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CLOSING PLENARY ASIL ANNUAL MEETING 2023

At 7:00 p.m. on Friday, March 31, 2023, after welcoming words from ASIL President Professor Gregory C. Shaffer and Mariëlle Vavier, Deputy Mayor for International & Humanitarian Affairs at The Hague Municipality—the sponsor of the (reception prior to the) Closing Plenary—the panel was convened by the moderator, Dr. Christophe Paulussen, senior researcher at the T.M.C. Asser Institute in The Hague—the organizing institution of this recurring annual ASIL event—who introduced the panelists: David Vaughn, of USAID Ukraine Justice for All Activity; Ivana Hrdličková, of the Judicial Academy, Czech Republic, former Special Tribunal for Lebanon; Susana SáCouto, of the American University Washington College of Law, War Crimes Research Office; and Beth Van Schaack, of the U.S. Department of State.

Remarks by Christophe Paulussen*

Good evening to you all and welcome to the closing plenary of the ASIL Annual Meeting 2023, at this magnificent venue of the National Press Club. Tonight, I have the pleasure and honor of moderating our panel "Pursuing Global Accountability for Atrocity Crimes: Needs, Challenges and the Path Forward." The theme of this year's annual meeting is "The Reach and Limits of International Law to Solve Today's Challenges." One of those challenges is how to best respond to and pursue accountability for atrocity crimes. Unfortunately, we have seen many such crimes being committed, in conflicts around the world. The one that has arguably received most of the attention is the conflict in Ukraine, which started with a manifest violation by the Russian Federation of the UN Charter, "our moral anchor," to quote UN Secretary-General António Guterres. The casual disdain with which Russia has undermined the international legal order led some to wonder whether international law should be pronounced dead. However, a contrary argument has emerged as well. The mobilization and use of international law in the context of the war in Ukraine—examples are the involvement of the International Criminal Court (ICC) and the International Court of Justice (ICJ), as well as the discussions about setting up a tribunal for the crime of aggression—has been hailed, in the words of Dr. Gabija Grigaite Daugirde, the Vice-Minister at the Ministry of Justice of the Republic of Lithuania, as international law's "renaissance." At the same time, some have criticized what they perceive as a disproportionate focus on the situation in Ukraine, selectivity, and the lack of attention to other conflicts. Our closing panel will address these fundamental questions and discuss specific situations around the world in which atrocities crimes and other serious human rights violations have taken place in order to identify the needs, challenges, and path forward to accountability. I am thrilled that we are joined tonight by truly excellent panelists, who, one way or the other, all have a connection to the T.M.C. Asser Institute, and who will share their wisdom with us. Thanks to all of you for your willingness to contribute to tonight's panel and as agreed, and for ease of communication, after the initial introduction, we will continue the panel on a first-name basis.

* Senior researcher at the T.M.C. Asser Institute in The Hague.

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The first speaker was David Vaughn, Chief of Party for the USAID New Justice Program in Kyiv, to whom Paulussen asked whether he felt there is indeed disproportionate focus on the situation in Ukraine and a lack of attention to other conflicts and if so, what could be done about it? And his more practical question was: having worked with judges but also other criminal justice professionals on the ground for such a long time: which needs and challenges do you see reappearing in the context of capacity building activities in all these different situations, and what are some of your proposed solutions toward the way forward? In other words: how can we ensure that criminal justice professionals, including judges, are in a best position to assist in pursuing accountability for atrocity crimes?

Remarks by David Vaughn*

Thank you very much for your questions, Christophe. I will start by responding to the fundamental question. Indeed, much attention is focused on Ukraine, but I believe that is currently warranted given the scale and human cost with nearly 15,000 innocent civilians killed since 2014, including more than 500 children with an estimated 16,000 forcibly deported, contributing to violations of international law on a massive scale all connected to some of the most brutal tactics being applied on the battlefield. This is particularly poignant today as the one-year anniversary of the liberation of Bucha, the scene of barbaric actions resulting in the killing of dozens of civilians in the Kyiv suburbs. Russia's unprovoked and unjustified war in Ukraine must not be considered in isolation. It can be directly linked to conflicts in Georgia and Moldova as well as Libya, Syria, Venezuela, Mali, and the Central African Republic. At the same time, there are several lessons learned from Ukraine that can be applied to other conflicts, particularly related to promoting accountability and ending impunity. Holding perpetrators accountable and ensuring justice for victims requires a holistic approach, especially at the domestic level where the bulk of international crimes are likely to and should be adjudicated.

Here, I will focus on three key areas that are not only relevant for Ukraine but other contexts, as we have unfortunately seen, no country is immune from the impact of war. First, ensuring that the domestic legal framework is in line with international standards and practices. Second, reinforcing the capacity of domestic justice institutions to respond to the rigorous demands of handling complex cases involving international crimes. And third, building the capacity of justice professionals to effectively fulfill their roles, including prosecutors, judges, and defense lawyers.

I will say a few words about each of these critical and interconnected areas. First, while easy to overlook, we must remember that domestic systems can only adjudicate crimes that are recognized within their national legal framework. Our experience in this regard has shown that international advisors often assume international crimes are formally codified. This is not always the case. It is therefore important to identify gaps in the law that may limit the ability to adjudicate cases, especially regarding key crimes under international law that may not be formally codified under domestic criminal law. This should be followed by supporting lawmakers with systematically harmonizing national laws to ensure alignment with modern international customs and norms related to atrocity crimes. Investigating, prosecuting, and adjudicating international crimes further requires specialized knowledge, which is why introducing specialization by law or internal rules will allow for the concentration of resources and support developing expertise within national justice institutions. This could include creating a specialized or internationalized court. Second, and related to reinforcing justice institutions, experiences of international tribunals and specialized courts around the world demonstrate the importance of creating the necessary infrastructure to

* USAID Ukraine Justice for All Activity.

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guarantee the predictable, efficient, and timely disposition of atrocity crimes cases. This includes ensuring a safe and secure environment for justice professionals, defendants, victims, and witnesses, including survivors of sexually based violence, together with adequate premises, appropriate equipment, and trained personnel to provide effective protection and support. Another critical component is implementing automated solutions across justice institutions that are integrated and interoperable allowing for the electronic exchange of documents between law enforcement, the prosecution service, and the courts. This will provide for the prompt processing of case materials and vast amounts of digital evidence.

No less important is building trust and confidence in justice institutions by promoting transparency in the handling of matters involving international crimes actively engaging the public, particularly related to the right to fair trial, and working proactively with the media providing timely and accurate information about the context and results of investigations and prosecutions. Third, in building the capacity of justice professionals, it is particularly useful to begin by conducting needs assessments for prosecutors, judges, and defense lawyers to identify the knowledge, skills, and abilities necessary to fairly and effectively prosecute, adjudicate, and represent defendants in cases involving international crimes. Our initial assessments of judges and defense lawyers in Ukraine revealed universal demand for designing and implementing a comprehensive series of training programs covering not only substantive international humanitarian law and international criminal law, but also drafting high-quality, well-reasoned judgments and briefs as well as how to address ethical considerations when judges and lawyers themselves may have been victims or witnesses of international crimes. Judges and lawyers also highlighted the need for developing specialized resource materials on international crimes and providing a platform for judges, prosecutors, and defense counsel to sit together and discuss overarching issues and procedural matters through facilitated thematic exchanges. I reiterate in this regard that the significant body of developed practice concerning international crimes must always be tailored to the national legal framework. This requires bringing together international and domestic experts to ensure it complies with domestic standards while reflecting international law. Although networks exist at the international level, especially for prosecutors, we found it important to create opportunities as well for national judges and defense lawyers to have access to materials and global or regional platforms to actively discuss issues related to the domestic application of international law with counterparts from other countries and share expertise together with subject matter resources.

Turning back to the original question, the lessons that I have presented are essential to promote accountability in any domestic context. They reinforce the need to provide support which recognizes the nature of the legal system and its ability to adjudicate international crimes. Finally, related to capacity building, I would be remiss if I did not emphasize the importance of legal education. This is key to preparing future generations of judges, prosecutors, and defense lawyers who will go on to handle cases involving international crimes. From my experience in the field, it is crucial to develop, implement, and continuously evaluate and update courses at law schools on international criminal law and prepare faculty to teach them with casebooks tailored to local contexts. Taken together, these three areas, strengthening the legal framework, reinforcing justice institutions, and building the capacity of justice professionals, promote the interest of justice and form a basis for upholding international standards as it relates to international crimes.

In closing, I would like to add a point about the web of accountability, which extends to utilizing recognized domestic and international mechanisms and non-traditional legal tools to ensure compensation for governments, businesses, and individuals who have suffered losses due to war. As we have learned on our USAID activity, this includes considering innovative approaches to creating a damage register, compensation commission, and compensation fund that are flexible, integrated,

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victim-oriented, and provide multiple pathways building on lessons learned from similar processes in the past to further close the gap of impunity.

Dr. Martin Luther King aptly said that "The arc of the moral universe is long, but it bends toward justice." In this context, our discussion this evening and your sessions over the past week play a force for good in holding accountable those responsible for atrocities, while also meeting the justice needs of those impacted by war. Thank you for your attention and this unique opportunity to engage such a broad and distinguished group of leaders in international law.

Paulussen then introduced Judge Ivana Hrdličková, Special Adviser on Rule of Law and Innovation at the Judicial Academy in the Czech Republic, and until a few weeks ago, also President of the Special Tribunal for Lebanon or STL. Paulussen asked her: looking back on your time at the STL, what were some of the challenges for you and the STL more generally in promoting justice, accountability and the rule of law in Lebanon? Which legal and practical lessons learned from the STL do you think could be used for the future, for instance in the context of the discussion of setting up an aggression tribunal? He also had a question for her related to her current role as Special Adviser on Rule of Law and Innovation: based on your experiences, can you provide us with a few points that in your view could strengthen the rule of law, which, in turn, will also assist of course in creating a climate in which atrocity crimes and other serious human rights violations can be addressed?

Remarks by Ivana Hrdličková*

Thank you, Christophe, for the introduction and questions.

To begin with, my gratitude goes out to the coordinators of this event for their efforts and for extending an invitation for me to impart my insights with everyone present.

The Special Tribunal for Lebanon (STL or tribunal), as one of the hybrid internationalized criminal tribunals, was established in 2007 by a United Nations Security Council Resolution as a result of negotiation between Lebanon and the United Nations on the issue of addressing the assassination of the Lebanese former prime minister, Rafiq Hariri. The mode of the tribunal's establishment has already foreshadowed some of the future challenges that the tribunal had to address. Unlike the other international and internationalized criminal tribunals, the STL possessed a very narrow jurisdiction for the crime of terrorism. The tribunal has been often described as a tribunal of many firsts related to its hybrid nature: it applied Lebanese substantive criminal law; had both Lebanese and international judges while the international judges possessed the majority; held trials in absentia; tried (and defined as an international crime) terrorism; and used an autonomous pre-trial judge. Financing of the tribunal presented one of the major challenges to the functioning of the institution, while 49 percent of the expenses had to be paid by Lebanon, the remaining 51 percent had to be covered by voluntary contributions. Despite many challenges, we completed the judicial work and closed the main case with a completed appeal. "Lessons Identified," which is what I call the whole package of experiences, challenges, and solutions, present fifteen meta lessons in three main areas, as each of the lessons could be further detailed into sub-lessons. The three main areas of Lessons Identified are: (1) creation of an institution aimed at securing support, managing the expectations, creating a strategic vision and its implementation, and internal and external communication; (2) legal issues, such as the founding documents, trials in absentia, legal aid, victims participation and its legal framework, and applicable law; and (3) management and efficiency of the institution, such as selection of judges and principals, hiring staff, internal and external accountability of personnel, efficiency, transparency and accountability in practice, ethics, and legacy.

* Judicial Academy, Czech Republic; former Special Tribunal for Lebanon.

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These "Lessons Identified" are completely transferable to any temporary institution, not only a judicial one, and my sincerest hope is that they could serve as an inspiration for any future accountability mechanisms, tribunals, or missions, if there are any to be established.

To your second question: I have been focusing on the strengthening of the rule of law as an essential component of good governance, which underpins the achievement of sustainable development and it is pivotal for all seventeen United Nations Sustainable Development Goals (SDGs). We can see that the rule of law is under threat in many countries around the world and there are clearly observable trends that the rule of law is declining globally. Despite many initiatives to enhance the enforcement of and adherence to the rule of law, there remains an urgent need to fortify the rule of law worldwide, while taking into account the unique challenges and context of each country. Innovative approaches are needed not only to counter persistent threats to the rule of law, but also to respond to emerging challenges and threats as societies evolve.

Such innovations necessitate leveraging advances in technology, developing new methodologies, and forging new collaborations to reinvigorate rule of law initiatives. These efforts will shape strong and sustainable preventive models, while achieving measurable outcomes. Establishing clear performance indicators and utilizing data-driven approaches for evaluating the success of these initiatives will ensure efficiency, transparency, and accountability. This, in turn, enables addressing socioeconomic and other factors that contribute to rule of law threats.

To harness the potential of innovation, I propose focusing on three critical areas where coordinated international action can strengthen the rule of law and advance the commitment to the SDGs: Combatting Corruption; Leveraging Artificial Intelligence; and Fostering International Cooperation.

Corruption undermines the rule of law and erodes public trust in government institutions. Combatting corruption at all levels is essential for strengthening the rule of law and requires a comprehensive and inclusive approach that includes both preventive and punitive measures. Central to this approach is a focus on reinforcing legal frameworks to enforce robust anti-corruption regulation at both national and international levels. Key indicators are transparent and merit-based appointments for public officers, judges, and law enforcement personnel to minimize the risk of political interference, nepotism, and favoritism, and independent oversight bodies to monitor public institutions and public resources, holding corrupt individuals accountable where necessary. At the same time, tackling corruption requires enhanced public trust and a culture of accountability, including effective whistleblower protection and financial transparency in public institutions to minimize the risk of illicit enrichments and conflicts of interest.

The rapid development and implementation of Artificial Intelligence (AI) present urgent challenges to ensure that the rule of law keeps pace with technological advances. This means developing an internationally coordinated legal and regulatory framework, for AI (liabilities, data privacy, intellectual property, and security issues), and ensuring that lawmakers, policymakers, judges, lawyers, and the general public understand the capabilities and limitations of AI when developing appropriate legal and regulatory responses. Key issues are bias and fairness (ensuring that AI algorithms are transparent, unbiased, and fair), accountability and responsibility (particularly where AI systems cause harm or make decisions with significant societal consequences), ethical considerations (concerns about privacy, surveillance, and the potential misuse of technology), and security (AI-generated misinformation, autonomous weapons, malicious use, and job displacement). Public education is particularly important to prevent misunderstanding, unrealistic expectations, or unfounded fears about AI that could undermine trust in public systems and importantly, to address all the concerns. As AI technologies become more advanced and integrated into society, it is essential to ensure that they are developed and used responsibly. At the same time, responsible use of AI can play a significant role in assisting tools and approaches in strengthening the rule of law.

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In an increasingly interconnected world, promoting consistency and harmonization across legal and regulatory systems to address transnational challenges becomes more and more pivotal. This requires a sustained focus on cross-border collaboration to tackle shared criminal threats such as terrorism, human trafficking, cybercrime, and environmental crime by strengthening a cooperation by innovative methods. Also important is engagement in capacity building and technical assistance to support countries and regions facing development challenges in adhering to international norms and standards, and harmonization of legal frameworks in areas such as international trade, intellectual property, and data protection to minimize conflicts between different jurisdictions.

To effectively address the underlying principles of the SDGs within the allotted time frame, I have developed the innovative PAY (Prevention, Awareness, Youth)—three interlinked approaches designed to facilitate a harmonized effort in bolstering the rule of law and promoting sustainable development.

Prevention

Diplomacy—and preventive diplomacy in particular—can play a vital role in identifying proactive steps to address potential challenges and weaknesses that threaten the rule of law before they manifest into larger issues. This can be done especially through diplomatic dialogue to encourage stakeholders to work together to combat corruption, address AI, and promote international collaboration. At the same time, regional and multilateral initiatives can help to promote the development and adoption of international norms and standards and shape preventive diplomacy tools that can proactively anticipate and address potential conflicts or tensions arising from cross-border issues. Examples of such preventive tools are early warning systems, mediation, and confidence-building measures. Other tools include educational events, good offices, community engagements, specifically tailored training, and education, as well as the promotion and encouragement of transparency and accountability.

Awareness

Employing dynamic awareness-raising tools and approaches can foster a culture of respect for the rule of law and empower communities to actively engage with and uphold its norms and principles. Such tools can help to address disinformation, promote critical thinking, and lessen the negative impacts of AI. Examples of awareness-raising approaches include tailored education and training programs, empowerment of independent media, support for fact-checking initiatives, and cooperation with social media platforms. In addition, engaging the general public through public information campaigns and outreach events, community workshops, legal aid clinics, collaboration with civil societies, and public opinion surveys can all play a role in strengthening the rule of law. At the same time, responsible use of AI can play a significant role in creating and enhancing online resources that strengthen and promote the rule of law. By adhering to ethical guidelines, ensuring data privacy, and avoiding bias, AI-powered tools can play a positive role in enhancing legal research and analysis, public access to information, dispute resolution, and other areas.

Youth

By engaging youth actively in the whole rule of law process we can foster resilience and promote social cohesion and attract young people to take an active role in promoting and strengthening the rule of law in their own communities. In this way we can also take steps to prevent radicalization and extremism. In this process, we need to encourage and enable youth participation in decision-making processes and public consultations, creating space for young people to express their

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opinions and ask questions. Equally important are youth-led initiatives that create networking and mentorship opportunities for young people in their own communities and organize events that empower young people to take part in public debates and exchanges.

After that, the panel turned to Susana SáCouto, who is Professorial Lecturer in Residence and Director of the War Crimes Research Office at the American University Washington College of Law (WCL). Paulussen asked her: working on the horror that CRSV is, and the impact it has on victims: do you still believe in the power and viability of international law to address these kinds of violations? And his more practical question was: what are some of the concrete lessons that you think criminal justice actors, in particular investigators and prosecutors, should be aware of in their pursuit of overcoming impunity for CRSV? What are the main needs of victims of CRSV and how can we ensure these needs are met?

Remarks by Susana SáCouto*

Thank you, Christophe, for the kind invitation to join you and the distinguished speakers on this panel.

Your question—whether I still believe in the power and viability of international law to address conflict-related sexual violence (CRSV) —is particularly timely, given the continuing prevalence of sexual and other forms of gender violence in conflicts and situations of mass violence around the globe. Put into the context of the broader themes of this panel, the question is whether Russia's "casual disdain" for international law norms will have a negative impact on international law's ability to address these crimes or will victims and survivors of these crimes benefit from international law's "renaissance" in the wake of Russia's invasion of Ukraine.

There have been some important positive developments this past year, some of which are the result of increased attention by the international community to the situation in Ukraine. More awareness, more documentation, more training, more funding dedicated to investigation and prosecution of atrocity crimes, including CRSV. At the same time, I think that this would be a lost opportunity if we fail to apply some of these promising developments to areas of the world that have received less attention than Ukraine this past year.

So let me start with Ukraine. Of course, documentation of CRSV in Ukraine has been happening at the national and international level, not only since Russia's invasion of Ukraine in February of 2022, but much earlier, since the violence that took place during the Maidan protests. For instance, the UN Office of the High Commissioner for Human Rights (OHCHR)—which has been monitoring the human rights situation in the country since the protests—published a report on CRSV in Ukraine in March 2017 in which it documented a sample of thirty-one emblematic cases that illustrated broad patterns and trends of CRSV, including some that could amount to war crimes.[1] More recently, of course, both international organizations and local CSOs have been documenting incidents of CRSV that have occurred since Russia's invasion of Ukraine in February of 2022. For instance, OHCHR's most recent report on Ukraine noted that it had documented 133 cases of CRSV between February 2022 to 31 January 2023, the majority of which took place in territory occupied by the Russian Federation.[2] Importantly, the Office of the Prosecutor General of Ukraine (OPG) established a specialized CRSV Unit within his office that has received significant international assistance focused on helping authorities apply victim-centered approaches to the investigation and prosecution of these crimes. Earlier this month, for instance, the International Criminal

* American University Washington College of Law, War Crimes Research Office.

[1] OHCHR, Conflict-Related Sexual Violence in Ukraine: 14 March 2014 to 31 January (Feb. 16, 2017).

[2] OHCHR, Report on the Human Rights Situation in Ukraine: 1 August 2022 to 31 January 2023 (Mar. 24, 2023).

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Court (ICC) held a training on witness protection and support for victims of CRSV with prosecutors from this Unit and other OPG staff, as well as psychologists and psychiatrists working in support of victims and witnesses of sexual violence.

These are unquestionably positive developments. At the same time, there are other areas of the world where sexual and gender-based violence (SGBV) occurring in other conflicts or situations of mass violence presents an equally—if not more complicated—picture. In Myanmar, for instance, credible reporting indicates that Myanmar's military has escalated its use of SGBV against ethnic minorities, most notably the Rohingya, since the coup in 2021.[3] This has triggered widespread demands for accountability and justice. While this has led to some important developments, they have been limited with respect to SGBV crimes. For instance, the ICC has opened an investigation into crimes committed against the Rohingya.[4] Yet these are limited to the crimes against humanity of deportation and persecution; given that Myanmar is not a state party to the Rome Statute, the ICC's jurisdiction is limited to crimes where at least part of the criminal conduct took place on the territory of a state party, in this case Bangladesh. It is not yet clear whether and how the ICC might adopt a gendered approach to the prosecution of these crimes.

There is also, of course, the case before the International Court of Justice (ICJ), in which The Gambia has alleged that Myanmar's military and other security forces perpetrated genocide by systemically destroying—through mass murder, rape, and other kinds of sexual violence—villages of the Rohingya in the Rakhine province of Myanmar.[5] Notably, while not as many states have intervened in that case as in the ICJ case by Ukraine against Russia,[6] two of the states that have expressed an interest in intervening in the case—Canada and the Netherlands—have stated that they "consider it [their] obligation to support these efforts which are of concern to all of humanity. As part of this intervention, Canada and the Kingdom of the Netherlands will assist with the complex legal issues that are expected to arise and will pay special attention to crimes related to sexual and gender based violence, including rape."[7]

I think the ICC and ICJ cases present two important opportunities where the momentum created by the increased attention to serious international crimes in Ukraine could be leveraged to push forward greater accountability for SGBV crimes committed in Myanmar.

Another extremely challenging situation, of course, is the plight of victims and survivors of gender violence in Afghanistan. The situation there is challenging for a number of reasons, but perhaps chief among them is that the nature of the gendered violence there is much broader than sexual violence. Since the Taliban took power in August 2021, they have issued numerous edicts restricting the rights of women, including: ordering women civil servants to stay home; banning women from working in many sectors, including international and national NGOs; banning girls from secondary education and women from attending university; and severely restricting women's freedom of movement, including banning them from public parks, restaurants and public baths.[8] Reports

[3] *See, e.g.*, Kathleen Kuehnast & Gabriela Sagun, *Myanmar's Ongoing War Against Women: The Country Is at High Risk for Worsening Sexual Violence. How Can the International Community Respond?*, USIP (Nov. 30, 2021).

[4] Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, *at* https://www.icc-cpi.int/bangladesh-myanmar.

[5] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for the Indication of Provisional Measures (Nov. 11, 2019).

[6] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), *at* https://www.icj-cij.org/case/182.

[7] Joint Statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in The Gambia v. Myanmar Case at the International Court of Justice, Ministry of Foreign Affairs Diplomatic Statement (Feb. 9, 2020).

[8] *See, e.g.*, International Crisis Group, *Taliban Restrictions on Women's Rights Deepen Afghanistan's Crisis* (Feb. 23, 2023).

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indicate that women who have peacefully protested these restrictions have been detained, tortured, and/or killed by the Taliban.[9]

The response of the international community, particularly to the violence against women by the Taliban since 2021, has been less than robust. Although there have been some high-level visits to Afghanistan—including a January visit by UN Deputy Secretary-General Amina Mohammed calling on the Taliban to reverse their edicts restricting the rights of women—many see this and other international attempts to "constructively engage" with the Taliban as benefiting the Taliban rather than those whose rights they are violating.

Of course, there is the ongoing investigation by the ICC, which includes allegations that the Taliban and other armed groups are responsible for the crime against humanity of gender persecution based in part on attacks against women and girls who worked, took part in public affairs, or attended school past the age of puberty.[10] These allegations date back to before the 2021 takeover by the Taliban, and we will have to see whether and how the investigation—which the Pre-Trial Chamber authorized the Prosecution to resume in October 2022[11]—will include the more recent violence.

While the gender persecution claims—if pursued—will be an extraordinary step forward, the systemic repression of Afghan women and girls by the Taliban and the severe consequences of this repression on the lives of women and girls may warrant an even stronger legal response. As Karima Bennoune and others have argued, perhaps we need a new crime—gender apartheid—to accurately capture and appropriately sanction the systematic discrimination and repression of women "as a form of governance" by the Taliban.[12] I do think that, at the very least, the situation calls for stronger international support of accountability for the systemic repression of women and girls in Afghanistan. As Zubaida Akbar, a leading women's rights and civil society activist from Afghanistan mentioned in an earlier panel at this conference, support could take a number of forms, including funding and elevating the work of those within and beyond Afghanistan resisting the Taliban's repression and/or the establishment of mechanisms, such as a fact-finding mission or commission of inquiry, to document the violence committed against women and girls since August 2021.

In sum, and I will close with this, if Russia's invasion of Ukraine has led to international law's "renaissance," I hope we seize this opportunity to insist on greater and more comprehensive accountability for all forms of SGBV both in the Ukraine and beyond.

The last panelist was Dr. Beth van Schaack, Ambassador-at-Large for Global Criminal Justice of the U.S. Department of State's Office of Global Criminal Justice. Paulussen noted that as Ambassador-at-Large Van Schaack is of course confronted on a daily basis with the political dimension related to the prevention of and response to atrocity crimes. He thought it would be very interesting for the audience to get an insight from her into those political dynamics and realities when pursuing accountability—a political reality check so to speak. And he also wondered whether she would agree international law is dead, as some have argued after the Russian invasion, or whether it is in fact alive and kicking?

[9] Amnesty International, *Afghanistan: Taliban's "Suffocating Crackdown" Destroying LIves of Women and Girls – New Report* (July 27, 2022).

[10] Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for Authorisation of an Investigation Pursuant to Article 15," ICC-02/17-7-Conf-Exp (Nov. 20, 2017).

[11] Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, ICC-02/17-196 (Oct. 31, 2022).

[12] Karima Bennoune, *The International Obligation to Counter Gender Apartheid in Afghanistan*, 54 COLUM. HUM. RTS. L. REV. 1 (2022).

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Remarks by Beth Van Schaack*

Thank you Christophe. It is great to be here. It is lovely to see so many old friends and to be back at ASIL in-person to have these important conversations. Indeed, I have been in this job a little over a year now. I was confirmed just after Russia launched its full-scale invasion of Ukraine. This was an enormous job on February 23, 2022, and it became—frankly—a crushing job on February 24, 2022. The number of lines of effort that we have undergoing with respect to Russia's manifest violation of the UN Charter is remarkable, all while staying focused on other parts of the world that demand justice.

The U.S. response to Russia's full-scale invasion of Ukraine is truly a whole-government approach, with three main pillars. The first, of course, is strengthening Ukraine's hand on the battlefield. Number two is dealing with the terrible humanitarian crisis that has been caused by this war. Obviously, the epicenter of suffering is in Ukraine, but we know that there are broad reverberations globally in the form of food insecurity, disrupted supply chains, and energy conflicts around the world. Number three is justice and accountability, which is where I come in.

As my colleague David so aptly outlined, there are multiple justice initiatives underway, including everything from ensuring solid documentation, collecting and processing open-source information, and—at times—revealing this information publicly in ways that can help policymakers make accurate decisions but also to bring attention to the crimes against humanity and war crimes that are being committed literally on a daily basis in every region in which Russia's troops are deployed.

We are also making sure that information is made available to a range of accountability mechanisms around the world. We are helping to stand up new documentation institutions, like the Ukraine Commission of Inquiry launched by the Human Rights Council, the Moscow Mechanism invoked by the Organization for Security and Cooperation in Europe, and the new International Center for the Prosecution of the Crime of Aggression (ICPA) to be generously hosted by The Hague as the world's capital of international justice.

Regarding the importance of the political context, we have tried to act multilaterally with respect to each one of these pillars to build international coalitions in support of these imperatives. We do this through existing multilateral organizations—like the United Nations, the G7, the Human Rights Council—and also new configurations that have been inspired by this unprecedented situation of a full-scale war of aggression being committed through the commission of grave international crimes. For example, a "core group" of states is thinking about how to structure a tribunal to prosecute the crime of aggression in Ukraine; the Group of Friends of Accountability is thinking about how to utilize existing pathways more effectively; and a "dialogue group" that the Dutch have helped to stand will support the work of the International Criminal Court and other accountability mechanisms.

So, these are all ways in which we can strengthen and advance international law but doing so in partnership with other peace-loving and justice-loving states. Indeed, the international community has activated an unprecedented number of accountability mechanisms in response to Russia's full-scale invasion. In response to the macro question of this panel, I will say that international law is alive and well, even if it might not be able to deter a malign actor like President Putin.

There are three pathways to justice now being pursued. The first is the International Criminal Court, which received an unprecedented referral by forty-three states. The ICC prosecutor has made his first move by successfully petitioning a Pre-Trial Chamber for an arrest warrant against the sitting head of state of a permanent member of the Security Council and one of his deputies,

* U.S. Department of State.

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Maria Lvova-Belova, who is responsible for "children's rights"—a remarkable irony when you consider the thousands of children who have been forcibly deported or trapped in Russia as part of the filtration operations being undertaken by Russia on a daily basis.

The second major pathway to justice is the domestic courts in Ukraine. They are open and operating. David has outlined a number of different ways in which we are trying to support that work. We have formed the Atrocity Crimes Advisory Group (ACA) with the European Union and the United Kingdom. We will soon be welcoming additional states that want to support this work and coordinate with our implementing partners. We want to ensure that we are bringing the best advice and assistance to the Prosecutor General, Ukrainian judges, the National Police, and other juridical actors that are on the ground now. These actors occasionally must duck into a bomb shelter when their city is under attack, but they are still out there doing investigations of international crimes.

The piece that my office has taken on is to deploy veterans from the world's war crimes tribunals to Ukraine to work side-by-side with their counterparts on their cases. These experts are helping to prioritize the now 80,000 plus incidents that have been recorded by the Prosecutor General, think about how to undertake trauma-informed and victim-centered investigations and prosecutions, and how to prosecute international crimes that are not prosecuted on a daily basis. For example, imagine the prosecutor who worked on the siege of Sarajevo now helping to investigate and charge under the Ukrainian legal framework the siege of Mariupol. This is complementarity in action, and we are doing this, again, in partnership, with other states.

The third pathway to justice that is currently active is potential universal jurisdiction or extraterritorial cases. We have seen, particularly in Europe, the collective mobilization of prosecutorial and investigative authorities working to share information, create a joint investigative team (JIT) operating under the Eurojust umbrella, comparing strategies, and tracking potential defendants, particularly when they start to travel, as we know they will. Perpetrators have done this in every past conflict, and they will do so again in this conflict for various and sundry reasons. They will eventually come into the jurisdictional reach of third states and those states are now ready because they have been opening structural investigations so that they can move quickly once an individual is within their jurisdictional reach. The United States is supporting these potential cases by way of memoranda of understandings with different states and also with the JIT itself.

So those are the three pathways that are currently active. In terms of the justice imperative, we have a fourth that is still on the drafting table: an aggression tribunal.

This is a proposal that the Ukrainians have been advancing from the beginning. They see the crime of aggression as the "original sin" that unleashed all the harm and the horror that they have experienced for more than a year. They want to see that crime punished. There are compelling reasons why it should be punished in parallel with the Rome Statute "atrocity crimes" that are being pursued at the ICC and in domestic courts around the world. There are a number of different proposals and models that are being considered and, wearing my academic hat, it is a fascinating exercise in institutional design. How do we draw from the best lessons in past exercises to build a tribunal that will be efficient and that will not be so expensive that it crushes the budgets of states, which are already overstretched in responding to this crisis and other global crises around the world.

The fourth pathway also raises additional questions. How do we find ways to mix international and domestic law? How do we ensure that fair trial and due process rights are accorded? How do we build something with international support?

A number of different models have emerged. Some involve states banding together under a sort of treaty arrangement; some involve a treaty between Ukraine and the United Nations to stand up some sort of internationalized or hybrid tribunal; and are rooted in the Ukrainian legal framework

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but with international elements enabled by local law. The United States, as many of you may have heard, has come out in favor of the third option. We looked carefully at all the different models with an eye toward identifying the model that will maximize the chances of genuine accountability for the crime of aggression—a crime that has not been prosecuted since World War II. It is critical that we get this right, and this is the model that can garner the most diverse and expansive international support.

In closing, I want to return to one of the themes that the Vice Mayor brought up in her remarks. We have to be acutely aware of perceptions around the world that there is disproportionate attention to this particular conflict in Europe. When I travel, I hear a high degree of empathy for what is happening in Ukraine—there is clear outrage toward Russia's conduct—but I also hear that lingering question of "where were you when we were experiencing these kinds of horrors?"

Because we have not seen the same degree of mobilization with respect to other crises elsewhere, we have to be very attuned to these articulated concerns about selective justice. And so, in my work, I am desperately trying to ensure that Ukraine does not consume all the oxygen that is available to my little office of twenty people in the Office of Global Justice, in the wider State Department, in the U.S. government, or within the international realm.

As such, I have been traveling around the world to other places that are experimenting with similar models of justice. The Central African Republic has launched an incredible new hybrid court—the Special Criminal Court—that is doing amazing work and hitting important benchmarks with virtually no international attention and very little international support. In The Gambia, there is an active conversation with ECOWAS about creating a subregional hybrid court to deal with the crimes that were committed under the Jammeh regime. In Ethiopia, policymakers and civil society are starting a conversation about transitional justice for the war in Tigray. We are also following other conflicts and transitional justice efforts around the world.

Susana mentioned, of course, the Rohingya. I was in Cox's Bazar recently and it was inspiring to speak with many women survivors who asked me incredibly pointed questions about what was happening at the ICC. They asked about the Argentinian universal jurisdiction case and when will they hear testimony from survivors. I was able to catch them up on developments in international criminal law. These are refugees who live in the most abject conditions in the largest refugee camp in the world, and yet they asked me incredibly sophisticated questions about the prospects for justice, because it is one of the few areas that are bringing those people hope.

Finally, Susana and I will be down in Colombia soon. This is a good news story about the creation of a sophisticated, multifaceted transitional justice response to fifty years of conflict. Justice actors are working to integrate marginalized communities—women, Indigenous, persons, and Afro-Colombians—to ensure that they have a say in the next phase of that country.

And so, in closing, I do think international law is alive and well, and it is desperately needed. I would encourage all of you, and especially the students in the room, to find a way to plug into the system of justice and accountability for this all-hands-on-deck moment.

Thank you.

After this final intervention Paulussen and ASIL Executive Director Michael Cooper provided some final concluding remarks, thanking everyone who made this Closing Panel a success.

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