procurement system called “Prozorro” which actually pushes all the government and municipal agencies to have all their procurement through that in an online and publicly accessible fashion, including some of the defense procurement as well. In the last 8 years, Ukraine has done an overhaul of its major procedural codes, of its enforcement system, of its constitution in the part that deals with the judiciary. It has elected the new supreme court and improved the procedural legislation that deals with the rights of the parties, transparency, access to the court judgments, and even electronic court.

The overall system is now very robust. In 2023, Ukraine relaunched the High Council of Justice that deals with the review of activities of judges and their disqualification. The High Qualification Commission of Judges was also re-elected in 2023 and it deals with the qualification of applicants for judicial roles. If you look back at all of this, of course Ukraine still has corruption. In fact, a bit more than a year ago, the head of the Supreme Court of Ukraine, to the huge dismay of the Ukrainian legal community and the nation in general, was arrested on the charges of corruption. Once in a while, you hear that a minister, a head of a department is also arrested, on these charges. People in the prosecution system are also being investigated by the National Anti-Corruption Bureau. The system that has been created is not only for petty corruption. It’s not only for low flying officials, but

it is also targeting, first of all, the top officials in the government. In my view, this actually proves that Ukraine, with the help of the world, with the help of the best experts, can create a very robust system. Just before this lecture, I read a statement by some of the prominent Ukrainian lawyers that is addressed to the anti-corruption authorities in Ukraine where they say that actually, the anti-corruption authorities are sometimes taking a too-conservative view. Sometimes they are putting too-high of bails. They are accepting the evidence that is questionable, sometimes. To me, that looks like Ukraine is still finding a balance between no fighting of corruption and rigorous fighting of corruption that sometimes is too quick to judge, and there is a lot of public pressure from society to disclose as much information as possible about these corruption cases, corruption investigations. Quite often, as you can see in every society but especially now in Ukraine, people are very quick to jump to conclusions and to call someone who is only investigated a corrupt person that needs to be put in jail. I think Ukraine, as every young society [does], will go through that process of finding the equilibrium, but eventually, the society will change and the corruption will fall. In the meantime, what is available right now to business, to the people, to Ukrainian business, and to foreign investors, is a much better system than there was 20-30 years ago when I started my career. Thank God technology is with us, and it really helps.

I also would like to spend a few minutes talking about the role of the Ukrainian Bar Association, which I lead. David mentioned our co-operation on various topics. We indeed cooperate a lot with the Global Accountability Network, with leading professors on the issues of Russia's accountability for their crimes in Ukraine, and the creation of the special tribunal for the crime of aggression. Apart from that, we, as the Ukrainian Bar Association, work a lot with the International Bar Association on various initiatives, including the establishment of the tribunal but also the collection of evidence of Russian atrocities in Ukraine with the program called "Eyewitness,"

as well as doing conferences all over the world that draw the attention of the legal community to the crimes that Russia has committed and also the damages that have been caused to Ukrainian businesses and people. We, as the UBA, have actually been involved last year in an interesting project which is called War Crime Trial Monitoring, where our representatives in various regions actually attended the trials on war crimes and recorded them according to a particular questionnaire developed by the IBA and reported to the Judiciary, to the prosecution, to the general public, our recommendations on how to improve the process to make it even more compliant and ensuring that even Russian criminals—Russian soldiers—get a fair trial, no matter what, in Ukraine.

Finally, I talked so much about corruption and the fight against corruption. We at the UBA believe that apart from spending so much time on the prosecution of corruption. The Ukrainian society and legal community need now to focus a lot on corruption prevention and education. In our view, there are three pillars to fighting corruption: prosecution, prevention, and education, and we hope that we will be able to launch this huge project that will analyze Ukrainian legislation in the areas where businesses meet the government—interact with the government to find areas that are grey, that require excessive discretion, that breeds corruption, and then eliminate it. Finally, we work a lot with USAID and IBA, also, on matters like educational reform in Ukraine, especially legal education reform, so that younger generations understand not only the fact corruption is bad, but also understand why it is bad and why it needs to change.

Finally, I would like to go back to the beginning of my presentation to say that I truly believe that the roots of the Ukrainian nation, the genes of the Ukrainian nation, have that rule of law element embedded. We just need to reawaken it. Ukraine is fighting not only because of its territories, but because of the principle of freedom. Ukrainians want to be free. We want to do what we want in Ukraine, whether its slow

or quick, whether it's up to international standards or whether we are lagging behind in some areas, but we want to be free to do what we like without being told by Russia or, for that matter, any other empire what to do or how to live or which language to speak. So I think that natural tendency towards freedom and liberty is actually what unites Ukrainians with many of you, with the Anglo-American world. As criminal Putin likes to say, he often refers to the struggle between the Anglo-Saxon world and the Russian world. Well, in fact, this is, in my view, a centuries-old struggle, and we believe that we must prevail and there is no other way.

Thank you very much, and I'll be happy to answer any questions you may have.

[Applause]

AMBASSADOR BETH VAN SCHAACK: Hi, thank you so much. That was a very informative lecture. I'd love it if you could talk about your role in ratifying the Rome Statute, and also what your interpretation of the Article 14 declaration is given ongoing cases before the ICC involving war crimes and crimes against humanity.

MYKOLA: I can speak a bit about it, but I'm not the best expert on international criminal law. David might be better in place to speak more about Article 14. The Ukrainian Bar Association definitely supported the ratification. I cannot say that we had a role in this. I think the government had a role in this, and finally made a bold step towards ratifying the Rome Statute. I believe this is very, very long overdue, and the legal community definitely supports it. You need to understand the background that there is a lot of misinformation, like in any other country, but especially now in Ukraine. Many people in Ukraine, especially in the military have been misinformed about the role of the Rome Statute, and the government has actually done quite a good job in promulgating the idea and explaining. In fact,

they have asked us to use the U.B.A. platform to explain to the legal community, and to society, the advantages of that ratification. Of course, the President recently signed the ratification law, which is very welcomed by our association. I think many people got worried that because Ukraine is in full-fledged war, the jurisdiction will apply. I understand that there are some qualifications made to that particular area. Some of the crimes may not be investigated for the next seven years, I believe. Honestly, my personal view is that you have to be very straightforward with Ukrainian society on that. We are fighting because we don't like the principles, the ideals that Russia is bringing, so we have to apply different ones. We have to apply civilized ones. That means that even if Ukrainian soldiers commit war crimes now, my personal view is that they have to be held accountable as well. I mean, the government is trying to find the balance in that area, and it remains to be seen how it plays out.

DAVID: Any other questions? Well, Mykola, thank you for the very informative lecture.

Panels

Benjamin B. Ferencz Prosecutors' Commentary and Update

This panel was convened at 10:30 a.m., Monday, August 26, 2024, by its moderator, Michael Scharf, Professor of Law at Case Western Reserve University School of Law.

[MICHAEL SCHARF] Welcome to the annual Benjamin Ferencz International Prosecutors Roundtable. This is the main event, so to speak of the IHL Roundtable. It's the chance for you to hear from the world's international prosecutors about some of the most important issues in international criminal law. We'll start in alphabetical order: Laurel Baig, the senior appeals counsel in the Office of the Prosecutor of the International Residual Mechanism for the Criminal Tribunals. Then on the video, hopefully we will have Fatou Bensouda, the Gambia Ambassador to the UK and former Chief Prosecutor of the ICC. Andrew Cayley is with us, the former chief prosecutor of the ECCC. That's the genocide tribunal for Cambodia. And maybe genocide tribunal is not even the right term for it, but that's one that you'll recognize, I'm sure. He's currently the ICC lead prosecutor in charge of the Gaza case. We have David Crane, the founding Chief Prosecutor of the Special Court for Sierra Leone, and the co-founder of the IHL Roundtable. We have Norman Farrell, the former chief prosecutor of the Special Tribunal for Lebanon and the Deputy Prosecutor of the Yugoslavia Tribunal, and currently Senior Legal Advisor at the Crimes Against Humanity and War Crimes Section of the Canadian Federal Department of Justice. We have Brenda Hollis, the former chief prosecutor of the ECCC and the former chief prosecutor of the SCSL, the Special Court for Sierra Leone, and she's currently the ICC's lead prosecutor in charge of the Ukraine case. We have Jim Johnson, our moderator and host, the Chief Prosecutor of the Residual Special Court for Sierra Leone, and he is the director of Case Western Reserve University School of Law's Henry T. King, Jr. War Crimes Research Office. We have Robert Petit joining

us on video. He's the founding Chief Prosecutor of the ECCC, and he's currently the head of the IIIM investigating Syria. We have Stephen Rapp, the former chief prosecutor of the Special Court for Sierra Leone and Ambassador at Large for War Crimes Issues at the US Department of State. And finally, James Stewart, the former Deputy Prosecutor of the ICC.

This is the most people we've ever had in one of these, and we will go till 12:15, so we have one hour and 10 minutes. What that means is, you guys are going to have to be really economical, because we want to have a whole discussion. They're going to start out by telling us each about one of the most significant things going on in their world, wherever they're working, whichever tribunal or affiliation they have. Then we have a second round where I'm going to be asking them some specific questions. Then, if there's any time left, we'll have some questions from the audience. So, let's start asking them to opine on some major recent developments related to international justice. Laurel, let's just start with you. Tell us about something significant in your world.

[LAUREL BAIG] I work at the International Residual Mechanism for Criminal Tribunals. With the completion of our final appeals case in the former Yugoslavia, following on the ICTY, and with the Kabuga case that I think we'll talk about later being stayed because of the lack of capacity of the accused, we thought we were moving into a truly residual posture. We thought we were moving into a stage where we would devote all our attention to supporting the national cases in the former Yugoslavia, in Rwanda and in third countries that are prosecuting cases relating to these conflicts. So, it came as a bit of surprise that what I'm working on now is a review hearing. The judges have reopened one of our very old cases, and I think it's of interest, particularly to an American audience, because it's the case of Gerard Ntakirutimana. Gerard Ntakirutimana is a doctor. His father was arrested here in the United States in the late 90s. The case went all the way up to the US Supreme Court. He was eventually extradited.

The ICTR Trial happened in 2001. The appeal was completed in 2004. Because of a witness who has purportedly recanted, the judges, in order to ensure that there's been no miscarriage of justice, have reopened the case on a very narrow point. So we are engaged in a review hearing, and we're back into the evidence and the underlying charges of one of the old ICTR cases. We will be going back to court in November. That is what I'm doing. I think it's surprising and not expected, but that's where we're at. So hopefully that will finish that up this year and we'll move back towards residual activities.

[MICHAEL SCHARF] You can always count on Laurel for following the directions, keeping it short and concise. But the important thing is, who knew that at this point they were going to be starting over with an entire evidentiary case again? So, buckle up. It's going to be an interesting ride. All right, next? Do we have either Fatou or Robert yet? Not yet. Okay, so going next in alphabetical order to Andrew Cayley.

[ANDREW CAYLEY] I'm going to stand actually, I mean, you've already heard something this morning about what I'm working on. I want to be very careful about what I say. I think I'd agree with Mr. Rosenbaum that the suffering in Gaza has been great, and the death toll is very high. I'd also actually make that same comment about the Hamas attack on Israel. One of the things that I think we should make clear is that the office is looking both at the attack by Hamas on October the Seventh against Israel, and also subsequently military operations in Gaza by the Israelis and the alleged crimes that have happened there. So, we're looking at both sides. We're looking at the victims of both sides of this conflict. And I know that I've got to keep this short, but I've been doing this for 30 years, and one of the things that has really struck me, actually about this conflict on both sides, both Israelis and Palestinians, are the number of children that have been mutilated and killed on both sides. And I'm reminded of this quote to I said to somebody yesterday, that President Jimmy Carter said, many years ago he said, we cannot possibly have peace until we

stop killing each other's children. So, I just wanted to give you some kind of balance. You know, feelings are really strong around this case, and ultimately, you know the arguments that Mr. Rosenbaum made this morning, and you know, I respect him. He's a highly respected lawyer. I have utmost respect for him. You're entitled to the views that you have. I have a completely different position on this, as you know, and I think the right place for this to be taking place is actually in the courtroom, not here, basically. And I'll finish just with this. Actually, it's a quote from Martin Luther, not your Martin Luther, the German priest, he said this, and I'm this is my position on this. It's the prosecutor's position about this case. "I cannot and will not recant anything for to go against conscience is neither right nor safe. Here I stand. I can do no other. God help me. Thank you."

[MICHAEL SCHARF] Now, if you are interested in seeing a longer presentation by Andrew this week, he is our Klatsky endowed lecturer on Wednesday at 4:30pm at Case Western. That will be webcast live, and Andrew is receiving our Humanitarian of the Year award. So, congratulations, Andrew, for that. Next in alphabetical order is David Crane, the founding Chief Prosecutor of the Special Court for Sierra Leone. David.

[DAVID CRANE] You know, I was sitting here listening to Laurel talking about the residual courts. I remember back in 2002 briefing the Management Committee on my 10-phase general strategic plan on how we were going to do our work in West Africa. And at the end, I talked about, you know, at the when we're done with our work, and this applies to all the tribunals. You're going to have to have residual courts. This is 2002 and they all looked at me like I had said something very terrible, and they kind of fluffed off. And they said, well, we'll deal with that later. I said, no, stop and think, you know, if I am successful in my work, I'm going to have people who have been convicted in most cases for many a term of years, and some maybe for the rest of their lives. They must have a right to whatever

post-trial issues are. So just as a contextual and like the UN and its forward thinking and open-minded approach to things, they blew me off and we never, never talked about it again. This is a strange world we live in, a more complex world than I ever been in. I'm a former cold warrior, you know, facing down the Soviet Union for decades, but I've never seen the world in such turmoil as we are now. And you know, as part of the Global Accountability Network, we are doing investigations around the world, in Syria, Venezuela, Pacific Rim. We call it the Pacific Rim Accountability Project, because I can't use the word China, because people run to the exits, and we can't get universities to support a China Accountability Project. So, we change the name to a Pacific Rim Accountability Project, and we have sponsors, but we're obviously dealing with the Uyghur genocide and all of that horror that goes with it. We're also very much involved in Venezuela. We just started an African Accountability Project based at the University of Johannesburg. And of course, we're very much involved in the Ukraine Accountability Project. And through that, we have developed a high-level Working Group. Three Heinz awards winners are part of that group, Erwin Kotler, Hans Correll and Richard Goldstone. Ambassador David Scheffer and I have been working for two and a half years trying to set up an aggression justice mechanism. First, it was the UN General Assembly backed special tribunal for aggression for Ukraine that went out the window because of political reasons. And so we regrouped and posed the question, can a group of UN member states come together, very much like Nuremberg, and create an aggression tribunal? And that is moving forward. We created the statute that is now the cornerstone of that with the core group as well as the Council of Europe, and we are moving closer to a reality of creating a, what we call a multinational court for Ukraine on the crime of aggression.

[MICHAEL SCHARF] Great, and we'll return to that issue. But David, I just want to mention that at Case Western, the Yemen Accountability Project is part of your umbrella.

[DAVID CRANE] I forgot that, of course.

[MICHAEL SCHARF] And we're very proud to be affiliated with that. Thank you for putting that together, and we'll hear more about your work with the aggression tribunal. I thought I saw Robert Petit on the video. Are you still there? Robert? There you are. All right. Robert Petit, I'm going to go out of alphabetical order because I heard you're in need of for time purposes, getting this done early on in our hour. I want to start off by saying, Robert, we miss you and your wife and your dog, but it's nice to see you on video. What we're doing, Robert is just having each of the prosecutors talk briefly about the most significant thing this year that they're doing in their role, and we'd love to hear about what's going on at the IIIM under your leadership.

[ROBERT PETIT] Great. Well, I'm glad I can be with you all, and as I said, Jim apologizes for the technical issues, and I'm happy that I can join you virtually. At the IIIM, as you know, we were created by the General Assembly to address the mass atrocities committed in the Syrian Arab Republic since March 2011 following the popular uprising and the repression of it by the regime. It is, as a reminder, a conflict that has led to about 500,000 people dead, about 5 million refugees to this day outside Syria, about 12 million IDPs, 130 or 150 depending on accounts of missing persons, and about 25% of the territory of Syria that is still under an armed conflict between the regime its allies with Russia, diverse groups, including a resurging ISIS, Turkey and the US presence. So, it's an ongoing conflict that has faced too much impunity and would have if the General Assembly had not taken the lead over a paralyzed Security Council and created the IIIM in 2016. We are mandated to gather, preserve, analyze and share all relevant information concerning serious violations committed in Syria since March 2011. To assist and support ongoing and future accountability, investigations and prosecutions for those core international crimes committed in Syria. To date, we have about 2.5 million records, which represents an excess of 250 terabytes of information that we've

gathered. We've deployed cutting edge information management tools that has allowed us to, among other things, assist 16 jurisdictions, through about 400 requests for assistance that we've received. Those represented 280 discrete investigations of individuals who may have committed crimes in Syria and returned to different jurisdictions. 199 of which we were able to support, in other words, to answer those requests for assistance, and then about a third of them to add value to them with information that the prosecutorial investigators did not have. So, whereas these requests represent accountability, it's still a very small part. And I'm personally hopeful that one day the political situation will allow for, in Syria, a tribunal. And as part of our mandate, we are preparing for that, and we are working on different lines of inquiries, one of which includes the specific crimes and patterns associated with Daesh. Other lines of inquiry also include the attacks on the civil population, such as the chemical attacks that we all remember. So, all of that has come in large part because my predecessor, and team, has built a very privileged relationship with civil society organizations. Syria Civil Society organizations that represent a key source of support and information and engagement with us. It's a very special relation that I've never seen in any of the tribunals. And we are privileged to have this relationship, but we're going to continue building on it. And hopefully, as I said, one day we will have a encompassing accountability process for the crimes that have been committed in Syria. Thank you.

[MICHAEL SCHARF] Thank you, Robert. One of the things that you probably have noted about our prosecutors here is they start as prosecutors at one tribunal, and just when you thought they were retired, they pop up and do something else really significant. And we're excited for your new position, Robert. All right, back into alphabetical order. The next person is Norm Farrell, and we're interested to know what you're doing up in Canada these days.

[NORM FARRELL] First of all, thank you very much for the invitation to attend. Thank you, Michael. My job at the moment covers a number of issues. I provide a certain amount of advice related to accountability for international crimes. I'm also advising with others in the government on the conflict in the Middle East and in Ukraine, and advising the Canadian authorities on accountability for people entering Canada seeking either refugee or immigration status. I can't speak for Canada specifically on all the matters I have been working on, or the areas where international criminal law is being developed. But the first matter, in terms of the development of international law I wanted to mention was the proposed Crimes against Humanity Convention. I've been sent as part of the Canadian delegation to New York to engage in the process of development of the crimes against humanity convention. This includes advising on matters such as gender apartheid or the slave trade as a potential crimes against humanity; as well as the definition of gender as set out in the ICC, as certain states have taken the view that gender is restricted to what I will call a more traditional definition of gender. Further, the discussions have also included whether Canada accepts certain definitions of crimes such as the elements found in the ICC for extermination. Canada's position, as an example, is that the definition of extermination in the ICC Statute does not reflect customary international law.

There have been steps made in the use and application of accountability for international crimes. This includes the use of the ICJ. I'm currently advising on the utilization of the ICJ to address crimes against humanity, genocide or war crimes in relation to state obligations. We've traditionally looked at individual responsibility, as we have all been involved in investigating and prosecuting individuals. Now states are turning to the ICJ and I have been involved in advising on state obligations under Conventions, and cases brought before the ICJ as a mechanism for accountability, even though it's state accountability. I'm advising on the ICJ case of *Gambia v Myanmar*, where Canada is intervening in that case, specifically on the definition of genocide.

The ICJ cases have also raised issues related to the interplay between human rights and international criminal law, specifically before the ICJ in the Syria case. In that case, *Canada and The Netherlands v Syria*, Syria is being brought before the ICJ for its violation of the Convention against Torture, including for events that our colleague Robert Petit has spoken about a minute ago. In that regard, Canada has looked to international criminal law cases that define what constitutes cruel and inhumane treatment, public reports on the facts such as those published by Robert's office at the IIIM or other international commissions. These are some of the matters that I have been currently working on. Thank you.

[MICHAEL SCHARF] That's exciting. Thank you for sharing that. Next in alphabetical order, we're going to the indefatigable Brenda Hollis, whose birthday was on Friday. Happy birthday.

[BRENDA HOLLIS] That just proves dinosaurs do roam the Earth. When I leave the ICC, it will be my fifth retirement, so at some point I have to look up the definition of that word.

Ukraine is very much involved at the investigative stage, and because of the scope of the potential criminality and the ongoing conflict we're looking at it in a thematic way. We have currently looked at two different themes of criminality and have submitted requests for arrest warrants in that regard. The next step for those cases, when the arrest warrants are issued, will be to prepare for confirmation hearings. So that's what we're looking at for deportation of children and the attacks on the power grid in Ukraine.

Of course, the big issue with the attacks on the power grid is, are these attacks on a civilian object? Or on a military object? Or does it depend on the circumstances? And so we dealt with both, because the legal analysis is very different, depending on how you characterize the attacks.

We were fortunate to move into our current focus and our current line of inquiry before the Prosecutor decided to move forward with Palestine. Andrew Cayley was not yet on board, so I had the privilege of heading that team until the applications for arrest warrants for Hamas and Israeli officials were submitted. But more importantly, we are one OTP office, and so I was able to bring several of my people from the Ukraine team to work on the Palestine team, which at that point was undermanned, and in my view still needs significant manning to deal with the situation it has. So moving into new investigative priorities in the Ukraine situation before I took over the Palestine team was very fortuitous, for the Office, and also very important for the people on the Ukraine team as well.

The OTP has established a field office in Ukraine, which is very important for us, because it allows us to enrich and expand the very excellent working relationship we have with the national, regional and local authorities in Ukraine. And we very often go very close to the conflict line. Sometimes, despite what the boss tells me to do, I go to the conflict lines. But I think it's important that we bring international justice representation to those areas, because Ukrainian prosecutors and investigators go there every day. And so why should we not? I think it is very important for us to be able to go to those areas; it is a significant accomplishment for us, I think. I would only say, in closing, that we are able to move fairly quickly in Ukraine, relatively speaking, because of the excellent cooperation we have with Ukrainian authorities, with the Prosecutor General himself, with the Office of the Prosecutor General, and with all of the regional and local prosecutors and investigators. Without that cooperation, we would be stymied in our ability to move forward. Thank you.

[MICHAEL SCHARF] When I first met Brenda 30 years ago, she was JAG Colonel Brenda Hollis trying the *Tadić* case, and if I know anything about Brenda over these years, she's incredibly brave. So, I'm not surprised to hear that you're going off into the front lines to do

your job. Thank you for that. All right. Jim Johnson, you're our emcee. You've had a big year. You had a legacy conference. Tell us about it.

[JIM JOHNSON] With pleasure. From the RSCSL perspective, we continue with our normal activities including sentence enforcement, we have another number of our convicts on conditional early release which requires constant monitoring. And, of course, witness protection issues are still very much in our headlights as well as issues concerning the availability and maintenance of our archives, just to name a few. But more recently, with the recent and ongoing conflicts, there has been great interest in, and everybody's been talking about the special court model. Looking at what we've done, looking at how we were set up, looking at how we accomplished our mission in a time frame that we did by comparison to the other tribunals. We were faster, we cost less, and we were organized and set up in a very unique way. And so there has been interest in looking at the special court model, and how could the special court model be adapted in other considerations. So with Binta, our Registrar, leading the effort, we looked at how can we bring to the Region, and beyond, the lessons of the special courts model, and how can the lessons be used in other situations? The Gambia, Liberia, Ukraine, Sudan and beyond, are just examples of where the special court model is being closely looked at. So, with the help of wonderful supporters and sponsors, we were able to put together a legacy conference in Freetown this past February. Attendees included representatives of judiciaries, justice departments, civil societies, victims groups and more from the region and beyond. Many in the room today were speakers and moderators at the conference. For example, we brought together a victims forum, which I'm not sure has been done before, where victims were able to tell their stories. There was also a Judge's forum where the Judges were able to give their perspectives. We brought the lessons learned and how they can be applied in the region and elsewhere in a report which can be downloaded from our website. Please download it and take a look. The viability of this model has

not run its course. In fact, it may be great gaining strength. That's a highlight of what we've done this last year.

[MICHAEL SCHARF] Alright, that's terrific. Let's turn to Stephen Rapp. We've heard he's gone 85,000 miles this year. That's a slow year for Stephen. But what have you been doing with all those miles?

[STEPHEN RAPP] I have been going to many situation countries and assisting the victims and survivors to develop the evidence. My central project is the establishment of a global investigative mechanism expanding on what Robert and Nick are doing with the Syria and Myanmar mechanisms. That is a broad topic, and I can talk about it later.

Now I would like to focus on Syria where we have had some fantastic breakthroughs in the last few months. This is due to the work of civil society groups that are showing that even in situations where there's no path to international justice, it's been possible to achieve some real progress. This has been aided by the work of the Syria IIIM under Catherine's and Robert's leadership but has been possible because the groups gathered such strong evidence from the beginning of the conflict.

My own involvement has been as a board member of the Syrian Emergency Task Force (SETF) that has worked to protect Caesar and bring him and his thousands of photos of murdered torture victims to Western audiences and courtrooms, and through the Commission for International Justice and Accountability (CIJA) which I chair, which has brought 1.3 million pages of regime documentation out of Syria, and with it built cases against hundreds of perpetrators that has been shared with the IIIM and directly with national prosecutors in third states. I have also worked with groups of European attorneys who are able to initiate and/or participate directly in criminal cases in civil law countries.

There have been two developments in the last few months. One is in France, where victims' organizations began a chemical weapons prosecution against President Bashar Assad, his brother General Maher Assad, and two people who lead the Syrian Scientific Research Institute. France had jurisdiction because there was a French citizen injured in the East Ghouta chemical weapons attack in August 2013 that killed approximately 1,600 men, women and children. Jurisdiction was thus based on the passive personality principle. On that basis, the judges of the investigative chamber issued arrest warrants, including against President Assad. That was challenged by the French prosecutor because of the *Arrest Warrant* case at the ICJ case of 2002, that says that a third country cannot prosecute the Troika, in other words, the president, the prime minister and the foreign minister while they are in office. We fought to uphold the Assad warrant in the Court of Appeal of Paris, and on June 26 won a decision that the conduct of Assad was so much outside international rules and norms that he was not entitled to immunity. Essentially, the judges looked at the reality that he had made himself president for life, and that recognizing his immunity would give him impunity, which is unacceptable for such a serious international crime.

The French prosecutor has again appealed, now to the French Supreme Court, the *Cour de Cassation*, and we are expecting a decision in April. But it shows that when you have enormously strong evidence, such as that implicating Assad in the chemical weapons attack, you can sometimes break through barriers that we thought were impossible to overcome.

The other is in the United States. In November of 2021, SETF identified the former governor of Deir ez-Zur, a province in Eastern Syria, living under an assumed name in Los Angeles, California. His real name is Samir Othman al-Sheikh, and he was appointed by Bashar Assad as governor of the province where he was responsible, according to evidence developed by CIJA, for crimes committed against the

civilian population of Deir ez-Zur. And he is also responsible for torture committed before the Syrian uprising in 2011, when he was administrator of Agra prison outside Damascus.

Two months ago, he was attempting to leave the United States on a one-way ticket to Beirut. He was arrested, and two weeks ago, on August 9, a federal grand jury in Los Angeles returned an indictment against him for false statements during his immigration and naturalization proceedings. Together these false statement charges carry terms that total 20 years, and there is precedent given the seriousness of the underlying conduct to “boxcar” the penalties and imprison him for the full 20. He is 72, so he faces the prospect of an effective life sentence. And the US authorities are continuing the investigation and may yet be able to charge him for torture under the US statute.

So, in the Syria situation where vetoes in the Security Council blocked ICC jurisdiction, it has been possible for civil society groups, by gathering the evidence and linking it to the perpetrators, and working with the IIM and national authorities, to achieve historic justice. In the process they have also been able to benefit from the law and the precedents developed at the international courts in which we have all served. Thank you.

[MICHAEL SCHARF] Two observations from what Stephen just said. One is you can see how collaborative the international prosecutors are even after they leave their initial positions. We’ve now heard, I think, four of the prosecutors talk about how they’re all working on different aspects of Syrian accountability. And the second observation is, I actually didn’t know that the French Supreme Court was going to decide that case in the Spring. I’m sure that not just Assad, but Mr. Putin, is also very concerned with the outcome of that. So really interesting things happening at the domestic level as well. Finally, we have James Stewart, the former Deputy Prosecutor of the

ICC. He told me, when I saw him last night, that the last time he saw me, I had a beard that was six years ago. So welcome back, James.

[JAMES STEWART] Thank you, Michael. I've been out of the ICC for two years now and been involved, in my retirement, in a few projects. But one of them that I have found particularly worthwhile and interesting involves the training of Ukrainian prosecutors with respect to war crimes and genocide, but particularly war crimes. I'm the only Canadian on a British team that is supported by a UK NGO and funded by the Foreign, Commonwealth and Development Office of the UK Government. We do the training in Poland for security reasons, but it also gives the Ukrainian prosecutors and investigators a little break from having to go into bunkers to avoid missile attacks and all the rest of it. I realized that very early on. I've been to Poland four times now, and the sort of work we're doing, really, is to assist domestic prosecutors who, until the Russian aggression against Ukraine, hadn't had to deal with war crimes. And in essence, we share with them what we learned. And I was never trained in international criminal law. I learned on the job, like many of us did, and so we share with them what we learned. And for example, the Ukrainians will come up with scenarios, and I helped create a template of the Elements of Crimes Document, what you'd have to plead in terms of mental element, contextual element, material elements, and how you might approach that in a domestic setting. And then we get them to really do, to do the analysis of the scenarios that they've come up with as a function of those templates, so that the indictments they bring, the investigations that they organize, and ultimately, because there's a judicial side of this training that I'm not involved with, the judgments that come out of trials that the Ukrainians themselves hold can stand up to international scrutiny. And of course, we use as a very handy checklist the Rome Statute and the elements of crimes document. And this, this process may now become simpler, because I understand that Ukraine has now ratified the Rome Statute, and that will become part of Ukrainian criminal law. Because under the Ukrainian Criminal

Code, international treaties have been ratified by their parliament, become part of domestic criminal law. And the issue, of course, for us in the training has been, fine you bring those elements of the law into your practice, but you have to be specific. You have to be focused. You have to lay out, for the accused, for the judges, for the public, what it is you have to prove, and how you're going to prove it in your pleading. So, I've really enjoyed that work. And if you permit me, Michael, I'll wish Laurel really good luck with Ntakirutimana. It was the first appeal that that we dealt with at the ICTR, when I went back to the ICTR to be involved in appeals after being involved with trials. And may I say, the way prosecutors do cooperate with one another, when I left the ICTR the first time I slept at night because I knew Norman Farrell was on the appeals coming out of the convictions that we secured for genocide in those early those early trials. Thank you.

[MICHAEL SCHARF] Thank you, James. Now, Jim, we still don't have Fatou on the video. Is that right? No, no Fatou? Okay, so let's begin the lightning round, and I'm going to start with a follow up to James Stewart. This is something that I don't know if a lot of people know is coming up, but it's a really big deal. On October 15, the ICC is scheduled to have its first ever in absentia, Article 61 confirmation hearing in the case of Joseph Coney, who was the leader of the LRA, the Lord's Resistance Army that kidnapped 60,000 children and turned the boys into killing machines and the girls into sex slaves. And he's eluded justice now for 20 years. So, the question I have for you, as the former Deputy Prosecutor of the ICC is, what are your thoughts on that case, on this new procedure that's never been tested before at the ICC?

[JAMES STEWART] Michael, I can say that when I was still at the ICC, it was something we were beginning to talk about for various reasons. And when you mentioned, when I saw that this was going to be a question I would have to deal with, of course, I went to read what the ICC has been saying about these things because I hadn't

been in touch with it. But my thoughts, and these are my personal thoughts, I think, in a sense, an Article 61 hearing which, of course, isn't to establish guilt, but to establish substantial reasons to believe that the person charged has in fact committed crimes under the Rome Statute, and if the confirmation hearing is successful, the suspect becomes an accused and potentially, then obviously subject to trial, if they can be, if they can be arrested and surrendered to the court. But it's a response, in a sense, to a chronic problem of the ICC, and not just the ICC, other international tribunals have faced, and that is, you may bring charges against someone, but then the challenge is to get them before the court. The International Criminal Court has no police force of its own, and it has to rely on others for the arrest and surrender of suspects to the court who can then stand trial. And in relation, of course, in the Ongwen trial, the prosecution was very successful, he's now doing 25 years for war crimes and crimes against humanity. And I used to delight in telling American officials that we can thank them, and in fact, Stephen Rapp, very largely for the fact that Ongwen was brought before The Hague. So, in a sense, it's a response to the inability to get the physical body there. And Article 61 permits hearing in absentia on substantial reasons to believe that a person has committed a Rome Statute crime. And I suppose it's a way of underscoring the evidence that's been collected to make known to the world the case that the ICC has to bring against the person who is wanted. And I suppose it allows at least victims even if they don't testify themselves, but their stories are told, to have some voice in what happened to them. And from a very practical point of view, I suppose, when I left the ICC, I think there were six trials ongoing at the time, the court was busier than it had ever been. But these trials run their course. And of course you run into that hiatus problem. You've got arrest warrants out there, but the people are still out there. Until you get them into the into the court, you can't sort of fire up the judicial engine again. So, if you want to use some judicial energy, I suppose a very good way of doing it would be to have a

hearing under Article 61 in relation to a particularly infamous case. Those are my personal reactions.

[MICHAEL SCHARF] I'm going to dig a little bit deeper into this issue because I'm so fascinated by it, and I think a lot of people are unlike the Rule 61 in absentia confirmation proceeding of the Yugoslavia tribunal, which, if you all remember, Karidsich, had been subject to, there that there was no role for the defense counsel. For the ICC, there's not only a role for the defense counsel, but apparently the court is going to order that they have access to full discovery, that they be able to cross examine witnesses, bring their own witnesses, get evidence into the record. So, it's really going to be more like a mini trial than what we saw before. Let me switch over to Norman Farrell, because you prosecuted in absentia case at this special tribunal for Lebanon. Since this is going to be, even though there's no guilt or innocence, more like that kind of case, what are the lessons from your experience that might apply to the ICC Coney proceedings?

[NORMAN FARRELL] First of all, Michael alluded to, the STL trial concerned guilt or innocence as opposed to the determination at a confirmation proceedings. There were positive aspects in our case of a trial *in absentia*. The reality was that it would be extremely difficult to arrest the four persons alleged to be associated with Hezbollah and which were found by the court to be associated with Hezbollah. In the end, three of the four individuals were convicted. Despite this, none have ever been arrested. The tribunal has closed since their convictions, so there is essentially no possibility that they will be now arrested. What was of value – which may be of similar value in confirmation proceedings before the ICC – was the importance to the victims and Lebanese society. One example was what occurred, rather unexpectedly, on the day of making the Prosecutor's Opening Statement in court. After I was leaving court, some victims who were in person watching the proceedings spoke to one of the Prosecutor staff. The communicated that even if the accused were not arrested,

the most valuable thing was that their story had been told. And in fact, one of them referred to the fact that some of the activities outlined in the Opening Statement were close to where one of them lived and spoke openly that she had no idea that she lived close to where the accused surveilled Hariri in preparation for his assassination. So, there is value in just the fact that the story is being told, accountability is being voiced even without the person's present. It's been 17 years since Kony has evaded justice. Now, in terms of the particular proceedings for the ICC, and both of our colleagues from the ICC can speak more specifically to the sort of procedural aspects, but, first of all, the requirements the prosecution has to make for such proceedings – as in Kony - are extensive. The requirement to provide the court with the overall number of written pieces of evidence, the overall number of non-written pieces of evidence, whether the Prosecution is relying on photographs, videos or audio, the length of time it will take to immediately disclose them, the estimate of the amount of exculpatory evidence, will witnesses be called to testify, etc.

This is an extensive exercise, and despite the ICC hearing being scheduled for October 15 of this year, the reality is, at least this is what we found at the STL is that there will ultimately be a challenge to the legality of the proceedings, because they're in absentia. The second was the issue of fairness, because if the length of time it will take the defense to review and prepare for the hearing when it is receiving extensive disclosure within months before the hearing. One must plan for the possibility of request for adjournment after the Defense are appointed, which was to take place within three to four weeks after the decision in March. Another difficulty we came across at the STL was that the defense counsel after getting appointed, submitted that they couldn't actually carry out their functions because they'd be disciplined by their national Bar Association. They argued that this was because in their national jurisdiction they could not represent someone unless they took instruction and the accused was before the court in person. This position seemed inconsistent with the acceptance

of the appointment by the very same defense counsel when they were appointed for in absentia proceedings. Plus their domestic bar rules did not apply before the STL. So, one had to deal with the delays and non-cooperation by Defense Counsel, despite the court finding that in absentia trials were permitted. Then there was the challenge to the unfairness, because they couldn't consult with counsel, which the court also addressed. This may be less of a concern at a confirmation hearing, where evidence is not called and the defense usually does not call a defense. I think there's less chance there'll be challenges to the fact that the prosecution is bringing summaries of evidence, but that's already been dealt with at the ICC, and my understanding is the only case where actual witnesses were called was in the Kenyatta confirmation hearing, partly because of the expectation that some of the witnesses may not testify later. So, it's going to be fairly procedural, and I expect there'll be an extensive number of challenges. At the end of the day, if Kony continues to remain at large, there are benefits with a confirmation hearing. The last thing to note is that, though it's in the rules that they will have an *in absentia* proceeding, one must look at the other courts, the ICTY, the ICTR, even the STL confirmation proceedings which were in absentia. In the STL, despite in absentia proceedings, there was no right to assign counsel during the confirmation proceedings, though there was a right to assign counsel in absentia without the accused in the actual hearing. So, I think there's less risk for the prosecution in that regard. Thank you.

[MICHAEL SCHARF] Oh, that's fascinating. Thank you for that update. Based on that, if I were a betting person, I would say it is not going to happen in October, probably in the Spring, because there's going to be a lot of delays. I see that Fatu has joined us, and then she left. All right, what I'd love to do, because every year when we do this. Is she back? Fatu, welcome. We miss you. Well, Fatou, we would love to hear what you've been up to lately, and anything you'd like to tell our audience.

[FATOU] Well, I have been doing mostly diplomatic work. But at the same time, I get invited to many of these events and I've been attending quite a few. I also get invited by London School of Economics and Oxford, some of the universities here, to give lectures, which I do in my spare time. I was invited to look at the draft bill to setting up the special prosecutor's office in The Gambia. And in fact, Stephen Rapp and Charles Jalloh are also part of that group. So, we did that, and in April of this year, it was taken before Parliament and is now enacted. So, preparations are underway to have a special selection panel, which I have been invited to join to recruit the Prosecutor and some of the staff. And maybe I'll just mention what happened in May, I think you have seen the Guardian article that came out regarding the intimidations and threats that I received during my time as Prosecutor. And it may be headlines that I was solicited by many big media houses, from CNN to NBC to BBC, and other media houses that wanted me to speak about it, but I chose not to. For the moment at least, I chose not to. But it did make big waves. I was getting all these calls, and people were sending in letters to say we didn't know this is what was happening. I was not the one who revealed it I must say. I don't know how they got the information, but at least it was true that this happened. But I kept it to the core staff at the ICC and also spoke to the Netherlands government to provide for the security that was needed. I think when it's time I will be able to openly talk about it. What they wrote was just a tip of the iceberg - was not really everything, but not only myself, my family was also targeted. And apart from that, I'm just busy with my work. At the moment, my Minister of Foreign Affairs is one of the candidates for the Secretary General of the Commonwealth. And this process is ongoing. We are meeting in Samoa in October for the elections to take place. In the meantime, we're doing the campaign for him. There are three candidates, all from Africa. There is the foreign minister of Ghana, it's a lady. There is also a former Minister of Trade, I believe, from Lesotho. So, it was decided that this year is Africa's turn. The candidates were busy trying to get an endorsement by the

African Union, as sole candidate. But the African Union decided to endorse all the three of them to go forward and compete. At the end of the day, it's all Africans. The events and debates of the candidates are being organized, which will take place next month, and various other events running up to the elections in Samoa in October. So basically, that is what I am busy with.

[MICHAEL SCHARF] Fatou, thank you for that update, and we miss you in person. Can I say based on your description of what you're doing, you're not only the ambassador of Gambia, you're the ambassador of international justice. We're really thankful for the role that you play. Also, I know that you described it in sort of vague terms, but there is a lot of concern now about attacks against prosecutors, the ICC, witnesses. And Article 70 of the ICC statute is the article that says the ICC has jurisdiction over anybody from any country who is trying to interfere with international justice. And I think that that is going to be a big issue coming up. But when we look at all of you international prosecutors, I think we take for granted that you guys are putting your lives on the line to do these jobs, and we really are grateful for that. Now, at this point every year, people say, I wish it was more time to ask questions from the audience, so I have 15 minutes for you to ask questions. Please state your name. Ask a question. Don't make a speech. Make it short, and then identify who the question's for. Anybody here can chime in, and if we keep it fast, we'll go through a number of questions. So just anybody want to raise their hand. Okay,

I'm going to bring the microphone to you.

[MILENA STERIO] Thanks, Michael, hi everybody. Milena Sterio, it's such a pleasure to be here again. I first just wanted to very quickly know that there is a disproportionate number of Canadians on this panel. Unbelievable. But here's my serious question. It has to do with the residual mechanisms. Should we be looking into

some consolidated residual mechanism? You know, there are courts that have closed over the years. Some have had successful residual mechanisms. The STL, you know, basically, hasn't. Should we be just in terms of sort of consolidation of resources? Should there be some residual body, whether within the UN or within some other international organization? Thank you so much.

[MICHAEL SCHARF] Who would like to volunteer to answer that? Brenda?

[BREDNA HOLLIS] I've had this position since, I think 2010 and that is that we need a common platform, and then we can consolidate primarily administrative functions, and we can still retain the president of each court, and the prosecutor, and a defense representative as needed. But I think having a common platform with people that use would give procedural requirements for access to each archive, etc. I think it's very doable. The big issue that we have faced is where would it be? Because each of the countries wants a mechanism that is close to their country or in their country, and that's been a big stumbling block. I think there's been some move toward that, at least for the in the Special Court, the residual Special Court. But I think it's doable. I think it's something that should be done, but it's something that's still, I think, under consideration.

[MICHAEL SCHARF] Great. Who's got the next question out there? Do not be shy. We have some of the foremost experts in the world and international criminal justice out here. Someone going to raise their hand? Okay?

[AUDIENCE MEMBER] Mr. Farrell was referring to the discussion regarding of definition of gender, and looking back on the ongoing case, at that time, there's a big discussion about whether to use the verbiage of sexual and gender based violence, and there's been some debates since then about just going to gender based violence or sexual

based violence, and I was kind of curious about what your take is on that discussion, because it's something that we've discussed heavily in our classes with Professor Sadat.

[NORMAN FARRELL] First of all, it's interesting the terminology you've used, because terminology is very much an identifier for certain states. First of all, just to go back a bit, the concern before the Sixth Committee of the General Assembly, with the use of certain terms was there'll never be a uniformly accepted term and terminology to capture gender-based violence. And then others bring in other things, such as forced marriage, and there's certain states that say forced marriage isn't a gender based violent crime, while others say it is. Then the definition of gender in non-traditional binary definition based on sex at birth, any definition outside of that is not accepted. I can tell you, without identifying them, at the convention, at the sixth committee, there was a number of states that got up and basically said, this is a this is a red line for us. So the question becomes both a legal one, which is trying to find a way to capture all forms of discrimination, persecution based on any form of gender identification, sexual orientation, in a way that is captured in some way, if states will not accept it being named officially that. That to me, part of the, I want to call it the strategy, because I'm not speaking about Canada at the moment, on behalf of Canada, about the strategy to try and find those types of forms of gender based violence, or other forms of violence based on gender orientation, association to spirit, that they're captured somehow, if we can't get states to agree to call it what it is, right? And that's the, anyway going off on a tangent. But that's one of the things that is being faced right now. And it looks like there seems to be a movement, at least at the Sixth Committee for just the adopting the definition from the ICC, which is the traditional binary definition, which is not very progressive, to be honest, and somewhat reflective of how far states will go. But if that's not the avenue that they'll take, then we have to find other avenues to recognize it, at least not some of the issues that are being faced at the moment. And Canada supports,

I can say now, Canada supports a more progressive approach. But in terms of how it's going to develop, and what language will be used, how it be termed, and then what elements will be required, because you have to come up with elements for the crimes if you're going to define them under certain terminology. Those things are out there. There are people who have done that, just whether it gets adopted, I guess is the next question. Sorry, there's other people in the room that know a lot more about this than I do who are in the body of the room. So, I don't want to go any further. And there is the panel on Crimes Against Children, which may very well overlap on some of these issues, where there are other experts who can speak to it.

[MICHAEL SCHARF] Wonderful question, though. Michael Cooper.

[MICHAEL COOPER] Thanks, Michael Scharf. Michael Cooper, American Society of International Law. The question is, for you, Stephen, in your opening remarks, you very briefly mentioned some thinking about a sort of a global evidence gathering mechanism of some sort. You deferred conversation on that, but since we have a little bit of time, could you elaborate?

[STEPHEN RAPP] I'm very glad to do that. There have been three of these special mechanisms created with explicit "case building" mandates. In 2016, the General Assembly established the IIIM, to build cases against the regime officials and non-state actors for international crimes committed in Syria. In 2017, the Security Council established the UNITAD, the UN Investigative Team Against Da'esh, focused exclusively on crimes committed by ISIS or Da'esh members in Iraq. In 2018, the Human Rights Council established the IIMM, with the mandate to build cases arising out to the crimes committed by the regime and non-state actors in Myanmar.

I earlier spoke about the work of the IIIM led by Catherine Marchi-Uhel and now Robert Petit. Regarding the UNITAD, it has been

headed by Karim Khan and now the German prosecutor, Christian Ritscher, but its mandate is unfortunately due to run out in three weeks, because the government of Iraq is against continuing it. The IIMM has been led from the beginning by another former international prosecutor, Nick Koumjian.

Each of these mechanisms operate very much like offices of the prosecutor-in-exile, by building cases then finding routes into court. In the Myanmar situation, that has included the ICC, because of its case based on forced deportation of the Rohingya into Bangladesh, an ICC state party, a crime which was committed exactly seven years ago. Nick has also been able to assist a non-criminal case, the action brought in the ICJ by the Gambia against Myanmar based on the Genocide Convention. But most of the work of the mechanisms has been directed to the benefit of national prosecutions in third countries, under the principle of universal jurisdiction.

Meanwhile, the UN Human Rights Council (the HRC) since 2010 has created 38 more traditional mandates—commissions of inquiry (COI's) or fact-finding missions (FFM's) to investigate in several atrocity crime situations, including Sri Lanka, Yemen, Sudan, South Sudan, Ukraine, N. Korea, and Palestine several times. These are often situations where there is no ICC jurisdiction, and no possibility of a Security Council referral. Also, the 47-member HRC is the easiest UN organ in which to win an investigative mandate as it operates by simple majority with no vetoes, so that you can pass a resolution with say, 19 yes votes, 16 noes, and 12 abstentions.

But the experience that many law enforcement agencies have with those commissions has not been good. Yes, the commissions issue great reports, but there is very little evidence that is available to prove the published conclusions. And the UN system is not very friendly when responding to requests from national prosecution authorities. So many of us have had the idea of providing these commissions

with more capacity to do investigations that meet judicial standards and to make them more “customary friendly” when responding to requests for information for use in criminal cases. This is particularly appropriate because most of these commissions are now being given explicit accountability mandates. For instance, the South Sudan commission is specifically directed to determine whether the human rights violations are international crimes, identify perpetrators, and share the information with the hybrid court that is to be established under the current peace agreement.

I headed a project at Oxford that surveyed the key actors in the field, including the civil society organizations that are gathering evidence and already trying to share it with traditional commissions, and sometimes directly with prosecution authorities. I then surveyed those authorities, including 23 prosecutors and investigators in national systems, as well as those at the ICC, who have sought such information for their investigations.

At the conclusion of the study, we suggested the consideration of alternate proposals such as the creation of a “global mechanism” that would take on all the situations that have reached the level that justified the “one-off” mechanisms for Syria and Myanmar. This would avoid the need to create new ones, with their own computer systems, their own teams, their own methods of analysis, etc. Alternatively, we proposed a body that would provide the capacity to the traditional commissions of inquiry when they have accountability mandates. This was best visualized by Catherine Marchi-Uhel, Robert’s predecessor at the Syria mechanism, who describes the service provider as “a mothership.” This ship could supply the evidence management system, including the latest software like *relativity media* and the state-of-the-art methodology for witness protection and cyber security, as well as international criminal law expertise, to all the smaller boats in the flotilla, who have country-specific mandates. The small boats would

be separately provided with the capacity to deal with their individual situations, such as expertise as to language and culture.

I met the current UN High Commissioner for Human Rights, Volker Turk of Austria, shortly after his appointment and heard that he had taken our recommendations seriously and received his request for time to provide the needed capacity through an investigative support facility that he would establish within the OHCHR. Two months ago, he announced the creation of the Human Rights Inquiry Branch, bringing together the staff from several divisions of the OHCHR into a kind of service bureau directly under his office, which branch is to have three sections, the first to set up, staff and resource investigations; the second to provide for information management, storage, and analysis; and the third to cooperate with judicial authorities having need for the information. He transferred the D-1 level supervisor of his Special Procedures subdivision, to head the branch temporarily while anticipating that a new D-1 position would be created and a person experienced in accountability processes recruited as the permanent chief.

Of course, from experience with the UN, a lot of us are concerned that this initiative will not have the budget, it will not have the capacity, and it will not have the personnel with investigative and prosecutorial backgrounds. The High Commissioner is certainly moving in the right direction, though this first step is facing challenges in the UN budget process because of the headwinds that are blowing against accountability. For the moment, he is hoping for modest regular budget funding, and then he'll be turning to interested states, like Canada, Germany, the Netherlands, and the US, to provide voluntary funding to grow the branch to the necessary size.

I should note that this be of great value to civil society, particularly if develops the kind of close relationship that has been the hallmark of the Syria Mechanism. The proposed cooperation section of the

new branch can work with civil society groups to strengthen their capacity to gather probative evidence, particularly material that links the crimes to the perpetrators. By collating and verifying the information from multiple groups, the professionals in the branch can help guard against the biases that may affect the collection practices of groups that are associated with one side in a conflict.

I see these new mechanisms, as well as other properly resourced investigative mandates, as important intermediaries in the international accountability ecosystem. The civil society groups are upstream, and the national and international prosecutors are downstream, and these bodies are in the middle, processing the information, and channeling it to the right offices, in the right places, and thus helping to build strong cases in courts of law. Through this work it should be possible, even in a world with limited international courts, and with many states not exercising universal jurisdiction, to create a more global system of justice than we have now.

[MICHAEL SCHARF] All right, I think we have time for one last question. I'm going to give it to Sophia Fisher.

[AUDIENCE MEMBER] Thank you so much. I appreciate it. I'm going to go ahead and stand up and as Dean Scharf said, my name is Sophia Fisher. I am a second-year law student at Case Western Reserve University. And my question for the panel is, what work is being done to further enforcement efforts to prevent impunity, especially by global powers that are often safeguarded with institutions like the UN that are a part of the P-five that often abuse, you know, veto power to evade accountability? What's being done to hold a lot of these powers accountable for the atrocities that they commit? Thank you.

[MICHAEL SCHARF] I look, I mean, Brenda briefly had her and her team built the case against Vladimir Putin, the head of one of these superpowers. So, you know, what was your thinking at that time?

[BRENDA HOLLIS] The good thing about being a prosecutor, at least not as the head of the office, perhaps, is that you're guided by two things. What's the law and what are the facts? And when you put the law and the facts together, you see what crimes you may prove to the requisite level, and you see what suspects. And so, if you have the evidence that links it all the way up, why not charge them? Because we don't see that they have impunity, and before an international court, they don't. So, really, it's the evidence within the legal framework that guides you to as high a level as you can go as an international court, because that's what your focus should be. So, it's really a very simple equation. Now, what states can do, of course, is put more pressure on other states to conform to the law and to try to support accountability mechanisms. That is probably what is most lacking. It's certainly not the willingness of existing institutions to maximize their efforts within their jurisdiction. You know, many people at this table have brought indictments against people that were thought to be untouchable, and eventually they are touchable, and maybe they're not. But even if they're not, you have done a few things that are important, in my view. Number one, you have highlighted that their conduct is criminal and is recognized by judges and an institution, a judicial institution is criminal. Number two, to the extent states have the political will to do so, you are inhibiting their ability to move. You may be providing a basis to freeze the funds that they have from all their ill-gotten gains in other countries. So there are some immediate effects that you can have. But in the long term, I think ultimately, as a global society, we are saying the law does matter, and that these people have been recognized as violating the law, regardless of their position. As we noted in the Charles Taylor case, with power and authority comes responsibility and accountability, and courts can only do so much to make that happen. Where it usually fails is in the international arena, where there's simply, quite honestly, not the political will to make it happen.

Conclusion

Conclusion

David M. Crane

As the curtain closed on the 16th Annual International Humanitarian Law Roundtable, one reflects on the wealth of discourse, insights, and collaborative spirit that characterized that time together. The theme “Dirty Little Wars - Issues that Confront the United Nations: Paradigm’s Viability in the Years Ahead” illuminated the complex challenges facing the international community—especially those conflicts that often occur beneath the threshold of traditional warfare, compelling one to rethink our approaches to humanitarian law.

From the very beginning, the gathering was enriched by distinguished voices. The reception hosted by the Robert H. Jackson Center, where Richard Goldstone was honored with the Joshua Heintz Award for Humanitarian Achievement, set an inspiring tone. It reminded one of the crucial role Richard Goldstone’s commitment played in the larger framework of international law and human rights.

Eli Rosenbaum’s keynote address as former Counselor for War Crimes Accountability at the U.S. Department of Justice highlighted the essential nature of accountability and the legal frameworks available to confront impunity. Following this, the session moderated by Michael Scharf honoring the esteemed Ben Ferencz and highlighting international prosecutors brought forth invaluable updates on the evolving landscape of international justice. Panelists such as Fatou Bensouda, Andrew Cayley, and Stephen Rapp, David Crane, Brenda Hollis, and Jim Johnson shared their wealth of experience, focusing on the challenges and victories in prosecuting war crimes, thereby reinforcing the necessity of perseverance and innovation in our approaches.

The core to the roundtable are the breakout sessions on the porches of the Atheneum Hotel. These sessions chaired by James Stewart were particularly impactful, fostering in-depth conversations on pressing issues and generating actionable insights. Each group was privileged

to have perspectives from various distinguished professionals moderated by experts in their fields:

1. Attacks on Civilians and Civilian Infrastructure

Leaders like Brenda J. Hollis and Norman Farrell explored the legal ramifications of indiscriminate attacks and highlighted the importance of enforceable accountability mechanisms to protect civilian lives.

2. Using Force to Settle Disputes

Discussions led by Andrew Cayley emphasized the moral and ethical considerations in military interventions, advocating for proactive conflict resolution strategies rooted in international law.

3. Crimes Against Children

Expert contributions from James Stewart and Laura Baig illuminated the urgent need for protective measures for children in conflict situations, leading to a collective call for stronger legal protections.

4. Democracies vs. Dictatorships

This subgroup, facilitated by notable figures such as James C. Johnson, engaged in robust discussions about governance's role in shaping adherence to humanitarian norms, exploring potential pathways for enhanced cooperation between different political systems.

5. History and Future Viability of U.N. Interventions

With a focus on reviewing past missions, this group, including key insights from Margaret M. deGuzman, examined the successes and failures of U.N. interventions, calling for a restructured approach to peacekeeping that is comprehensive and adaptable.

Emerging from these vital discussions, key recommendations were drafted for the IHL Roundtable Proclamation, signed by the Chair James Stewart, proclaimed guiding principles for the future:

- *Enhanced Accountability Mechanisms:* The Roundtable emphasized the need for stronger systems to hold violators of international humanitarian law accountable, particularly in situations involving attacks on civilians and humanitarian workers.
- *Protection of Vulnerable Populations:* A robust commitment to enhance protective frameworks for children and other vulnerable groups in conflict situations was highlighted, advocating for increased international cooperation in this sphere.
- *Promotion of Diplomatic Solutions:* A clear call was made for prioritizing diplomacy over military interventions, elaborating on the need for comprehensive dialogue as a means to resolve conflicts while adhering to the principles of necessity and proportionality.
- *Reevaluation of U.N. Peacekeeping Missions:* The importance of re-evaluating the structure and resources allocated to U.N. peacekeeping missions was underscored, ensuring they are better equipped to address modern conflict dynamics and complexities.
- *Stronger Collaboration Between States and NGOs:* Participants recognized the crucial role of collaboration among governments, civil society, and legal entities to foster a more effective response to humanitarian issues.

As the roundtable concluded with the discussions regarding the issuance of the IHL Roundtable Proclamation, it became evident that collective responsibilities extend beyond dialogue; they necessitate the ongoing commitment to translating these principles into actionable strategies. The group must galvanize our advocacy efforts, forging robust networks that can combat the realities of ‘dirty little wars’ that often evade international scrutiny.

It is hoped that participants left the roundtable with reflections on the challenges and to be invigorated by the potential for a future where

the United Nations—and the global community—can effectively address the complexities of humanitarian law with resilience and moral clarity. The connections formed here must continue to foster meaningful collaborations and powerful dialogues in the relentless quest for justice and the enforcement of human rights worldwide.

The organizers of this roundtable would like to extend their heartfelt gratitude to all participants, speakers, and organizers who contributed to making this roundtable a memorable and impactful event. Together we continue to champion the cause of humanitarian law and strive diligently to ensure that the tenets of justice prevail in every corner of our world. Until next year—2025!

Appendices

Appendix I

Agenda of the Sixteenth International Humanitarian Roundtable August 25-27, 2024

Sunday 25 August

4:00 p.m. **Departure to the Robert H. Jackson Center**

5:00 p.m. **Reception and Welcome Dinner**

Hosted by the Robert H. Jackson Center
Invitation Only

**The Joshua Heintz Award for
Humanitarian Achievement**

Awarded to Richard Goldstone
Presented by Joshua Heintz and Kristan McMahon.

8:00 p.m. **Return to the Hotel**

Informal Reception on the Porches

Monday 26 August

- 7:30 a.m. **Breakfast with the Prosecutors**
- 9:00 a.m. **Welcome and Introductions**
- Keynote Address**
 Eli Rosenbuam
- 10:00 a.m. **Break**
- 10:30 a.m. **In Memoriam of Ben Ferencz and The Ben
Ferencz Prosecutors' Commentary and Update**
 Moderated by Michael Scharf
- 11:30 a.m. **Break**
- 11:45 a.m. **Roundtable Convenes**
 Chaired by James Stewart
- 12:30 p.m. **Lunch**
- 1:15 p.m. **Clara Barton Lecture**
 Andrew Cayley, lead prosecutor in charge of the
 ICC's Gaza Case
- 2:00 p.m. **Break**

- 2:15 p.m. **Subgroups Convene**
1. Attacks on Civilians and Civilian Infrastructure
 2. Using Force to Settle Disputes
 3. Crimes Against Children
 4. Democracies vs. Dictatorships
- 5:30 p.m. **Reception and Dinner**
- 7:30 p.m. **The Katherine B. Fite Lecture**
- Margaret M. deGuzman, Judge at the International Residual Mechanism for Criminal Tribunals
- 8:30 p.m. **Informal Reception on the Porches**
- Entertainment by Razing the Bar

Tuesday 27 August

- 7:30 a.m. **Breakfast with the Prosecutors**
- 9:00 a.m. **Year in Review**
- Presented by Valerie Oosterveld
- 10:00 a.m. **Break**
- 10:30 a.m. **Plenary**
- Subgroup co-chairs report, compilation of reports and draft of the Roundtable Principles

12:30 p.m. **Lunch**

1:45 p.m. **Magnitsky Lecture**

Mykola Stetsenko, President of the
Ukraine Bar Association

1:45 p.m. **Global Accountability Network
Informational Session and Update**

2:00 p.m. **Break**

2:30 p.m. **The Issuance of the Chautauqua Principles
Document and Conclusion of the Roundtable**

5:00 p.m. **Lake Cruise**

6:30 p.m. **Closing Dinner**

Informal reception on the porches follows

Appendix II

The Fourth Chautauqua Principles

August 27, 2024



In the spirit of humanity and peace we assembled here at the Chautauqua Institution recognize that aggression, as the supreme international crime, shatters the international legal order and encompasses the whole scope of atrocity crimes. This compels us, as individual practitioners within the international criminal justice system, to renew our commitment to a global vision of the rule of law and to further develop and refine practical responses to aggression and atrocity crimes, in order to secure justice for victims and to hold perpetrators accountable.

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

I. Aggression must be prosecuted under international law.

- A. To that end, those responsible for the crime of aggression must be prosecuted in accordance with an international, impartial and fair process.
- B. Given that aggression is essentially a crime of leadership the ultimate objective should be to bring those most responsible to account.
- C. Achieving this goal does not preclude the prosecution of other perpetrators or seeking justice for other related atrocity crimes.

- D. In pursuing these objectives, retribution offers justice and accountability for victims, while deterrence seeks to prevent future victims.

II. As a community of practitioners, we cannot take for granted our liberties and freedoms, which are based on respect for the rule of law, but must work to protect and strengthen traditions and institutions which are essential to them.

- A. Confronting the reality that democracies and autocracies co-exist, international prosecutors and the institutions they serve have the responsibility to deliver independent, impartial, and objective justice, in order to strengthen the rule of law, and, further, be prepared to work with all actors to develop appropriate justice mechanisms.
- B. While autocracies may present a facade of respect for the rule of law, democracies, including transitional and emergent democracies, are characterized by a genuine respect for the rule of law, which includes protection of independent judicial institutions and safe and inclusive environments for spirited political debate.
- C. In particular, we must support international prosecutors, who are under intense scrutiny in a world that is increasingly polarized; robust criticism of institutions is vital, but must be respectful and constructive, in order to not tear down the very institutions we wish to build.

III. The investigation and prosecution of war crimes, involving the deaths of civilians and destruction of civilian infrastructure, must rely upon a skilled analysis of the law and its application to the facts, in order to deliver justice.

- A. As appropriate, this analysis must focus on the nature of the target of attack: whether it is purely military, civilian, or involves a dual military-civilian use;

should the target have both a civilian and a military character, then the analysis requires an assessment of proportionality balancing military necessity with anticipated harm to civilians.

- B. The nature of warfare today, especially in densely-populated urban areas, requires an assessment of whether the most accurate weapons systems available must be used to minimize civilian casualties and destruction of civilian infrastructure.
- C. The legal implications of the use of emerging technologies, including AI enhanced weaponry, must be a subject of consideration in international humanitarian law, and the circumstances assessed in which human actors in a decision-making chain may attract individual criminal liability; practitioners and policy makers should pay particular attention to the danger of removing human actors from the decision-making chain and the way in which unconscious biases may affect the application and accuracy of technology.

IV. Crimes against children are particularly important in international criminal law, because of the unique impressionability and vulnerability of children and the lasting harm they experience as child victims.

- A. The agency of child soldiers is a principal consideration when evaluating criminal liability, because agency may transform when children reach the age of majority and choose to remain in positions of military capability to commit international crimes despite reasonable options of leaving.
- B. The initial recruitment and participation in conflict of child soldiers may be considered, but current international

jurisprudence does not absolve a perpetrator of criminal liability simply because they were initially a child soldier; however, during sentencing, status as a child soldier may be a mitigating factor.

- C. The transfer of children may present a potential case of genocide, by reason of the social, and cultural destruction of the victim group; in particular, given the dynamic nature of the evolution of international humanitarian law, the assimilation and re-education of children may present a novel evidential threshold to prove the destruction of a victim group.

As chair of the Sixteenth 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.

A handwritten signature in black ink that reads "James K. Stewart". The signature is written in a cursive style with a large, sweeping initial "J".

James K. Stewart

Chair, Sixteenth International Humanitarian Law Roundtable

Appendix III

Biographies of the Prosecutors and Participants

PROSECUTORS



LAUREL BAIG – *INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS*

Laurel Baig is a Canadian litigator with more than 20 years of international criminal law experience. She is currently the Principal Legal Advisor to the Prosecutor of the UN Mechanism for International Criminal Tribunals. She served as Senior Appeals Counsel in a number of historic cases, including against former Bosnian-Serb President Radovan Karadžić and army commander Ratko Mladić. In her current role, she also leads capacity-building seminars for domestic prosecutors, judges and military officers. She worked as a prosecutor at the United Nations International Criminal Tribunal for the former Yugoslavia for 10 years and contributed to the legacy project evaluating the office’s successes and challenges in prosecuting sexual violence crimes. Laurel has advised judges in Chambers at the International Criminal Tribunal for Rwanda and at the Special Court for Sierra Leone. She is a member of the Justice Rapid Response Sexual and Gender Based Violence Investigations Roster, the Executive Committee of the Prosecuting Conflict-Related Sexual Violence Network of the International Association of Prosecutors and the Board of Editors of the Oxford Journal of International Criminal Justice.



DR. FATOU BENSOU DA
– *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 Adviser 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 award-

ed 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 – EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA**

Andrew Cayley is a King's Counsel and an army veteran and is currently Principal Trial Lawyer at the International Criminal Court. He was His Majesty's Chief Inspector of the Crown Prosecution Service from 2021 until 2024. In this role he was responsible for inspecting and reporting on the performance of the national prosecuting authorities of England & Wales. He reported directly to the Attorney General of England and Wales and to the British Parliament. From 2013 to 2020 Andrew was Director 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 Her late Majesty Queen Elizabeth II under the Armed Forces Act 2006. In this role he led on all allegations of war crimes against British Armed Forces arising from operations in Iraq and Afghanistan. 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. Andrew served in the British army from 1991 to 1998, retiring in 1998 as a major. He served in Central America on operations, and also in Germany and in the United Kingdom. He is a barrister and now a Governing Bencher of the Honourable Society of the Inner Temple. He was appointed Kings's Counsel 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 the Royal Military Academy Sandhurst graduating in 1991.



DAVID M. CRANE –
SPECIAL COURT FOR SIERRA LEONE

Professor David Crane was the founding Chief Prosecutor of the Special Court for Sierra Leone from 2002 to 2005 after being appointed by Secretary General of the United Nations, Kofi Annan. Served with the rank of Under-Secretary General, he indicted the President of Liberia, Charles Taylor, the first sitting African head of state in history to be held accountable. Prior to this position, he served over 30 years in the U.S. government. Appointed to the Senior Executive Service of the United States in 1997, Mr. Crane has held numerous key managerial positions during his three decades of public service, including as Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School. Additionally, until his retirement in 2018, he was a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture between the Maxwell School of Public Citizenship and the College of Law at Syracuse University. He is author of the "Caesar Report," which brought to light the crimes against humanity in Syria. Prof. Crane is on one of the founders of the Global Accountability Network. Prof. Crane recently published his memoirs about his time in West Africa called, Every

Living Thing. He was made an honorary Paramount Chief by the Civil Society Organizations of Sierra Leone and received the George Arendts Pioneer Medal from Syracuse University. Throughout his career he received various awards including the Intelligence Community Gold Seal Medallion, the Department of Defense/DoDIG Distinguished Civilian Service Medal, and the Legion of Merit. In 2005, he was awarded the Medal of Merit from Ohio University and the Distinguished Service Award from Syracuse University College of Law for his work in West Africa. He founded Impunity Watch, an online public service blog and law review and created the “I am Syria” campaign in 2012. Prof. Crane is chair of a High-Level Working Group that has drafted the statute that is currently before the Council of Europe on creating a Multinational Court for Ukraine on the Crime of Aggression. 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

— *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 – EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA; SPECIAL COURT FOR SIERRA LEONE; RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Ms. Hollis is currently serving as 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. She also served as Principal Trial Lawyer (D-1 level) leading the investigation into possible crimes committed in Palestine and Israel until the filing of warrants of arrest in May 2024. Prior to assuming her duties with the ICC OTP, 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 – 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.



ROBERT PETIT– *EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA*

Robert Petit is a national of Canada and was appointed by the UN Secretary General as Head of the International, Impartial and Independent Mechanism for Syria on 22 March 2024.

Mr. Petit has 35 years of criminal justice experience in both national and international settings. Since 2017, he was the senior United Nations official to lead the United Nations Follow-On Mechanism on the Democratic Republic of the Congo in relation to the murders of two members of the Group of Experts in March 2017. Mr. Petit also served as Senior Counsel and Team Leader in the Crimes against Humanity and War Crimes Section of Justice Canada for over 20 years.

Previously a Crown Attorney in Canada, Mr. Petit has held various international senior prosecutorial positions, including as the founding International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia, Senior Trial Attorney at the Special Court for Sierra Leone, and Prosecutor of the Serious Crimes Unit, United Nations Mission in East Timor. He was also legal advisor to the international administrator of one of the five regions of Kosovo, and as legal officer for the International Criminal Tribunal for Rwanda, supervised the investigations, indictments, and prosecutions of numerous perpetrators of crimes committed during the Rwandan Genocide.

Mr. Petit holds an Advanced University Law Degree from the University of Montreal, Canada, as well as a Bachelor of Arts in History from the same university. He is fluent in English and French.



AMB. STEPHEN J. RAPP – *THE SPECIAL COURT FOR SIERRA LEONE*

Stephen J. Rapp is a Senior Fellow at the United States Holocaust Memorial Museum’s Center for Prevention of Genocide, and at Oxford University’s Center for Law, Ethics and Armed Conflict. During 2017-2018, he was the Father Robert Drinan Visiting Professor for Human Rights at Georgetown University. He serves as Chair of the Commission for International Justice and Accountability (CIJA), a Senior Piece 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.



JAMES K. STEWART
– *INTERNATIONAL CRIMINAL COURT*

Since leaving the International Criminal Court (ICC) in March 2022, at the close of his nine-year term in office as Deputy Prosecutor, James Stewart has become involved in activities, such as serving as chair of a treaty drafting subcommittee on international cooperation in relation to a project to create an International Ant-Corruption Court, participation on a team of British experts providing training to Ukrainian prosecutors and investigators to handle war crimes cases in their own domestic courts, and assisting in the delivery of training on crimes against humanity to Kenyan prosecutors.

Before going to the ICC, James was a career prosecutor in the Ministry of the Attorney General of Ontario, serving as an Assistant Crown Attorney in Downtown Toronto and then as Crown counsel in the Crown Law Office-Criminal. In these capacities, he handled trials at every level of court and appeals before the Court of Appeal for Ontario and the Supreme Court of Canada, working in both English and French. When he finished his career at the Ministry, he was serving as General Counsel.

During his time at the Crown Law Office-Criminal, James was granted periodic unpaid leaves of absence to work as a Senior Trial Attorney in the Office of the Prosecutor (OTP) of the International Criminal Tribunal for Rwanda (ICTR), as the first Chief of Prosecutions in charge of the Prosecutions Division at the International Criminal

Tribunal for the former Yugoslavia, and again in the ICTR OTP as Chief of the Appeals and Legal Advisory Division.

Married, with three children, James has resettled in Ontario, but divides his time between Canada and the Netherlands.

SPEAKERS AND SPONSORS



**MUTASIM A. ALI – RAOUL
WALLENBERG CENTER FOR HUMAN RIGHTS**

Mutasim A. Ali is a legal advisor at the Raoul Wallenberg Center for Human Rights and the co-author of the independent legal analysis into breaches of the Genocide Convention in Sudan. His current practice focuses on international criminal law, international human rights and humanitarian law, transitional justice, and targeted human rights and anti-corruption sanctions. Mr. Ali is a Doctor of Juridical Science Candidate at American University Washington College of Law. His research is focused on the duality of peace-making and constitution-making processes in post-conflict states.



**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.teachingabouthnorthkorea.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.



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).



JUDGE MARGARET M. DEGUZMAN –
INTERNATIONAL RESIDUAL
MECHANISM FOR CRIMINAL TRIBUNALS

Margaret M. deGuzman is a Professor of Law and Co-Director of the Institute for International Law and Public Policy at Temple University's Beasley School of Law. She is also a judge of the Residual Mechanism for International Criminal Tribunals, where she currently serves on the Trial Chamber for *The Prosecutor v. Félicien Kabuga*. Her research areas include international criminal law, international humanitarian law, international human rights law, and transitional justice. Professor deGuzman's scholarship examines the role of international criminal law in the global legal order. Her publications include *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law* (Oxford University Press 2020), *The Elgar Companion to the International Criminal Court* (with Valerie Oosterveld eds., Edward Elgar Publishing 2020), and *Arcs of Global Justice: Essays in Honour of William A. Schabas* (with Diane Marie Amann eds., Oxford University Press 2018). Her work has appeared in numerous other books and journals, including the *Journal of Criminal Law and Philosophy*, *Virginia Journal of International Law*, and *Yale Journal of International Law*. Professor deGuzman is a Senior Peace Fellow at the Public International Law and Policy Group, a board member of the Center for International Law and Policy in Africa, and she serves on the editorial board of the *African Journal of International Criminal Justice*.

Before joining the Temple Law faculty, Professor deGuzman clerked on the Ninth Circuit Court of Appeals and practiced law in San Francisco, specializing in criminal defense. She served as a legal advisor to the Senegal delegation at the Rome Conference on the ICC and as a law clerk in the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia. She was a Fulbright Scholar in Darou Ndiar, Senegal. Professor deGuzman received

a Ph.D. (human rights) from the National University of Ireland, Galway, a J.D. from Yale Law School, an M.A.L.D. from the Fletcher School of Law and Diplomacy, and a B.S.F.S. from Georgetown University's School of Foreign Service.



**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.



**ALEXANDRA LANE –
*THE GLOBAL ACCOUNTABILITY NETWORK***

Alexandra Lane is a recent law school graduate from Suffolk University Law School in Boston, MA where she concentrated 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 the Development Assistant for the Educators' Institute for Human Rights. During law school, Allie was a student attorney with Suffolk's Human Rights and Indigenous Peoples' Clinic and published her article *The Right to Recognition: International Surrogacy and the Implications on Birthright Citizenship* in the Journal of Health and Biomedical Law. She previously interned at the Immigrant Council of Ireland, the Robert H. Jackson Center and Synergy for Justice. She served as the Executive Director of the Ukraine Accountability Project from 2023-2024 and now serves as the project's liaison with the Ukrainian Bar Association.



MARY ANN MCGRAIL
– AMERICAN RED CROSS

Mary Ann McGrail is an attorney in Washington, DC practicing in the fields of higher education law and international humanitarian law. She is Co-Chair of the DC Bar International Law Community, on the Executive Committee of the Lieber Society of the American Society of International Law (ASIL), and Co-Chair of the Intellectual Property Group at ASIL. She is IS US for International Humanitarian Law programs for the American Red Cross in the national capital region, head of the Youth Action Campaign, and a disaster responder. She holds a J.D. from the University of Virginia School of Law and a Ph.D. and B.A. from Harvard University in English literature. She is admitted to practice in DC, MD, NY and to the Supreme Court of the United States.



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.



VALERIE OOSTERVELD – *UNIVERSITY OF WESTERN ONTARIO FACULTY OF LAW*

Valerie Oosterveld the Western Research Chair in International Criminal Justice and a full professor at the Faculty Law, University of Western Ontario (Canada). She is also the Special Adviser on Crimes Against Humanity to the Prosecutor of the International Criminal Court (ICC). She has published widely on gender-based international crimes, and on gender-sensitive investigation and prosecution of these crimes. With Indira Rosenthal and Susana SaCouto, she is the co-editor of the award-winning book, *Gender and International Criminal Law* (Oxford University

Press, 2022). She was awarded the 2022 Royal Society of Canada Ursula Franklin Award in Gender Studies. Prior to joining Western Law, she was a lawyer with Global Affairs Canada's Legal Bureau, where she provided legal advice on international criminal accountability for genocide, crimes against humanity, and war crimes. She served on the Canadian delegation to various ICC-related negotiations, including the Assembly of States Parties, 2010 Review Conference, and 1998 Diplomatic Conference. She has B.Soc.Sc. (Ottawa), LL.B. (Toronto), LL.M. (Columbia), and J.S.D. (Columbia) degrees.



ELI ROSENBAUM

– U.S. DEPARTMENT OF JUSTICE (Ret'd)

During a 38-year U.S. Justice Department career, from which he retired in January, Eli Rosenbaum led the investigation and prosecution of a broad range of war criminals and human rights violators, including World War II Nazi criminals, Rwandan genocidaires, and perpetrators of Russian crimes in Ukraine. He is the longest-serving investigator and prosecutor of such persons in world history. Under his leadership as Director of USDOJ's former Office of Special Investigations (OSI) from 1995 to 2010, his office won more cases against WWII Nazi criminals than did governmental authorities in the rest of the countries of the world – combined. In June 2022, Rosenbaum was appointed by U.S. Attorney General Merrick Garland to serve as USDOJ's first-ever Counselor for War Crimes Accountability and to launch and head the agency's War Crimes Accountability Team (WarCAT), to coordinate the Department's efforts to pursue accountability for atrocity crimes committed in the wake of the Russia's full-scale invasion of Ukraine. Last December, as a result of WarCAT-led efforts, the Department indicted four Russia-affiliated military personnel for committing war crimes in Ukraine, making the U.S. the first country other than Ukraine to prosecute perpetrators of such crimes. (This also marked the first-ever charging of the U.S. federal war crimes statute.) Rosenbaum's USDOJ career

also included 15 years in the Criminal Division's Human Rights and Special Prosecutions Section as Director of Human Rights Enforcement Strategy and Policy.

A graduate of the University of Pennsylvania's Wharton School (B.S., MBA) and Harvard Law School (J.D.), Rosenbaum has also worked as a corporate litigator with the Simpson Thacher & Bartlett law firm and as general counsel of an international NGO.

Rosenbaum's awards include the Attorney General's Award for Distinguished Service (USDOJ's highest award) and Ukraine's Order of Merit, awarded by Ukrainian President Volodymyr Zelenskyy and conferring the title Chevalier of the Order of Merit, for support Rosenbaum rendered to Ukraine's pursuit of justice for Russian Federation aggression, war crimes, and crimes against humanity.



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 the Special Adviser on Crimes Against Humanity to the ICC Chief Prosecutor from 2012-2023. Sadat is a prolific scholar and teacher and launched and continues to direct an 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. In 2023 she was 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 Joseph C. Hostetler—BakerHostetler Professor at Case Western Reserve University School of Law. After having served as Co-Dean of the Law School for eleven years, he recently returned to leading its International Law Program as Associate Dean for Global Legal Studies. Scharf served as Attorney Adviser for U.N. Affairs in the Office of the Legal Adviser of the U.S. Department of State during the Bush and Clinton Administrations, where he played a lead role in drafting the Statute, Rules, and Security Council Resolutions establishing the Yugoslavia Tribunal. In 2005, he and the Public International Law and Policy Group, an NGO he co-founded with Paul Williams, were nominated for the Nobel Peace Prize for their work assisting in war crimes trials. During a sabbatical in 2008, Scharf served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. In 2022, he made an Amicus argument before the Appeals Chamber of the ICC in the Ongwen case. He is the author of 20 books, five of which have won national book of the year honors. Scharf hosts the radio program “Talking Foreign Policy,” produced by Cleveland’s NPR station, WKSU 89.7 FM. Since 2022, he has been the President of the American Branch of the International Law Association.



MILENA STERIO – *CLEVELAND STATE UNIVERSITY SCHOOL OF LAW, INTLAWGRRRLS*

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



MYKOLA STETSENKO
– *UKRAINIAN BAR ASSOCIATION*

Mykola Stetsenko is the president of the Ukrainian Bar Association. In his capacity, Mykola focuses on the rule of law, major legislative reforms, as well as ethics of the legal profession in Ukraine. Mykola is also the Managing Partner at a leading Ukrainian law firm, AVELLUM, and heads its Corporate/M&A Practice.

Mykola has extensive experience in corporate law, including mergers and acquisitions, joint ventures, private equity, IPOs, and corporate

governance. During his legal career Mykola was actively engaged in the development of the Ukrainian corporate law, namely regulation of shareholders agreements, LLCs, corporate governance in public companies, and tender offers. Prior to co-founding AVELLUM in 2009, Mykola worked as a partner at Baker McKenzie Kyiv.



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, including Vice President. 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, 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. 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 takes ballet classes, dog sits, 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.

Appendix IV

**CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW**

**16TH ANNUAL
INTERNATIONAL HUMANITARIAN LAW
ROUNDTABLES
“DIRTY LITTLE WARS”**

Breakout Sessions: 1) The Crime of Aggression and Using Force to Settle Disputes 2) Democracies vs. Dictatorships; 3) Attacks on Civilians and Civilian Infrastructure; and 4) Crimes Against Children

Prepared by Liam J. Parsons
J.D. Candidate, 2026
Fall Semester 2024

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40. Ted van Baarda, *Assessing the Proportionality of the Violence in the Gaza Strip*, The International Society for Military Ethics in Europe, available at <https://www.euroisme.eu/index.php/en/blogs/views-on-the-crisis-in-the-middle-east/396-assessing-the-proportionality-of-the-violence-in-the-gaza-strip>.
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II. Introduction

The 16th Annual International Humanitarian Law (IHL) Roundtables featured four breakout sessions, each lasting one and a half hours and conducted simultaneously. These discussions were led by prominent experts in the field, and divided into two groups per session, each guided by a pair of moderators—one academic and one practitioner—to ensure a well-rounded exploration of the subjects. Attendees participated in lively debates on pre-assigned topics. Group One focused on the crime of aggression and the use of aggression as a foreign policy to settle disputes. Group Two discussed and differentiated between democracies and dictatorships. Group Three addressed attacks on civilians and civilian infrastructure. Finally, Group Four concentrated on crimes against children. The sessions commenced with moderators presenting the topic and posing a curated question, after which discussions were allowed to unfold organically. The following sections summarize the insights and conclusions drawn from these expert-led conversations.

III. Roundtable Breakout Groups

A. The Crime of Aggression and Its Use as a Foreign Policy

- *The crime of aggression is the supreme international crime because it disrupts the entire international legal order and creates the conditions that enable and exacerbate other violations.*
- *Aggression must be prosecuted under international law despite its jurisdictional issue, and since aggression is a crime of leadership, the ultimate goal should be bringing those individuals responsible to account through a fair, impartial, international process.*
- *Achieving accountability for the responsible actors does not*

rule out seeking justice for perpetrators involved in other atrocities.

- *In the search for justice, retribution helps current victims, and deterrence seeks to prevent any future victims.*

i. Background

Currently, the international law community regards the crime of aggression as the “supreme international crime,” a term first coined by Nuremberg prosecutor Robert Jackson, because it “contains within itself the accumulated evil of the whole.”¹ Today, the crime of aggression is defined as “the use of armed force by a State against the sovereignty, integrity or independence of another State.”² This definition was adopted by amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010.³ Combatting aggression was first seen in action in the aftermath of World War One when the Covenant of the League of Nations was created in April 1919 relying on the “imbalance of powers” that would be accumulated by member states against any aggressor.⁴ The League provided that it would protect the territorial integrity and political independence of all members from external aggression.⁵ However, the Covenant’s provisions represented a weak system for decision-

1 The Crime of Aggression, *International Nuremberg Principles Academy* (2024), available at <https://www.nurembergacademy.org/projects/detail/adf9bc613be04825aa302997f7aa35c6/the-crime-of-aggression-25/>.

2 How the Court Works, *International Criminal Court*, available at <https://www.icc-cpi.int/about/how-the-court-works#:~:text=Finally%2C%20the%20fourth%20crime%20falling,Statute%20and%20Elements%20of%20Crimes.>

3 *Id.*

4 Jean-Michel Guieu, “Guaranteeing Peace through “Collective Security” in the 20th Century,” *EHNE – Digital Encyclopedia of European History* (22 June 2020).

5 *Id.*

making and collective action leading to its ultimate demise and the creation of the stronger United Nations.⁶

Following World War Two, the crime of aggression was first codified in Article 6(a) of the London Charter.⁷ This provided the legal basis for the first international trial for aggression, marking the beginning of the current era where individual criminal responsibility for aggression has become part of customary international law.⁸ The next progression came with the Rome Statute where the crime of aggression was included in the jurisdiction of the

Since then, it can be argued that little progress has been made in reaching an internationally accepted definition of the crime of aggression prior to the Rome Statute.⁹ At the end of negotiations, the crime of aggression was included in the jurisdiction of the statute without commenting on the definition. Then, in Kampala in 2010, Resolution 6 of the Review Conference of the Rome Statute laid down the definition, conditions for jurisdiction, and the new leadership clause.¹⁰

Further, it is worth noting that following World War Two and the establishment of the UN, the powers given to the permanent members of the security council can be seen in Article 24 with “the primary responsibility for the maintenance of international peace and security,” Article 41 giving them the decision-making power of economic sanctions, and in Article 42 with the power to “take such action by

6 *Id.*

7 Nikola R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, Georgia Journal of International and Comparative Law, Vol. 51(1), 1-36 (2022).

8 *Id.* at 3.

9 *Id.* at 3.

10 *Id.* at 3-4.

air, sea or land forces as may be necessary to maintain or restore international peace and security.”¹¹ These profound powers given to the Big Five have made Security Council action in the Ukraine War near impossible, as Russia has the power to veto any resolution proposed.¹²

ii. Challenges with Prosecuting the Crime of Aggression

Since Russia launched a war of aggression against Ukraine in February 2022, its prosecution for the crime of aggression has remained unseen.¹³ This can be attributed to a significant, crucial obstacle to the prosecution of the crime of aggression – its jurisdiction. In the context of Ukraine, there is the absence of an international court with the jurisdiction to adjudicate the crime of aggression because Ukraine and Russia are not parties to the ICC.¹⁴ Before the ongoing discussion of the operation and logistics of a tribunal to prosecute the crimes of aggression in Ukraine can happen, the discussion of the problematic and substantive aspects of the crime of aggression needs to be addressed.¹⁵

Out of the four crimes prosecuted at the ICC, genocide, war crimes, crimes against humanity, and aggression, the latter, aggression, has only recently had its definition established at the first Review Conference of the Rome Statute of the International Criminal Court in

11 *Id* and United Nations Charter, *United Nations*, available at <https://www.un.org/en/about-us/un-charter>.

12 Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions, *United Nations*, available at <https://news.un.org/en/story/2022/09/1129102>.

13 Nikola R. Hadjin, *How to Prosecute Ongoing Acts of Aggression Following the Initial Invasion*, *Lawfare*, available at <https://www.lawfaremedia.org/article/how-to-prosecute-ongoing-acts-of-aggression-following-the-initial-invasion>.

14 *Id*.

15 *Id*.

Kampala in 2010.¹⁶ This delay in international criminalization, which points to its current issues, was namely political, but “jurisdiction over the crime of aggression is now activated at the ICC.”¹⁷

Yet not every act of aggression is criminal; Article 8*bis* of the Rome Statute states an act of aggression is deemed criminal when its “character, gravity, and scale manifest a violation the Charter of the United Nations” and states that this comprises individual and state action.¹⁸ This definition sets apart the crime of aggression in numerous ways: The “crime stipulates as a condition of criminal responsibility direct state action;”¹⁹ “The attribution of criminal responsibility is restricted to “person[s] in a position effectively to exercise control over or to direct the political or military action of a state;”²⁰ and “harm to individual human persons is not part of the definition.”²¹

The attribution of criminal responsibility in international criminal law requires connections between the individual and the offense through *actus reus*, via conduct, consequences, and circumstances, as well as *mens rea*, via intent and knowledge.²² This means that the perpetrator needs to have the requisite mental state regarding their

16 Nikola R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, Georgia Journal of International and Comparative Law, Vol. 51(1), 1-36 (2022).

17 *Id.*

18 Rome Statute Art. 8*bis*(1).

19 Nikola R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, Georgia Journal of International and Comparative Law, Vol. 51(1), 1-36 (2022).

20 *Id.* at 5.

21 *Id.* at 5.

22 *Id.* at 5.

actions and that prosecutors need to prove both elements.²³ Contrary to the current attribution of criminal responsibility, prevailing theories have suggested that the perpetrator causing the use of force should suffice in and of itself of the conduct aspect of the requirement or the perpetrator should not necessarily be held accountable for an act of aggression to face prosecution.

In the application of the crime of aggression, the difficulties of deciding upon a definition are overshadowed by the major issue of the scope of the ICC's jurisdiction over the crime.²⁴ As stated plainly and rightfully by Claus Kreß, the crime of aggression should not be seen as a special crime with particular jurisdictional requirements; instead, it is equal to all other crimes tried at the ICC whose prosecution is "particularly necessary in order to criminalize also the killing of combatants or civilians falling short of amounting to war crimes."²⁵ Currently, individuals from non-state parties to the ICC cannot be prosecuted as the jurisdiction only extends "over nationals from a State within the

23 See Nikola R. Hajdin, *Attributing Criminal Responsibility for the Crime of Aggression*, Georgia Journal of International and Comparative Law, Vol. 51(1), 1-36 (2022) and Nikola R. Hadjin, *How to Prosecute Ongoing Acts of Aggression Following the Initial Invasion*, Lawfare, available at <https://www.lawfaremedia.org/article/how-to-prosecute-ongoing-acts-of-aggression-following-the-initial-invasion>.

24 Carrie McDougall, *The Imperative of Prosecuting Crimes of Aggression Committed against Ukraine*, Journal of Conflict and Security Law, Vol. (28)(2): 203-230 (2023).

25 Nuremberg Academy Lecture 2023: Claus Kreß on "The Ukraine War and the Crime of Aggression", *International Nuremberg Principles Academy*, (2023) available at <https://www.nurembergacademy.org/events/nuremberg-academy-lecture-2023/>.

court's jurisdiction."²⁶ This is a major issue with the Ukraine conflict as the State of Ukraine is not a party state to the ICC.²⁷

Article 121, paragraph 1, of the Rome Statute provides that: "After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto."²⁸ Currently, there is momentum to amend the Rome Statute to create more jurisdiction, and the Breakout Group moderators recommended as such, to determine why non-state parties are exempt from jurisdiction for the crime of aggression.²⁹ World-renowned professors and advisors, such as Claus Kreß and the Breakout Group moderators, recommend such an amendment to the Rome Statute in order to harmonize the jurisdictional regimes of all four crimes within the jurisdiction of the International Criminal Court.³⁰

26 How the ICC Works, *ABA-ICC Project*, available at <https://how-the-icc-works.aba-icc.org/#:~:text=The%20ICC%20can%20only%20investigate.by%20the%20UN%20Security%20Council> and How the Court Works, *International Criminal Court*, available at <https://www.icc-cpi.int/about/how-the-court-works#:~:text=Finally%2C%20the%20fourth%20crime%20falling,Statute%20and%20Elements%20of%20Crimes>.

27 The States Parties to the Rome Statute, *International Criminal Court*, available at <https://asp.icc-cpi.int/states-parties>.

28 Rome Statute Art. 121(1) and Working Group on Amendments, *International Criminal Court*, available at <https://asp.icc-cpi.int/WGA#:~:text=Article%20121%2C%20paragraph%201%2C%20of,1>.

29 See *Ukraine: Ratifying the Rome Statute a welcome step, but limitations must be addressed*, *Amnesty International*, (22 August 2024) available at <https://www.amnesty.org/en/latest/news/2024/08/ukraine-ratifying-the-rome-statute-a-welcome-step-but-limitations-must-be-addressed/>.

30 Nuremberg Academy Lecture 2023: Claus Kreß on "The Ukraine War and the Crime of Aggression, *International Nuremberg Principles Academy*, (2023) available at <https://www.nurembergacademy.org/events/nuremberg-academy-lecture-2023/>.

This then raises the issue of how long it would take to amend the jurisdiction piece and another issue of whether it can be applied retroactively to the Ukraine conflict. A core element of the ICC is the principle of legality, and its major element is non-retroactivity, “which requires that criminal acts be previously prohibited and punishable by law.”³¹ However, there are instances where its application risks being substantively retroactive: “When the UN Security Council (SC) refers a situation to the ICC, or a state makes an ad hoc declaration accepting the Court’s jurisdiction for a situation, and the relevant conduct was not criminal under any previously binding source of law.”³² These two instances are also hotly debated and give rise to other ways of reconciling the Rome Statute with the principle of legality.³³ One proposal is undertaking a complete assessment of the Rome Statute’s nature, which would include “not only an interpretation of its relevant provisions but also an analysis of the delegated powers which make up the Court and the Statute,” in order to identify instances of inconsistency between the Statute and the principle of non-retroactivity.³⁴ This would be followed by applying the norm displacement technique in Article 21(3) ICC Statute: “the ‘super legality’ of ‘internationally recognized human rights,’ including the principles of non-retroactivity and fair labeling.”³⁵ This would allow the ICC to accept or deny applying the

31 Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, Journal of International Criminal Justice, Vol. 16(1): 65-89 (2018).

32 *Id.*

33 See Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, Journal of International Criminal Justice, Vol. 16(1): 65-89 (2018).

34 *Id.*

35 *Id.*

substantive provisions of the Rome Statute that extend past customary international law or “another applicable source of international law in cases of retroactive ad hoc declarations.”³⁶

Regardless of the preferred, approach, the Breakout Group moderators and experts across the globe would like to see changes to the Rome Statute and the ICC to extend jurisdiction for crimes against humanity while still allowing the ICC to be able to “fulfill its promise of complying with internationally recognized human rights and respecting the limits of its powers.”³⁷ Without such necessary changes to the current doctrine, Putin and other responsible Kremlin officials cannot face prosecution for the act of aggression in Ukraine, and nor would future acts of aggression be able to be prosecuted if they are not a party to the ICC.

iii. Should the Crime of Aggression be Prosecuted as an Ongoing Crime, as Applied Through the Ukraine Conflict?

Currently, a major, yet outstanding, question is how to address the prosecution of ongoing acts of aggression following the initial invasion.³⁸ International law has long followed the general principle that an illegal act cannot produce legal rights, but this principle is

36 *Id.*

37 See Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, *Journal of International Criminal Justice*, Vol. 16(1): 65-89 (2018) and Nuremberg Academy Lecture 2023: Claus Kieß on “The Ukraine War and the Crime of Aggression,” *International Nuremberg Principles Academy*, (2023) available at <https://www.nurembergacademy.org/events/nuremberg-academy-lecture-2023/>.

38 *Id.*

partially ignored when prosecuting crimes of aggression.³⁹ Evidently, Russia has committed the crime of aggression in its initial invasion of Ukraine, but its subsequent uses of armed forces, like particular missile strikes, do not necessarily rise to the level of “manifest aggression.”⁴⁰ Or, since the initial invasion is subject to criminal liability should continuous acts of the illegal use of armed forces also face criminal liability for aggression?⁴¹ In short, the answer is yes.

In international criminal law, “wrongfulness is attributed to individuals whose conduct causes criminal consequences within specific circumstances,” so, individuals are not responsible for creating the circumstances of the crime.⁴² In other words, the offender must have a mental relationship with the circumstances of the crime.

Article 7 of the Rome Statute outlines an analogy: an act, or conduct, resulting in death, the consequence, is a violation, but “a widespread or systemic attack” elevates this crime to a crime against humanity.⁴³ *Tadić* exemplifies this by holding that one act of murder can be classified and prosecuted as a crime against humanity if it is part of a series of actions that, when taken collectively, amount to widespread attacks.⁴⁴ As for aggression, drawing directly on the analogy, “any act of the illegal use of armed force ... can be seen as a continuation

39 Rachel E. VanLandingham, *Criminally Disproportionate Welfare: Aggression as a Contextual War Crime*, Case Western Reserve Journal of International Law, Vol. 48(1-2): 215-272 (2016).

40 Nikola R. Hadjin, *How to Prosecute Ongoing Acts of Aggression Following the Initial Invasion*, Lawfare, available at <https://www.lawfaremedia.org/article/how-to-prosecute-ongoing-acts-of-aggression-following-the-initial-invasion>.

41 *Id.*

42 *Id.*

43 *Id.*

44 See Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, 7 May 1997 and Nikola R. Hadjin, *How to Prosecute Ongoing Acts of Aggression Following the Initial*

of the crime of aggression if integrated into a series of actions that collectively, amount to the state conduct element.”⁴⁵ With that, every subsequent illegal act or use of armed force by Russia after the initial manifest violation of the UN Charter extends the initial crime and may incur criminal responsibility – the ICC must discern and make policy choices aligning with justice and international legal order.⁴⁶ The Breakout Group moderators touched on this and emphasized that aggression should be prosecuted as an ongoing crime. This traces back to the beginning – that the crime of aggression is the supreme international crime. Without the initial crime of aggression, the subsequent acts of violence would not have been enabled. Aggression inherently creates and greatly exacerbates the conditions that enable other violations to be committed, a critical point the Breakout Group moderators emphasized per se and emphasized its need for change.

iv. Recommendations by Group

The group proposed that efforts should be made to develop concepts of law that would allow those most responsible for the crime of aggression to face justice, regardless of jurisdictional issues. Since aggression is the “supreme international crime,” it needs to persevere jurisdictional issues and must be prosecuted. This answers, and renders moot, the question of “Do we even need to prosecute the crime of aggression since the UN charter creates a prohibition on the use of force?” Although the concepts of how to prosecute the crime of aggression are disputed, upon the prosecution of the crime of aggression, one needs to look at the facts and evidence wholly, as

Invasion, Lawfare, available at <https://www.lawfaremedia.org/article/how-to-prosecute-ongoing-acts-of-aggression-following-the-initial-invasion>.

45 Nikola R. Hadjin, *How to Prosecute Ongoing Acts of Aggression Following the Initial Invasion*, Lawfare, available at <https://www.lawfaremedia.org/article/how-to-prosecute-ongoing-acts-of-aggression-following-the-initial-invasion>.

46 *Id.*

the people who might be prosecuted might be in the Troika, or they might not. Lastly, if a tribunal is to be formed for Ukraine, or in the future for other acts of aggression, the need for a uniform coalition of states is critical – a tribunal needs the backing of the entities that have built it. Once courts or tribunals have been established, deterrence can be achieved. However, without a court that can prosecute the crime of aggression, there is no deterrence or retribution whatsoever. At present, efforts are being made to achieve justice for the crime of aggression, which is required for deterrence, but the nuances of how that will be worked out remain to be seen.

B. Democracies versus Dictatorships

- *Democracies have a genuine respect for the rule of law, such as the protection of independent judicial institutions, inclusivity, and the encouragement of political debate. Whereas autocracies may present a facade of respect for the rule of law.*
- *Continuous work must be done to protect and strengthen institutions that grant liberties and freedoms based on respect for the rule of law – they must not be taken for granted.*
- *It is a reality that democracies and autocracies co-exist and will continue to. Therefore, international institutions are responsible for delivering independent, impartial, and objective justice to strengthen the rule of law and, further, be prepared to work with all actors to develop appropriate justice mechanisms.*
- *To strengthen the rule of law institutions must be prepared to work with all actors to develop appropriate justice mechanisms.*

i. Background

Compared to authoritarian regimes, democracies rarely ever initiate and go to war with other democracies.⁴⁷ Known as the democratic peace theory, this peace amongst democracies can be attributed to their liberal democratic framework that actively supports the promotion of peace, and factors that maintain peace.⁴⁸ So, while democracy is the dominant system in the world, major powers going to war will decrease, as seen since the conclusion of the Cold War.⁴⁹ Following the dissolution of the Soviet Union, Eastern Europe saw a drastic increase in the number of democracies, in fact, “all of the former communist regimes of Eastern Europe were replaced by democratically elected governments” and in only one of those nations did the transition turn violent.⁵⁰ Although democracies have been on the rise since 1989, authoritarian regimes still exist today and will continue to exist in the future.⁵¹ In fact, authoritarian regimes are on the rise and are expected to keep spreading.⁵²

47 The Logic of Democratic Peace Theory in the Post-Cold War Era, *BINUS University International Relations*, available at <https://ir.binus.ac.id/2018/11/19/the-logic-of-democratic-peace-theory-in-the-post-cold-war-era/>.

48 *Id.*

49 *Id.*

50 Fall of communism in Eastern Europe, 1989, *Department of State Office of the Historian*, available at <https://history.state.gov/milestones/1989-1992/fall-of-communism#:~:text=By%20the%20summer%20of%201990,even%20collaboration%2C%20in%20them.%E2%80%9D>.

51 Sarah Repucci and Amy Slipowitz, *The Global Expansion of Authoritarian Rule*, Freedom House, available at <https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule>.

52 *Id.*

ii. Why Don't Democracies Invade and Fight with Other Democracies?

“It is well-documented that democracies rarely go to war with one another” leading some scholars to conclude that the theory of democratic peace is probably “the closest thing we have to a law in international politics.”⁵³ Albeit democratic states are about as conflict- and war-prone as nondemocracies, they simply rarely attack and fight with one another.⁵⁴ This theory has its roots long ago when, according to its historian, Thucydides, the only documented time Ancient Athenian Greece warred against a “democracy like themselves” was in 413 B.C.⁵⁵ In the twenty-three centuries since the Athenians waged war on the Syracusans, there has been no better case of war between established democratic states, and democracies still do not fight each other.⁵⁶ But why?

In short, “democracy, in and of itself, has a consistent and robust negative effect on the likelihood of conflict or escalation in a dyad.”⁵⁷ In testing potential causes of dyadic disputes, a Moaz and Russett study revealed that amongst wealth, economic growth, contiguity, common alliance bonds, and political stability only political stability

53 Alex Mintz, and Geva Nehemia, *Why Don't Democracies Fight Each Other? An Experimental Study*, *The Journal of Conflict Resolution*, Vol. 37(3): 484-503 (1993).

54 Zeev Moaz and Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, *American Political Science Review*, Vol. 87(3): 624-638 (1993).

55 Spencer Weart, *Never at War: Why Democracies Will Not Fight One Another*, Yale University Press, available at <https://doi.org/10.2307/j.ctt32bgps.5>.

56 *Id.*

57 Zeev Moaz and Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, *American Political Science Review*, Vol. 87(3): 624-638 (1993).

is related to low rates of disputes amongst democracies.⁵⁸ Following this, normative and structural explanations of democratic peace revealed that “constraints on political leaders in democratic states with regard to dispute and war initiation” and “norms of behavior that characterize their domestic political processes and institutions” result in democracies not attacking one another.⁵⁹ Compared to authoritarian regimes, leaders do not have these checks and balances on war initiation; instead, nondemocratic regimes have norms that allow for the “elimination...and the forceful resolution of political conflicts.”⁶⁰ Stated plainly, an increase in the level of domestic political restraints on the leader to initiate war leads to a decrease in the use of force.⁶¹ This is seen through what is commonly referred to as checks and balances. For example, in the United States, war can only be declared by Congress, composed of hundreds of elected officials, then the president must sign the declaration of war.⁶² Dissimilarly, in authoritarian regimes, the executive leader likely yields all the power himself.

58 See Alex Mintz, and Geva Nehemia, *Why Don't Democracies Fight Each Other? An Experimental Study*, *The Journal of Conflict Resolution*, Vol. 37(3): 484-503 (1993) and Zeev Maoz and Bruce Russett, *Normative and Structural Causes of Democratic Peace*, Presented at the annual meeting of the Peace Science Society (International). Ann Arbor, MI November 15-17.

59 *Id.*

60 *Id.*

61 Alex Mintz, and Geva Nehemia, *Why Don't Democracies Fight Each Other? An Experimental Study*, *The Journal of Conflict Resolution*, Vol. 37(3): 484-503 (1993).

62 See *About Declarations of War by Congress*, United States Senate, available at <https://www.senate.gov/about/powers-procedures/declarations-of-war.htm> and Michael Ramsey and Stephen Vladeck, *Declare War Cause*, *National Constitution Center*, available at <https://constitutioncenter.org/the-constitution/articles/article-i/clauses/753>.

Breaking this theory down further, the higher level of decisional restraints stems from the democratic political structure of electoral processes, where the elected leader is answerable to the public.⁶³ This fear of electoral punishment is a major constraint on decision-making in international conflicts, whereas nondemocracies do not have to fear being reelected and are willing to pay the price of war in lives and resources.⁶⁴ Conversely, democracies emphasize “liberal peace” and are unlikely to fight because the citizens, who elect the leaders into office, will bear the cost of war leading them to avoid war.⁶⁵

The Breakout Group moderators emphasized this by stating that democracies have a respect for this rule of law while nondemocracies present a façade of respect for the rule of law. Additionally, the Group stated that nondemocracies often play upon religion and a “boogie man” (an external threat only the nondemocratic leader can resolve, typically immigrants) to instill fear to need to go beyond the rule of law to pierce the veil. The criticism or action that inherently stems from nondemocracies not respecting the rule of law typically leads nondemocracies “tearing down the system” or “destroying the judiciary” whereas democracies accept criticism – a feature of democracy never found in authoritarian regimes. Lastly, when mistakes are made authoritarian regimes do not acknowledge mistakes whereas democracies do, in theory.

Beyond constraints, democracies also have incentives, or, better yet, the lack of incentives, to not attack other democracies – with these incentives and constraints working coextensively to further produce

63 *Id.*

64 *Id.*

65 Alexandre Debs and H.E. Goemans, *Regime Type, the Fate of Leaders, and War*, *American Political Science Review* Vol. 104(3): 430-445 (2010).

the same result.⁶⁶ One of the major lack of incentives for a democracy to not attack another democracy is that the public views it as not “right” to fight another democracy, and, instead, believes that there are other possibilities of solving the conflict among democracies.⁶⁷ Dissimilarly, studies have shown that in the same situation, with the adverse parties’ regime type being the only difference, a nondemocracy may “deserve to be victim of force.”⁶⁸ In other words, public approval of the use of force is contingent upon the regime of the adversary.⁶⁹

This major lack of incentive works independently and in aggregation with the constraints to create a negative net gain on the cost/benefit analysis of democratic leaders to attack other democracies – democratic avoidance of the use of aggression is directly related to the lack of benefits from the use of force.⁷⁰ In sum, the answer to the above question of “Why don’t democracies invade and fight with other democracies?” is simple – leaders of democracies have extremely low political incentives to do so.⁷¹

66 Alex Mintz, and Geva Nehemia, *Why Don’t Democracies Fight Each Other? An Experimental Study*, *The Journal of Conflict Resolution*, Vol. 37(3): 484-503 (1993).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 See Alex Mintz, and Geva Nehemia, *Why Don’t Democracies Fight Each Other? An Experimental Study*, *The Journal of Conflict Resolution*, Vol. 37(3): 484-503 (1993), Zeev Maoz and Bruce Russett, *Normative and Structural Causes of Democratic Peace*, Presented at the annual meeting of the Peace Science Society (International). Ann Arbor, MI November 15-17, and Zeev Moaz and Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, *American Political Science Review*, Vol. 87(3): 624-638 (1993).

iii. How Might International Institutions and Prosecutors More Efficiently and Effectively Obtain Justice by Working with all Types of Government?

With it well established that democracies are not politically incentivized to fight other democracies, this does not mean that democracies and democratic leaders, such as prosecutors, should not work with nondemocracies to achieve justice – a principle of the ICC seen in the Policy on Complementarity and Cooperation of the ICC.⁷² This is outlined by the ICC having to rely on “cooperation with countries worldwide for support, particularly for making arrests, transferring arrested persons to the ICC detention center in The Hague, freezing suspects’ assets, and enforcing sentences.”⁷³ The reasoning behind this is it is more efficient and effective to obtain justice by working with all types of governments and international institutions versus just working with democratic, or similarly aligned or allied governments.⁷⁴ In practicing this, prosecutors can prioritize

72 How the Court Works, *International Criminal Court*, available at <https://www.icc-cpi.int/about/how-the-court-works#:~:text=Finally%2C%20the%20fourth%20crime%20falling,Statute%20and%20Elements%20of%20Crimes> and Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in the Democratic Republic of the Congo and renewed investigations, *International Criminal Court*, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-situation-democratic-republic-congo-and-renewed>.

73 *Id.*

74 *See Combatting Corruption and Promoting Good Governance*, US Department of State, available at <https://www.state.gov/combating-corruption->

diplomacy and engagement, build strong relationships with all national authorities, leverage political pressure or assistance when necessary, tailor approaches to specific contexts, and prioritize victim participation and protection – all while respecting the principle of complementarity and the rule of law.⁷⁵

A few short examples of the ICC working with nondemocratic governments can outline this need for international institutions and adverse governments to work together to achieve justice. Prosecutor Khan outlines that some goals in the Democratic Republic of the Congo⁷⁶ “can only be achieved through joint accountability efforts by the DRC, my Office, and the wider international community.”⁷⁷ Just north in the Central African Republic, the ICC and other international

and-promoting-good-governance/, Informal Expert Paper: The Principle of Complementarity in Practice, *International Criminal Court*, available at <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>, and How the Court Works, *International Criminal Court*, available at <https://www.icc-cpi.int/about/how-the-court-works#:~:text=Finally%2C%20the%20fourth%20crime%20falling,Statute%20and%20Elements%20of%20Crimes>.

75 *Id* and *What Is the Rule of Law*, United Nations and the Rule of Law, available at <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

76 A country that, although is labeled as democratic, is not seen as a democratic nation and is becoming less democratic. Democratic Republic of the Congo, *Freedom House*, available at <https://freedomhouse.org/country/democratic-republic-congo/freedom-world/2022>.

77 Statement of ICC Prosecutor Karim A.A. Khan KC on the Situation in the Democratic Republic of the Congo and renewed investigations, *International Criminal Court*, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-situation-democratic-republic-congo-and-renewed#:~:text=As%20the%20Office's%20Policy%20on,a%20problem%20with%20this%20page>.

institutes have been continuously working with various transitional justice mechanisms to achieve justice and restitution.⁷⁸

A good example of how working with all sorts of government can be effective is seen in the prosecution of Charles Taylor. Here, early in investigations, ICC prosecutors from the Special Court for Sierra Leone visited surrounding West African heads of state, some authoritarians some democratically elected. In doing so, the ICC prosecutors showed their respect to the surrounding leaders and asked for their views of Charles Taylor, what he had done, and what they think should be done. This led to earnest diplomacy and relationship building with the surrounding states that allowed the ICC to learn information it otherwise potentially would not have learned if it had not connected with nondemocratic leaders.

iv. Recommendations by Group

Democracies should not take their democratic qualities and values for granted as they can change drastically in a short amount of time; instead, democracies should continuously work on improving their invaluable qualities and values. These include values such as the freedom of education, written and unwritten checks and balances, lack of fear, freedom to voice concerns about impunity without fear of reprisal, accountability, and, importantly, inclusivity. Safeguarding these qualities and systems is crucial and can be seen through the protection of history, open and free press, taking accountability for actions, embracing humanity, and not vilifying one another. These qualities are what make democracies stand ahead of authoritarian regimes, but democracy alone does not solve all problems.

⁷⁸ See *Central African Republic*, International Center for Transitional Justice, available at <https://www.ictj.org/location/central-african-republic> and *Central African Republic (I and II)*, Coalition for the International Criminal Court, available at <https://www.coalitionfortheicc.org/country/central-african-republic-i-and-ii>.

Backsliding on these values results in failing to serve vulnerable citizens and creating people who are more equal than others. Insofar as democracies protect their qualities and values, then the democratic peace theory will reign continuing their peace amongst each other. Democracies need to have the semblance of equality where all people are equal before the law and prosecutors need to prosecute on all sides of the democratic spectrum. Democracies should not be focused on trying to take over with democracy; instead, they should fight atrocity crimes. In doing so, prosecutors need to deal with nondemocratic and democratic systems where justice can potentially be more efficient. This is best practiced through the strong man respect strength approach where prosecutors act respectfully to all governments but make it known that the prosecutor is the stronger entity. By working with all forms of government, justice is better achieved to get justice for victims while always working within the bounds of the law.

C. Attacks on Civilians and Civilian Infrastructure

- *In investigating and prosecuting war crimes involving the deaths of civilians and destruction of civilian infrastructure, institutions must rely upon a skilled analysis of the law and its application to the facts.*
- *This analysis must focus on the nature of the attack: whether it is purely military, civilian, or involves a dual military-civilian use; followed by an assessment of proportionality, and an assessment of whether the most accurate weapons systems available must be used to minimize civilian casualties and destruction of civilian infrastructure.*
- *The legal implications of the use of AI-enhanced weaponry must be a subject of consideration in international humanitarian law, including the circumstances in which human actors in a decision-making chain may attract individual criminal liability.*

i. Background

On 7 October 2023, Hamas launched a surprise attack on Israel from Gaza killing approximately 1,200 people and taking over 200 hostages – the deadliest attack in Israeli history.⁷⁹ In response, Israel has been bombing the Gaza Strip, and, according to the UN, as of 29 October 2024, at least 43,061 Palestinians have reportedly been killed, 101,223 have reportedly been injured and about 1.9 million people – 90% of the population – are internally displaced.⁸⁰

ii. How might Israel face international humanitarian crimes for the widespread civilian destruction and death in Gaza?

Although Israel had the right to a lawful and valid exercise of Article 51 self-defense of the UN Charter against Hamas and Gaza, many concerns have been raised about the proportionality used in the ongoing conflict in Gaza.⁸¹ The principle of proportionality is mentioned in Article 51 of Additional Protocol I, and even though Israel is not a party to this, they are bound by proportionality as proportionality is considered to be part of customary law.⁸² In fact, “Israel’s Ministry

79 *Israeli-Palestinian Conflict Timeline*, Council on Foreign Relations, available at <https://education.cfr.org/learn/timeline/israeli-palestinian-conflict-timeline>.

80 *UNRWA Situation Report #146 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem*, United Nations Relief and Works Agency for Palestine Refugees in the Near East, available at <https://www.unrwa.org/resources/reports/unrwa-situation-report-146-situation-gaza-strip-and-west-bank-including-east-jerusalem>.

81 *Charter of the United Nations*, United Nations, available at <https://legal.un.org/repertory/art51.shtml>.

82 Ted van Baarda, *Assessing the Proportionality of the Violence in the Gaza Strip*, The International Society for Military Ethics in Europe, available at <https://www.euroisme.eu/index.php/en/blogs/views-on-the-crisis-in-the-middle-east/396-assessing-the-proportionality-of-the-violence-in-the-gaza-strip>.

for Foreign Affairs has accepted Article 51 as a “clarification” of customary international law.”⁸³ The ministry added that:

“Evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimize incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues.”⁸⁴

Simply put, proportionality means using force that is necessary to address the threat and proportionate in nature to the threat posed – a position the U.S. supports.⁸⁵ Further, a use of force is necessary if diplomatic measures are insufficient, and “if there is a logical connection between the actions taken and the threat which one seeks to neutralize.”⁸⁶ Although this may seem simple, this is a complex, “maddingly complicated” question of what amounts to proportional violence with different meanings in different contexts.⁸⁷

83 *Id.*

84 *Id.*

85 Peter E. Combe, *Israel – Hamas 2024 Symposium – Ruminations on the Legal, Policy, and Moral Aspects of Proportionality*, Lieber Institute West Point, available at <https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality/>.

86 *Id.*

87 See Ted van Baarda, *Assessing the Proportionality of the Violence in the Gaza Strip*, The International Society for Military Ethics in Europe, available at <https://www.euroisme.eu/index.php/en/blogs/views-on-the-crisis-in-the-middle-east/396-assessing-the-proportionality-of-the-violence-in-the-gaza-strip> and

Considerations regarding the use of force in the first place (*ius ad bellum*) are not at play since the laws of armed conflict (*ius in bello*) are the relevant rules since hostilities have commenced, the concept of proportionality is now derived from the international Law of Armed Conflict (LOAC).⁸⁸

Proportionality also concerns the balance of the use of military force when engaging in conflict on whether the attacking parties' targets are purely civilian, purely military, or a dual-use military-civilian target.⁸⁹ IHL Rule 7, codified in Articles 48 and 52(2) of Additional Protocol I, quite plainly states "The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects,"⁹⁰ The Rome Statute outlines this in ICC Statute, Article 8(2)(b)(i) to (v) stating in general that targets must be military in nature and any use of force against civilian objects or with the knowledge that civilian life will be lost is a serious violation of IHL.⁹¹ Further, the prohibition of directing attacks against civilian targets is also in Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons, and

LTC Geoffery S. Corn, *The Disproportionate Confusion About Proportionality*, Jewish Institute for National Security of America, available at <https://jinsa.org/disproportionate-confusion-about-proportionality/>.

88 Barry A. Feinstein, *Proportionality and War Crimes in Gaza Under the Laws of Armed Conflict*, Rutgers Law Record, Vol. 36: 224-256 (2009) and LTC Geoffery S. Corn, *The Disproportionate Confusion About Proportionality*, Jewish Institute for National Security of America, available at <https://jinsa.org/disproportionate-confusion-about-proportionality/>.

89 *International Humanitarian Law Databases*, International Committee of the Red Cross, available at <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule7>.

90 *Id.*

91 ICC Statute, Article 8(2)(b)(i), (ii), (iii), (iv), and (v) *Rome Statute of the International Criminal Court*, International Criminal Court, available at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

the ICC states that “intentionally directing attacks against civilian objects, that is, objects which are not military objectives,” constitutes a war crime.⁹² “Thus, while Israel may avail itself of the legal right to use military force in self-defense, its overall operational design must be both necessary and proportionate to the threat posed by Hamas.”⁹³

With the rules and customs laid out, an analysis of potential violations of those rules is critical, with numerous factors to be considered. The Gaza Strip, about 25 miles by 7 miles, has a population of roughly 2.3 million people, making the population density about 14,000 people per square mile—roughly the same density as London.⁹⁴ Within Gaza, roughly 38.8% of the population is between 0-14 years, 58.3% between 15-64, and 2.9% above 65 years, with male-to-female ratios being roughly the same without any outstanding differences.⁹⁵ This makes children roughly half of the population of Gaza.⁹⁶ As for Hamas, it is estimated that around February of 2023, Hamas fighters made up about 30,000 people.⁹⁷

92 *Id.*

93 Peter E. Combe, *Israel – Hamas 2024 Symposium – Ruminations on the Legal, Policy, and Moral Aspects of Proportionality*, Lieber Institute West Point, available at <https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality/>.

94 *The Gaza Strip: Tiny, cramped and as densely populated as London*, AP News, available at <https://apnews.com/article/israel-gaza-hamas-war-90e02d26420b8fe3157f73c256f9ed6a>.

95 *Gaza Strip*, CIA The World Factbook, available at <https://www.cia.gov/the-world-factbook/countries/gaza-strip/>.

96 Linah Mohammad, *Children Make Pp Nearly Half of Gaza’s Population. Here’s What it Means for the War*, NPR, available at <https://www.npr.org/2023/10/19/1206479861/israel-gaza-hamas-children-population-war-palestinians>.

97 Peter E. Combe, *Israel – Hamas 2024 Symposium – Ruminations on the Legal, Policy, and Moral Aspects of Proportionality*, Lieber Institute

The arguments of violations against proportionality stem from Israel's repeated bombardment of the Gaza Strip. On 7 October 2024, exactly one year after the commencement of the conflict, it was estimated that upwards of 60% of all buildings in Gaza had been damaged or destroyed, with numbers certainly to increase.⁹⁸ This is an unprecedented level of destruction not seen since World War II, with nearly 2.4 million tons of debris created in just the first 51 days of conflict.⁹⁹ For comparisons, in just the first two months of conflict, researchers say that more destruction was created in these first two months than the razing of Aleppo from 2012-2016, Ukraine's Mariupol, or proportionally, the Allied bombing of Germany in World War II¹⁰⁰ – killing more civilians than the U.S. coalition did against ISIS in a three-year campaign.¹⁰¹ This can be partially explained by the sorts of munitions used by Israel which include hundreds of

West Point, available at <https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality/>.

98 Raja Abdulrahim et al., *Gaza in Ruins After a Year of War*, available at <https://www.nytimes.com/interactive/2024/10/07/world/middleeast/israel-gaza-destruction-amas-war.html>.

99 Edith Lederer, *The Unprecedented Destruction of Housing in Gaza Hasn't Been Seen Since World War II*, *The UN Says*, AP News, available at <https://apnews.com/article/un-report-gaza-destruction-housing-economy-recovery-4f61dca7db3fd5eb3da5c6a25001e12>.

100 As of April 2024, it is estimated that Israel has dropped over 70,000 tons of bombs into Gaza. This is relatively more than 18,300 dropped on London by Germany from 1940-1941, 8,500 tons dropped on Hamburg in the summer of 1943, and 3,900 tons dropped on Dresden in February 1945. Muhammed Enes Çalli, *Amount of Israeli Bombs Dropped on Gaza Surpasses That of World War II*, Anadolu Agency, available at <https://www.aa.com.tr/en/middle-east/amount-of-israeli-bombs-dropped-on-gaza-surpasses-that-of-world-war-ii/3239665>.

101 Julia Frankel, *Israel's Military Campaign in Gaza Seen as Among the Most Destructive in Recent History*, *Experts Say*, AP News, available at <https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope-419488c511f83c85baea22458472a796>.

2,000-pound bombs.¹⁰² These massive bombs have a blast radius big enough to kill people 360 meters away from detonation and can cause severe damage to building infrastructure 800 meters away.¹⁰³ Even worse, some of these bombs were dropped “within dangerous proximity of hospitals across the Gaza Strip” with data analysis and satellite imagery investigations showing that “at least one bomb crater within 800 m of 83% percent of the 36 hospitals in the Gaza Strip, and nine of those hospitals had 2000 lb bomb craters within 360 m.”¹⁰⁴ Further, when these bombs were dropped, “tens of thousands of civilians used these hospitals and their surrounding areas as places to seek refuge” revealing “serious concern for the violation of international humanitarian law.”¹⁰⁵ Even more concerning for potential violations of IHL, the same analysis also found the “Israeli military air-dropped over one hundred 2000 lb bombs in the officially designated evacuation zone for civilians.”¹⁰⁶

102 See *Press Release: New Study Shows Israel Air-Dropped 2000lb Bombs within Lethal and Damage Ranges of Hospitals in Gaza*, FXB Center for Health and Human Rights at Harvard University, available at <https://fxb.harvard.edu/2024/10/10/new-study-shows-israel-air-dropped-2000lb-bombs-within-lethal-and-damage-ranges-of-hospitals-in-gaza/>, Tamara Qiblaw et al., ‘*Not Seen Since Vietnam*’: Israel Dropped Hundreds of 2,000-Pound Bombs on Gaza, *Analysis Shows*, CNN World, available at <https://www.cnn.com/gaza-israel-big-bombs/index.html>, and Julia Frankel, *Israel’s Military Campaign in Gaza Seen as Among the Most Destructive in Recent History, Experts Say*, AP News, available at <https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope-419488c511f83c85baea22458472a796>.

103 *Press Release: New Study Shows Israel Air-Dropped 2000lb Bombs within Lethal and Damage Ranges of Hospitals in Gaza*, FXB Center for Health and Human Rights at Harvard University, available at <https://fxb.harvard.edu/2024/10/10/new-study-shows-israel-air-dropped-2000lb-bombs-within-lethal-and-damage-ranges-of-hospitals-in-gaza/>.

104 *Id.*

105 *Id.*

106 *Id.*

In sum, since the principle of proportionality prohibits, “launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,”¹⁰⁷ it can be concluded that Israel’s campaign has likely committed IHL violations. The sheer number and type of bombs dropped¹⁰⁸ resulting in the massive amount of lives lost¹⁰⁹ in such a densely populated area¹¹⁰ the bombing campaign in Gaza is un-proportionally killing civilians and damaging civilian infrastructure.¹¹¹

107 Peter E. Combe, *Israel – Hamas 2024 Symposium – Ruminations on the Legal, Policy, and Moral Aspects of Proportionality*, Lieber Institute West Point, available at <https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality/>.

108 See Julia Frankel, *Israel’s Military Campaign in Gaza Seen as Among the Most Destructive in Recent History, Experts Say*, AP News, available at <https://apnews.com/article/israel-gaza-bombs-destruction-death-toll-scope-419488c511f83c85baea22458472a796>, *Press Release: New Study Shows Israel Air-Dropped 2000lb Bombs within Lethal and Damage Ranges of Hospitals in Gaza*, FXB Center for Health and Human Rights at Harvard University, available at <https://fxb.harvard.edu/2024/10/10/new-study-shows-israel-air-dropped-2000lb-bombs-within-lethal-and-damage-ranges-of-hospitals-in-gaza/>, and Tamara Qiblaw et al., *‘Not Seen Since Vietnam’: Israel Dropped Hundreds of 2,000-Pound Bombs on Gaza, Analysis Shows*, CNN World, available at <https://www.cnn.com/gaza-israel-big-bombs/index.html>.

109 See *UNRWA Situation Report #146 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem*, United Nations Relief and Works Agency for Palestine Refugees in the Near East, available at <https://www.unrwa.org/resources/reports/unrwa-situation-report-146-situation-gaza-strip-and-west-bank-including-east-jerusalem>.

110 See *The Gaza Strip: Tiny, cramped and as densely populated as London*, AP News, available at <https://apnews.com/article/israel-gaza-hamas-war-90e02d26420b8fe3157f73c256f9ed6a> and *Gaza Strip*, CIA The World Factbook, available at <https://www.cia.gov/the-world-factbook/countries/gaza-strip/>.

111 See *UNRWA Situation Report #146 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem*, United Nations Relief and

iii. Recommendations by Group

The group proposed that in differentiating between a civilian and military target, a comprehensive, skilled analysis of the target, the law, and its application to the facts should be done to determine whether it is civilian or military, and where there is a dual civilian-military use target, proportionality becomes the important factor. This analysis must focus on the nature of the target of attack whether it is purely military or civilian or involves a dual military-civilian use. Further, with the nature of warfare today, an assessment of the most accurate weapons systems available must be used to minimize civilian casualties and the destruction of civilian infrastructure. In doing so, prosecutors should always go back to applying jurisprudence and the factors of the law, with close calls giving the benefit of the doubt to the military for trying to do their job. It does not really matter if military personnel are at more risk in lowering casualties as the military accepts the risk, what matters is the weapon used, whether it is appropriate, and what is the platform. In addressing the mental state requirement of attacks on civilians and civilian infrastructure, the expertise of the alleged perpetrator should also come into play as a factor.

D. Crimes Against Children

- *Crimes against children are unique because of the impressionability and vulnerability of children along with the long lifelong experience of being a child victim.*
- *The practice of child soldiers is a major consideration when evaluating criminal liability because of its complex transformation of when children reach the age of majority*

and choose to remain in positions of the military to commit international crimes despite reasonable options of leaving.

- *Currently, international jurisprudence does not absolve a perpetrator of criminal liability because they were initially a child soldier, but recruitment and participation in conflict of child soldiers may be considered.*
- *Due to the social and cultural destruction of the victim group, the transfer of children may present a potential case of genocide.*

i. Background

Tens of thousands of child soldiers are estimated to be recruited by armed groups around the world, and, in 2019 alone, more than 7,700 children, some as young as six, were recruited for use as soldiers, according to the UN.¹¹² From 2005 to 2022, 105,000 child soldiers were verified as recruited and used in armed conflict, although the exact number is unknown and expected to be higher.¹¹³ Despite IHL and global efforts to eradicate the use of child soldiers, young girls, and boys are still being forced into combat and can be found in fourteen different nations.¹¹⁴ No matter how children become involved in armed conflict (whether it be done by abduction, threats, coercion by armed actors, driven to join by poverty, or compelled to

112 See *Children Recruited by Armed Forces or Armed Groups*, UNICEF, available at <https://www.unicef.org/protection/children-recruited-by-armed-forces>, and Emeline Wuilbercq, *Factbox: Ten Facts About Child Soldiers Around the World*, Reuters, available at <https://www.reuters.com/article/world/factbox-ten-facts-about-child-soldiers-around-the-world-idUSKBN2AC0CB/>.

113 *Children Recruited by Armed Forces or Armed Groups*, UNICEF, available at <https://www.unicef.org/protection/children-recruited-by-armed-forces>.

114 Emeline Wuilbercq, *Factbox: Ten Facts About Child Soldiers Around the World*, Reuters, available at <https://www.reuters.com/article/world/factbox-ten-facts-about-child-soldiers-around-the-world-idUSKBN2AC0CB/>.

generate income for their families) the use of child soldiers in conflict by armed forces is a violation of international humanitarian law.¹¹⁵

The exploitation of children in armed conflict is not limited to the use of child soldiers on the battlefield. In some instances, children are forcibly separated and abducted from their families, taken across borders, and indoctrinated into a new race or ethnicity. This can be seen in the ongoing abduction of Ukrainian children by Russian forces. The Ukrainian government has documented around 20,000 instances of children being taken to Russia or Russian-controlled areas of Ukraine for forced “russification” and assimilation – this number is now surely to be higher.¹¹⁶ These acts led to the ICC formally issuing warrants of arrest in March 2023 for Russian President Vladimir Putin and Maria Lvova-Belova, the Commissioner for Children’s Rights in the Office of the President of the Russian Federation.¹¹⁷

ii. Should Formerly Conscripted Child Soldiers Who Committed War Crimes After Turning 18 Years of Age Continue to be Prosecuted for War Crimes and Crimes Against Humanity? If So, Should Decisions by the ICC Reflect an Alleged Perpetrator’s History of Being Forced to be a Child Soldier?

115 *Children Recruited by Armed Forces or Armed Groups*, UNICEF, available at <https://www.unicef.org/protection/children-recruited-by-armed-forces>.

116 *Hearing – Eyewitness Accounts: Ukrainian Children and Adult Civilians Abducted by Russia*, Commission on Security and Cooperation in Europe, available at <https://www.csce.gov/press-releases/hearing-eyewitness-accounts-ukrainian-children-and-adult-civilians-abducted-by-russia/>.

117 *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, International Criminal Court, available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and->

The prosecution of former child soldiers who have committed grave atrocities after reaching the age of majority presents cases that are unique and different from that of non-child soldier persons as conflict has severe “damaging effects on children and are typically left with long-lasting psychological scars.”¹¹⁸ The prohibition on the recruitment of child soldiers, whether voluntary or by force, can be seen in Article 77 of Additional Protocol I, and Article 4 of Additional Protocol II.¹¹⁹ Similarly, Article 38(3) of the Convention on the Rights of the Child prohibits the recruitment of children below 15 and is interpreted to completely outlaw child soldiers, no matter how they were recruited.¹²⁰ Under the ICC in Article 8(2)(b)(xxvi) and (e)(vii), “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” and “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” are both expressly prohibited.¹²¹

International humanitarian law does allow individuals to be prosecuted for humanitarian crimes they committed before reaching 18 years, and, to this day, no international tribunal has ever tried a child for war crimes.¹²² Delegates negotiating the statute for the ICC

118 See *Children Recruited by Armed Forces or Armed Groups*, UNICEF, available at <https://www.unicef.org/protection/children-recruited-by-armed-forces>, and Emeline Wuilbercq, *Factbox: Ten Facts About Child Soldiers Around the World*, Reuters, available at <https://www.reuters.com/article/world/factbox-ten-facts-about-child-soldiers-around-the-world-idUSKBN2AC0CB/>.

119 *Child Soldiers*, Casebook International Committee of the Red Cross, available at https://casebook.icrc.org/a_to_z/glossary/child-soldiers#:~:text=IHL%20prohibits%20the%20recruitment%20and,and%20non%2Dinternational%20armed%20conflicts.

120 *Id.*

121 *Id.*

122 *Treatment of Former Child Soldiers Accused of Crimes*, Human Rights Watch, available at <https://www.hrw.org/legacy/backgrounder/usa/us0607/4.htm>.

“decided that the Court should not have jurisdiction over children under 18.”¹²³ The SCSL decided that the Prosecutor must consider alternate mechanisms for dealing with child perpetrators, here, the Sierra Leone’s Truth and Reconciliation Commission.¹²⁴ Even so, the SCSL has not prosecuted any persons for crimes committed before 18 years.¹²⁵ This is outlined best in the Paris Principles enumerating guidance for the treatment of child soldiers accused of crimes stating, “Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offenses against international law; not only as perpetrators.”¹²⁶

Instead, the prosecution focuses on former child soldiers who have committed atrocities after turning 18 years old which is best outlined by the groundbreaking case of *The Prosecutor v. Dominic Ongwen*.¹²⁷ Here, most importantly, Ongwen was “the first abducted child soldier found guilty of the commission of the same crimes that he had also suffered” when he was a child soldier.¹²⁸ Ongwen was the leader of the Lord’s Resistance Army (LRA) and was charged with and faced two counts of war crimes for the conscription and use of child soldiers, among numerous other charges, before the ICC.¹²⁹ The Trial Chamber found Ongwen fully responsible for the crimes committed, that he did

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 Konstantina Stavrou and Andreas Sauer Moser, *The Prosecutor V Dominic Ongwen: A Judgment Of Many Firsts*, Human Rights Pulse, available at <https://www.humanrightspulse.com/mastercontentblog/the-prosecutor-v-dominic-ongwen-a-judgment-of-many-firsts>.

128 *Id.*

129 *Id.*

not possess a mental disease of disorder during the relevant period, and he was not acting under duress in the relevant instances.¹³⁰

This is crucial to note because this was the first time the ICC faced the affirmative defense of mental disease and duress, seemingly stemming from his unfortunate past of being conscripted as a child soldier.¹³¹ The case exemplified an extremely complex balancing of criminal culpability and victimhood that sparked adverse reactions regarding whether former abduction and victimization as a child soldier should play a role in the decision of the ICC.¹³² What was decided and portrayed, and what is current and widely supported, is the victimization of Ongwen, and potential future defendants should have legal relevance to the case.¹³³ Although met with opposition, this is the best way to ensure proper justice for the victims providing retribution and deterrence to others. This is in alignment with Rule 145 of the Rules of Procedure and Evidence of the ICC as it serves as a mitigating factor in the sentencing but does not result in the dropping of a case.¹³⁴ For argument's sake, if an alleged perpetrator was not prosecuted due to his former experiences as a child soldier negating his prosecution, the ICC would not be able to award collective community support reparations or maybe even individual payments – an important source of retribution.¹³⁵ Furthering the need to have prosecution for former child soldiers, is the fact that sentencing acknowledges the unfortunate childhood history and the perpetrator's

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.*

135 Amy Braunschweiger, *How to Hold a Former Child Soldier Accountable?*, Human Rights Watch, available at <https://www.hrw.org/news/2021/01/27/how-hold-former-child-soldier-accountable>.

crimes serves as a comfort to many families.¹³⁶ Victimized families and victims from being child soldiers need support in reintegrating back into the community and rebuilding damaged institutions.¹³⁷

“This trial cannot solve the myriad problems created by the LRA conflict, including its devastating impact on children,” Keppler said. “But fair trials, including appropriate punishments for those convicted, can help build greater respect for rule of law and hopefully contribute to a brighter future – in Uganda and beyond.”

In sum, ICC trials cannot and will not solve all the adverse effects created by the complex issue of child soldiers committing humanitarian and war crimes.¹³⁸ Notwithstanding this, decisions by the ICC still need to factor in and consider the perpetrator’s past as a child soldier. Still, the fact that a defendant was a child soldier, along with their horrific experiences and tortures, mental and physical, should not be used to negate responsibility fully.¹³⁹

iii. How Might Russia Face International Humanitarian Crimes for its Abduction and Deportation of Children from Russian Occupied Regions of Ukraine?

The abduction and deportation of children falls under the international humanitarian crime of genocide. Genocide is defined in Article 6(e) of the Rome Statute and Article II of the Genocide Convention. It states in relevant part that “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” such as “forcibly transferring children of the group to another group” are acts

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

of genocide.¹⁴⁰ Therefore, international humanitarian law prohibits the evacuation of children by the party to an armed conflict, except in circumstances of temporary evacuation where there are convincing reasons such as the health of the children, “or except in occupied territory, their safety, so requires.”¹⁴¹ Even in such circumstances, the written consent of parents or legal guardians is required.¹⁴² In sum, the crime of genocide constitutes a mental element that is seen in “acts committed with intent...” as well as a physical element seen in “forcibly transferring children of the group to another group.”¹⁴³ The satisfaction of both of these elements is necessary to conclude that the crime of genocide has occurred.

The Human Rights Council of the Office of the United Nations High Commissioner for Human Rights conclusively determined that none of the child abduction instances that they examined in Ukraine satisfied the requirements for evacuating children set forth by international humanitarian law – none were justified by safety or medical reasons.¹⁴⁴ In other words, Russia did not evacuate the children for convincing reasons such as health nor did they have the consent

140 ICC Statute, Article 6(e), *Rome Statute of the International Criminal Court*, International Criminal Court, available at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

141 *Report of the Independent International Commission of Inquiry on Ukraine*, Office of the United Nations High Commissioner for Human Rights, available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf.

142 Additional Protocol 1, Article 78(1).

143 ICC Statute, Article 6(e), *Rome Statute of the International Criminal Court*, International Criminal Court, available at <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

144 *Report of the Independent International Commission of Inquiry on Ukraine*, Office of the United Nations High Commissioner for Human Rights, available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf.

of the children's parents. This leads to the conclusion that Russia evacuated and abducted the children, thereby forcibly transferring the children to another group. This can be seen through state actions as Russia has taken numerous legal and policy measures regarding the abducted children, including granting of Russian citizenship and placing some of the children in foster families.¹⁴⁵ Among other violations, the children are forbidden to speak Ukrainian or preserve their Ukrainian identity.¹⁴⁶ These actions taken by the government of Russia intentionally created a framework that will result in some children permanently staying in the Russian Federation.¹⁴⁷ This is further evidenced by President Putin signing a decree in May 2022 that facilitated Russian citizenship applications for some categories of children, and, more evidently, Maria Lvova-Belova expressly declared, "Now that the children have become Russian citizens, temporary guardianship can become permanent."¹⁴⁸ All of this evidence that Russia is taking the children is to destroy a group of people, but this is difficult to prove and the basis of the issue. To constitute genocide, intent to destroy a group needs to be shown. Notwithstanding looking at the plain language of the Genocide Convention statutes and the facts at bar leads one to conclude that the mental and physical requirements have been satisfied.

145 *Report of the Independent International Commission of Inquiry on Ukraine*, Office of the United Nations High Commissioner for Human Rights, available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf.

146 *Deportation, Treatment of Ukraine's Children by Russian Federation Take Centre Stage by Many Delegates at Security Council Briefing*, United Nations Meetings Coverage and Press Releases, available at <https://press.un.org/en/2023/sc15395.doc.htm>.

147 *Id.*

148 *Id.*

Breakout Group moderators discussed how the Russian evacuation and deportation of children is a vestige of cultural genocide and could be the first instance of actus reus of the act of cultural genocide. The moderators emphasized how the treaties and statutes do not make a distinction between children and adults and that the acts are more egregious when committed against children with discussions about different standards for children versus adults were raised. Additionally, the group emphasized the extreme importance of returning the children back to Ukraine as timely as possible so as not to let them lose their childhood. Canada, the UAE, and some NGOs have started to quietly negotiate the return of children whereas the ICC charges are acting as a front-line, publicly viewed line of accountability with both being equally important. Lastly, even once children are returned, the reeducation of children once they assimilate into the majority group will have a profound impact on the individuals, society, and their culture.

iv. Recommendations by Group

The group recommended that the agency of a child soldier should continue to be a principal consideration when evaluating criminal liability, including their initial recruitment and participation in the conflict, but should not absolve the perpetrator of liability. Although status as a child soldier may be a mitigating factor in sentencing because the agency may transform when children reach the age of majority and choose to remain in military positions to commit an international crime despite the option to leave, criminal liability must be assessed. The group also discussed how there is a need to evaluate how duress is defined in this argument and what to do with former child soldiers who are found to be mentally incompetent. Arguably, the question of competence will become a pressing and controversial issue in international human rights as disability experts are arguing that no one should be declared incompetent. This debate should be addressed and focus on the issue of if the individual knew

right versus wrong. The group touched on how rehabilitation and restitution, not necessarily incarceration, may be alternatives for some former child soldiers due to the unique impressionability and vulnerability of children resulting in the lasting harm they will live with as child victims. As for Russia's deportation of children, the group emphasized the necessity for children to be returned as soon as possible and emphasized continued support for the ICC in its case against Putin and Maroa Lvova-Belova.

About the ASIL

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

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