

The George Washington University Law School
Law and Policy Workshop

2023

U.S. Cooperation with the International Criminal Court on Investigation and Prosecution of Atrocities in Ukraine

Possibilities and Challenges



WEST POINT
PRESS

U.S. Cooperation with the International Criminal Court on Investigation and Prosecution of Atrocities in Ukraine:

Possibilities and Challenges

**Law and Policy Workshop
The George Washington University Law School
February 3, 2023**

A collaboration between



TABLE OF CONTENTS

Letter from the Co-Chairs	3
Workshop Attendees	5
Introduction	10
Framing Paper – Dean Shane Reeves & Professor Ronald Alcala	22
Framing Paper for Session One – Ambassador Todd Buchwald	27
Session One Summary	41
Framing Paper for Session Two – Ambassador Todd Buchwald	52
Session Two Summary	62
Framing Paper for Session Three – Professor Alex Whiting	74
Session Three Summary	77
Conclusion	87
Appendix A – Summary of Fireside Chat between Ambassador Beth Van Schaack and Professor Laura Dickinson	89
Appendix B – Text of Relevant Recent Legislation	107

LETTER FROM THE CO-CHAIRS

On Feb. 3, 2023, The George Washington University Law School (“GW Law”) offered an opportunity for leading experts and officials to discuss the possibilities and challenges related to U.S. cooperation with the ICC in the context of Ukraine. Entitled “U.S. Cooperation with the International Criminal Court on Investigation and Prosecution of Atrocities in Ukraine: Possibilities and Challenges,” the workshop brought together a prominent and diverse group of practitioners, current and former government officials, and scholars from around the country to consider a variety of issues related to U.S. cooperation with the Court.

We were motivated to host this workshop at GW Law, nearly one year after Russia’s invasion of Ukraine, by the growing global outrage over the mounting and alarming atrocities committed by Russia in the ongoing war, as well as the importance of ensuring accountability for those atrocities in a variety of fora, including in the ICC. Although the United States has had a complex relationship with the Court, this is a pivotal moment in which there is growing, bi-partisan support for U.S. cooperation with the institution. Furthermore, new legislation enacted at the end of 2022 has lifted key legal restrictions on U.S. assistance to the Court and opens the door for greater cooperation in the context of Ukraine.

The discussion followed the Chatham House rule and was both candid and constructive. This report summarizes the key points considered in the workshop and highlights those areas in which a large majority of participants concurred. More specifically, the workshop addressed the following three key issues:

- (1) The current legal regime governing potential U.S. cooperation with the ICC Ukraine investigation, including the interpretation of long-standing legislative restrictions on U.S. cooperation with the ICC, examples of past cooperation within those restrictions, and the ways in which the new legislation enacted in 2022 may impact U.S. cooperation going forward;
- (2) ICC doctrines and policies that may affect the prospects for U.S. cooperation, including ICC treatment of non-party states and their nationals, the ICC’s complementarity jurisprudence and interpretations of gravity, and ICC decisions related to immunity; and

- (3) Challenges related to potential U.S. cooperation, including, for example, challenges related to intelligence sharing, provision of advice, and the interaction of the ICC investigation with investigations and prosecutions conducted by domestic Ukrainian authorities, third States, or other international tribunals.

In addition, on the same day as the workshop, GW Law Professor Laura Dickinson engaged in a “fireside chat” with Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice, entitled “The Biden Administration Approach to International Criminal Justice.” A summary of this fireside chat is included as an appendix to this report. Four short “read-ahead” papers by workshop participants are also included in the body of the report.

The workshop was a collaboration between the GW Law School Program in National Security, Cybersecurity, and Foreign Relations Law and the Program in International and Comparative Law. Our colleagues Professor Lindsay Rodman, Professor Leah Calabro, Associate Dean Lisa Schenck, and Associate Dean Rosa Celorio were key collaborators in organizing the event.

The issues surrounding U.S. support for the ICC Ukraine investigation are timely and important, and we hope this report of the day’s discussions will help illuminate key issues as the United States considers its role in relation to the ICC in the context of Ukraine. The principal conveners of the workshop would also like to thank each participant in the workshop for their thoughtful contributions regarding these highly significant issues.

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INTRODUCTION

More than a year after Russia invaded Ukraine in February 2022—itself a blatant act of aggression under international law¹—Russian forces have been committing atrocities in the country on an alarming scale. Public outcry among liberal democratic and other states around the world and within the United States has led to strong support for the investigation and prosecution of atrocities committed in Ukraine. Indeed, President Biden, in a recent speech in Poland, declared that the United States would seek justice for war crimes and crimes against humanity committed by Russians during the armed conflict in Ukraine,² and U.S. officials have expressed support for the ICC’s investigation.³ A broad coalition of countries, including the United States, has provided significant assistance to Ukraine to conduct domestic investigations and prosecutions of war crimes, crimes against humanity, and other atrocities.⁴ In addition, immediately after the Russian invasion in 2022, 43 states parties to the Rome Statute referred the Situation to the Prosecutor of the International Criminal Court (ICC) to open an investigation in Ukraine.⁵ Not only did the Prosecutor do so, announcing an investigation into war crimes, crimes against humanity, and genocide on the territory of Ukraine dating from

¹ For example, on March 2, 2022, the United Nations General Assembly voted to condemn Russia’s aggression as a violation of the Charter of the United Nations, with 141 states in favor and only five opposed. See Press Release, General Assembly, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022), <https://www.un.org/press/en/2022/ga12407.doc.htm>. The Russian invasion of Ukraine in 2022 followed Russia’s occupation of the Crimea region of Ukraine and Russian military operations in eastern Ukraine. See Cory

Welt, *Ukraine: Background, Conflict with Russia, and U.S. Policy*, CONG. RSCH. SERV. R45008, at 14-19 (Oct. 5, 2021).

² President Joseph R. Biden Jr., U.S., Remarks Ahead of the First Anniversary of Russia’s Invasion of Ukraine in Warsaw, Poland, 2023 DAILY COMP. PRES. DOC. No. 202300130 (Feb. 21, 2023), <https://www.govinfo.gov/content/pkg/DCPD-202300130/pdf/DCPD-202300130.pdf>; see also Vice President Kamala Harris, U.S., Remarks by Vice President Harris at the Munich Security Conference (Feb. 18, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/18/remarks-by-vice-president-harris-at-the-munich-security-conference-2/>.

³ Ambassador Beth Van Schaack, U.S., Ambassador Van Schaack’s Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression (Mar. 27, 2023), <https://www.state.gov/ambassador-van-schaacks-remarks/>.

⁴ For an overview of these efforts, please see the summary of the fireside chat between Beth Van Schaack, U.S. Ambassador for Global Criminal Justice, and Professor Laura Dickinson, *infra* Appendix A; see also *Ambassador Van Schaack Chats About International Criminal Justice*, GEO. WASH. L. (Mar. 8, 2023), <https://www.law.gwu.edu/ambassador-van-schaack-chats-about-international-criminal-justice> (summarizing the event and providing an embedded video recording thereof).

⁵ See *Ukraine: Situation in Ukraine ICC-01/22*, INT’L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> (noting “[s]ituation referred to the ICC by 43 States Parties” between March and April 2022, and listing all referring states parties).

2013,⁶ but a Pre-Trial Chamber of the Court now has issued arrest warrants for Russian President Vladimir Putin and Maria Lvova-Belova, the Russian Commissioner for Children's Rights.⁷

The central role of the ICC in promoting accountability in Ukraine has raised questions about whether, and if so to what extent, the United States might support the Court in its investigation there. The United States has long been a leader within the international community in calling for accountability and justice for atrocities, whether in international, domestic, or hybrid courts.⁸ Yet, the relationship between the United States and the ICC has been complex.⁹ Although deeply involved in the negotiations to establish the Court, the United States has never become a party to the Rome Statute, the treaty that established the ICC,¹⁰ and until recently domestic legislation has limited the ability of the United States to cooperate with the Court.¹¹ The United States has at times provided assistance to the ICC, but it has long objected to key aspects of the Court's legal framework, including its assertion of jurisdiction over the nationals of non-party states such as the United States (for example, in the ICC investigation in Afghanistan).¹² Indeed, at the end of the Trump administration, the United States went so far as to impose sanctions on Court officials,¹³ though the Biden administration subsequently lifted them.¹⁴

Despite this fraught relationship, Russia's invasion of Ukraine and the atrocities it has committed there provide a significant opening for greater U.S. cooperation with the ICC. In particular, new legislation enacted in the U.S. Congress at the end of 2022 amended earlier statutory restrictions on U.S. assistance to the Court, providing greater legal scope for U.S.

⁶ *Id.*; see also Statement of Karim A.A. Khan Q.C., Prosecutor, Int'l Crim. Ct., on the Situation in Ukraine Declaring to Proceed with Opening an Investigation (Feb. 28, 2022), <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁷ Statement of Karim A.A. Khan Q.C., Prosecutor, Int'l Crim. Ct., on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms. Maria Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/statement-prosecutor-karim-khan-kc-issuance-arrest-warrants-against-president-vladimir-putin>.

⁸ For a brief history of U.S. support for global criminal justice, see AM. SOC'Y INT'L L., ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC 1-2 (2021), <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf> [hereinafter "ASIL TASK FORCE REPORT 2021"].

⁹ For an overview of U.S. engagement with the ICC, see *id.* at 2-7, 13-39.

¹⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (*entered into force* July 1, 2002) [hereinafter "Rome Statute"].

¹¹ For a detailed analysis of these restrictions, see ASIL TASK FORCE REPORT 2021, *supra* note 8, at 8-12.

¹² See *id.* at 2-3, 41-44.

¹³ Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020).

¹⁴ Exec. Order No. 14,022, 86 Fed. Reg. 17,895 (Apr. 1, 2021).

cooperation. And as public demand for accountability for Russian atrocities has grown, there is a potential impetus for a policy shift toward increased U.S. support for the ICC in its work in Ukraine. Indeed, a bi-partisan group of U.S. Senators recently called upon the U.S. executive branch to “move forward expeditiously with support to the ICC’s work so that Putin and others around him know in no uncertain terms that accountability and justice for their crimes are forthcoming.”¹⁵

A workshop held at The George Washington University Law School (“GW Law”) on February 3, 2023, offered an opportunity for leading experts and officials to discuss the possibilities and challenges of U.S. cooperation with the ICC in the context of Ukraine. Entitled “U.S. Cooperation with the International Criminal Court on Investigation and Prosecution of Atrocities in Ukraine: Possibilities and Challenges,” the workshop brought together leading practitioners, current and former government officials, and scholars from around the country to discuss a variety of issues related to U.S. cooperation with the Court. This report summarizes the key points considered in the workshop and highlights those areas in which a large majority of participants concurred.

More specifically, the workshop addressed the following three key issues:

- (1) The current legal regime governing potential U.S. cooperation with the ICC Ukraine investigation, including the interpretation of long-standing legislative restrictions on U.S. cooperation with the ICC, examples of past cooperation within those restrictions, and the ways in which the new legislation enacted in 2022 may impact U.S. cooperation going forward;
- (2) ICC doctrines and policies that may affect the prospects for U.S. cooperation, including ICC treatment of non-party states and their nationals, the ICC’s complementarity jurisprudence and interpretations of gravity, and ICC decisions related to immunity; and
- (3) Challenges related to potential U.S. cooperation, including, for example, challenges related to intelligence sharing, provision of advice, and the interaction of the ICC

¹⁵ Letter from U.S. Senators Richard Blumenthal, Richard J. Durbin, Lindsay O. Graham, Robert Menendez, Thom Tillis, and Sheldon Whitehouse, to President Joseph Biden (March 24, 2023).

investigation with investigations and prosecutions conducted by domestic Ukrainian authorities, third States, or other international tribunals.

A. FORMAT AND OVERVIEW OF KEY DISCUSSION POINTS

The discussion took place during a one-day workshop of scholars, practitioners, and policy-makers addressing the key issues summarized above under the Chatham House rule. The workshop was divided into three substantive sessions over the course of the day, in a round-table format. On the same day as the workshop, GW Law also conducted a public-facing fireside chat with Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice, and Professor Laura Dickinson entitled “The Biden Administration Approach to International Criminal Justice.”

***Session One:** Assessing the current U.S. legislative framework governing U.S. cooperation with the ICC and its implications for cooperation with the ICC Ukraine investigation*

In this session, participants considered the impact of recently enacted U.S. legislation, including the FY-2023 Consolidated Appropriations Act (CAA),¹⁶ the Justice for Victims of War Crimes Act,¹⁷ and the FY-2023 National Defense Authorization Act (NDAA)¹⁸ regarding the legal framework governing U.S. cooperation with the ICC. In particular, participants discussed the extent to which this new legislation expands the domestic legal authority for the United States to cooperate with the ICC regarding the ICC’s investigation in Ukraine. This analysis inevitably required evaluation of the pre-existing legislative framework that had restricted U.S. cooperation with the ICC: the American Servicemembers’ Protection Act of 2002 (ASPA) (and the so-called “Dodd Amendment”)¹⁹ and the Foreign Relations Authorization Act for Fiscal Years 2000 and 2001 (FRAA),²⁰ as well as executive branch interpretation of that legislative

¹⁶ Consolidated Appropriations Act, Fiscal Year 2023 § 7073, Pub. L. No. 117-328, 136 Stat. 4459 (2022) [hereinafter “FY-2023 CAA”].

¹⁷ Justice for Victims of War Crimes Act, Pub. L. No. 117-351 (2022), 136 Stat. 6265 (2022) (amending 18 U.S.C. § 2441) [hereinafter “Justice for Victims of War Crimes Act”].

¹⁸ National Defense Authorization Act for Fiscal Year 2023 §§ 5948, 6512, Pub. L. No. 117-263, 136 Stat. 2395 (2022) [hereinafter “FY-2023 NDAA”].

¹⁹ American Servicemembers’ Protection Act of 2002, 22 U.S.C. §§ 7421-7433 (2002) [hereinafter “ASPA”].

²⁰ Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001, H.R. 3427, 106th Cong. (2000) [hereinafter FY “2000-01 FRAA”].

framework as embodied in a 2010 Department of Justice Office of Legal Counsel (OLC) opinion.²¹

The pre-existing legislative framework, as interpreted by the U.S. executive branch, would have hindered the United States from cooperating with the ICC Ukraine investigation in a number of respects. The framing paper for Session One describes these limitations in more detail, but key provisions of the pre-existing law contained broad restrictions against supporting ICC activities.²²

The Dodd Amendment, however, carved out a capacious exception to these restrictions, by providing that nothing in the ASPA prohibits the United States from assisting in international efforts to bring to justice foreign nationals accused of genocide, crimes against humanity, and war crimes: “Nothing in [the ASPA] shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic [sic], Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes, or crimes against humanity.”²³ In the 2010 OLC legal opinion, the U.S. executive branch interpreted the Dodd Amendment to permit some U.S. cooperation with the ICC, but nonetheless concluded that the Amendment did not cover many aspects of such cooperation, including “general institutional support to the ICC not sufficiently connected to efforts to bring particular individuals to justice (i.e., general training or capacity building).”²⁴ In addition, the Dodd Amendment, as interpreted by the OLC memo, did not overcome restrictions on ICC investigative activity in the United States or a restriction contained in the FRAA that barred any direct funding support for the ICC.²⁵ And, as noted in the framing paper

²¹ Memorandum for Mary DeRosa Legal Advisor, Nat’l Sec. Council, Op. O.L.C. (2010) [hereinafter “2010 OLC Opinion”].

²² Pre-existing law restricted the United States from supporting the ICC in various ways, including “the provision of financial support, services, or law enforcement cooperation; the transfer of property or other material support; intelligence sharing; the training or detail of personnel; the arrest or detention of individuals; the ability of U.S. courts and state and local governmental entities to respond to ICC requests for cooperation; and ICC investigative activity in the United States.” ASIL TASK FORCE REPORT 2021, *supra* note 9, at 8. For a detailed analysis of these restrictions, see *id.* at 8-11.

²³ ASPA, *supra* note 19, at § 7433.

²⁴ See ASIL TASK FORCE REPORT 2021, *supra* note 9, at 9.

²⁵ For a more detailed discussion of the FRAA restrictions, see *id.* at 10. In the Consolidated Appropriations Act of 2021, Congress prohibited funds under the State Department from being made available to the ICC but allowed funds to be used for some technical assistance training, assistance to victims and witness protection, law enforcement, and other activities. Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1792 (2020), §7049(b); see also ASIL TASK FORCE REPORT 2021, *supra* note 9, at 10.

for Session One, there has been some recent debate about whether the exception in the Dodd Amendment, permitting U.S. support for “accused” foreign nationals, barred assistance at the early stages of an investigation before the issuance of accusations (whether formal or informal) against individuals.

The new legislative provisions signed into law at the end of 2022, in particular Section 7073 of the FY-2023 CAA, address each of these restrictions, opening up much broader legal authority for the United States to cooperate with the ICC Prosecutor’s Ukraine investigation. Participants therefore discussed in great detail the scope and impact of these new provisions. (Appendix B contains the full text of the relevant portions of these recently enacted laws.)

Some of the key issues discussed in this session included:

- The current status of the ICC Ukraine investigation;
- Interpretations of the long-standing legal framework limiting U.S. cooperation with the ICC, including the 2010 U.S. Department of Justice Office of Legal Counsel opinion evaluating the statutory framework outlined above;
- The meaning of the statutory provision, prior to the 2022 amendments, stating that the United States could overcome restrictions on rendering assistance to ICC efforts to bring to justice foreign nationals “accused” of atrocity crimes and the question of whether this language barred assistance at early stages of an investigation when the Prosecutor is developing a crime base but prior to the existence or issuance of “accusations” against foreign nationals;
- Past instances of U.S. cooperation with the ICC, including non-opposition to and support for U.N. Security Council referrals, assistance in the arrest and surrender of fugitives, protection of witnesses, support for victims, and provision of information to aid investigations;
- The question of how the new legislation could impact U.S. cooperation with the ICC;
- The extent of potential U.S. collaboration with the ICC Ukraine investigation permitted within the new legal framework;
- The meaning of the new legislative text allowing ICC investigative activities within the United States;
- The extent to which the new legal framework allows cooperation before individuals are charged; and
- The types of cooperation that may currently be possible, including intelligence sharing, training of ICC personnel, detailing of U.S. personnel, submission of briefing materials or

other legal assessments, transfer of suspects to the ICC, funding, support for victims and witnesses, and related issues.

The major outcomes from the discussion in Session One included the following:

- ⇒ It is evident that Section 7073 of the FY-2023 CAA eliminated the legal prohibitions under the ASPA and the FRAA to providing assistance to the ICC related to the Situation in Ukraine.
- ⇒ It is evident that Section 7073 of the FY-2023 CAA also overcomes the prior restrictions on ICC personnel conducting “investigative activity” within the United States, as related to the Situation in Ukraine.
- ⇒ It is evident that, as to the Situation in Ukraine, there is no requirement for an ICC accusation (in whatever form) before the United States may render assistance to the ICC.
- ⇒ Many participants praised the enactment of the Justice for Victims for War Crimes Act for closing a loophole in existing law and permitting the United States to prosecute war crimes allegedly committed abroad by non-citizens against non-citizen victims when the perpetrator is present in the United States, as well as the other legislation adopted at the end of the last Congress.

Session Two: Assessing ICC doctrines and policies and their implications for U.S. cooperation with the ICC Ukraine investigation

Public outcry over Russian atrocities in Ukraine has not only sparked changes in the domestic legal framework governing U.S. cooperation with the ICC, but it also has potentially opened up space for a policy shift in the United States’ relationship with the Court. The history of U.S. policy toward the ICC is complex and has proceeded through multiple phases.²⁶ However, certain elements of the ICC’s jurisdictional framework have to a degree played a role in hindering greater U.S. cooperation. As noted in the framing paper for Session Two, the ICC’s assertion of jurisdiction over the nationals of non-party states is the most significant obstacle to

²⁶ For an overview of U.S. engagement with the ICC, see ASIL TASK FORCE REPORT 2021, *supra* note 9, at 2-7, 13-39.

the willingness of the United States to support the Court. Additional legal and policy positions of the ICC that likely hinder U.S. support include the Court's interpretation and implementation of the principles of complementarity and gravity.

In this Session, participants discussed these impediments to the United States' potential collaboration with the ICC's Ukraine investigation, with a focus on the ICC's legal and policy positions that have long been the source of U.S. objection and critique. As noted in Session One, there was general acceptance that recent U.S. legislation has resolved virtually all of the domestic legal restrictions on U.S. cooperation with the ICC related to the Situation in Ukraine under the ASPA and the FRAA. Remaining impediments are thus limited to particular U.S. agencies' policy concerns, either about cooperation with the ICC generally or cooperation on specific issues that may present difficulties, and, in addition, international law-related considerations pertaining to the ICC's exercise of jurisdiction over the nationals of non-party states, as well as ICC doctrines and practices. In the discussion, participants therefore took each of the following issues in turn: the history of the U.S. relationship with the ICC, policy advantages to U.S. cooperation with the ICC Ukraine investigation, longstanding U.S. objections to the ICC's jurisdiction over nationals of non-party states, U.S. concerns related to the ICC's interpretation of the complementarity and gravity doctrines, U.S. concerns related to the ICC's interpretation of head-of-state immunity, and possibilities for reframing the U.S. interaction with the ICC.

Some of the key issues for discussion in this session included:

- Longstanding U.S. legal and policy concerns about cooperation with the ICC, including:
 - concerns about ICC jurisdiction over nationals of non-party states (other than through UN Security Council referrals or with the consent of the state of nationality of the accused), the risks of legal exposure for U.S. troops and other personnel, and the impact of the ICC Afghanistan investigation;
 - concerns about specific ICC doctrines and policies, such as the manner in which the Court and the Prosecutor have applied the principles of complementarity and gravity; and
 - potential concerns related to issues of immunity, particularly the principle of head-of-state immunity.
- Legal and policy benefits of U.S. support for the ICC Ukraine investigation.

- Potential recommendations for paths to greater U.S. cooperation with the ICC Ukraine investigation in a manner that mitigates risks and concerns related to U.S. support for the ICC.

The major outcomes from the discussion in Session Two included the following:

- ⇒ Many participants noted that the potential benefits of cooperating with the ICC in the Situation in Ukraine likely outweigh whatever policy or legal concerns remain. Many participants also stressed that the United States should view the ICC as an asset, not a threat, especially in the interest of national security, continuing longstanding U.S. leadership in international justice, and the need to further isolate, hold accountable, or even stigmatize Russia and the Putin Regime on the international stage.
- ⇒ More specifically, a significant majority of participants expressed hope that the United States would overcome whatever concerns may remain regarding the ICC's exercise of jurisdiction over the nationals of non-state parties and move forward to tangibly support the ICC's efforts in Ukraine in line with its rhetorical support. Participants found the U.S. objections to ICC jurisdiction over the nationals of non-state parties to be unpersuasive to any actors that matter, including key U.S. allies and Court personnel. Participants also noted that the U.S. objection to ICC jurisdiction over nationals of non-state parties does not need to be merged with questions about whether, and to what extent, the U.S. cooperates with the ICC. Rather, these issues can be addressed separately.
- ⇒ Some participants also discussed the benefits of focusing on a more affirmative agenda, in which the United States could encourage the ICC to apply the principles of complementarity and gravity in a manner that the United States views as more faithful to the language and spirit of the Rome Statute. Participants also suggested that the United States might encourage the ICC Prosecutor to develop "durable" policies that might reflect these approaches. Participants urged the United States to take advantage of the current moment, while the Court is considering how to implement recommendations that emerged from the Independent Expert Review process on September 30, 2020, that could alleviate the United States' concerns in these matters.

Session Three: Assessing the practical challenges of U.S. cooperation with the ICC Ukraine investigation

This session addressed some of the practical challenges that could arise regarding United States cooperation with the ICC Ukraine investigation. Participants structured their discussion by focusing primarily on three sets of challenges: (i) those related to information-sharing; (ii) those related to detailing and/or training personnel; and (iii) those related to the complex interactions between the ICC investigation and those investigations and prosecutions conducted by domestic Ukrainian authorities, third-party States, or other international mechanisms or tribunals. Participants also addressed other types of assistance that the United States might provide to the ICC and the issues that could arise related to that assistance. Throughout, participants also considered challenges that could arise related to the ICC's institutional structure and culture. Participants also discussed recommendations to address these challenges.

The major outcomes from the discussion in Session Three included the following:

- ⇒ Multiple participants asserted that the United States and the ICC Prosecutor would need to be creative and proactive in pursuing a cooperative relationship.
- ⇒ With respect to information-sharing, participants raised the possibility that the United States' ability to share confidential or classified intelligence lead information with the ICC will need to take into account ICC jurisprudence and may, in some situations, require the Prosecutor to disclose potentially exculpatory information to the ICC judges, and potentially to the defense, if that information is ever used as evidence. This disclosure obligation does not apply to information exclusively provided as lead and background information, which some participants noted has been the U.S. practice for information sharing with international tribunals in the past. Many participants agreed that the United States would need to think creatively to determine ways in which it can distill shareable information from confidential or classified intelligence. Participants suggested that regular briefings between the United States and the ICC Prosecutor could be useful to guide information-sharing and help build the relationship.

- ⇒ With respect to detailing personnel, many participants asserted that U.S. cooperation faces considerable practical challenges, with some participants suggesting that the overall benefits of detailing personnel may not outweigh the costs. Some participants suggested that U.S. support in the form of training ICC personnel might be a more effective use of resources than detailing or secondment.
- ⇒ Participants noted that the multitude of potential investigations into the ongoing crimes in Ukraine could pose competing demands and practical challenges to U.S. cooperation with the ICC.
- ⇒ Participants discussed the benefits and drawbacks of a separate tribunal for prosecuting the crime of Russian aggression against Ukraine. Nonetheless, many participants seemed to accept that the United States should support leaving open the door to jurisdiction over aggression and developing a case for prosecution of that crime in the future.²⁷
- ⇒ Most participants agreed that U.S. cooperation should extend to issues outside of the direct investigation of crimes to encompass, *inter alia*, victim and witness protection; however, some participants expressed concern that congressional appropriations limitations and/or earmarks, relevant legislation, or diplomatic concerns may limit the ability of the United States to cooperate in this regard under some circumstances.

B. REPORT

This report memorializes the events of the workshop. Consistent with the Chatham House rule, the report does not attribute comments to any individuals, while it seeks to faithfully represent the discussion and outcomes of the day. Participants were all afforded an opportunity to review and edit the report prior to publication.

²⁷ See Van Schaack, Ambassador Van Schaack's Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression, *supra* note 3.

The discussion was wide-ranging and technical. To aid readers in understanding the discussion summation, the read-ahead papers drafted by Ambassador Todd Buchwald, Professor Ron Alcala and Dean Shane Reeves, and Professor Alex Whiting are provided in this report before the summary of each discussion. The appendices include a summary of the Fireside Chat (Appendix A) and the text of relevant recently enacted legislation discussed mostly in Session One (Appendix B).

FRAMING PAPER

U.S. COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT ON INVESTIGATION AND PROSECUTION OF ATROCITIES IN UKRAINE: POSSIBILITIES AND CHALLENGES

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Russia's invasion of Ukraine in February 2022 marked a dramatic escalation of the ongoing armed conflict between Russia and Ukraine that began in 2014. Despite Russia's insistence that its military activity constituted a "special military operation" in defense of the self-proclaimed "people's republics" of Luhansk and Donetsk,²⁸ the international community remained unconvinced. Indeed, Russia's bald attempts at a legal justification were met with incredulity. A day after Russia's offensive began, 11 members of the UN Security Council voted in favor of a resolution condemning the invasion, while 3 members (China, India, and the United Arab Emirates) abstained in the vote.²⁹ Unsurprisingly, Russia exercised its veto to block the resolution. Several days later, the UN General Assembly passed a resolution demanding, among other things, that Russia "immediately cease its unlawful use of force against Ukraine" and "withdraw all of its military forces" from the territory of Ukraine.³⁰ The vote was 141 in favor and 5 against with 35 abstentions.³¹

Singling Russia out as the aggressor in the Ukraine conflict has not been difficult. Russia's legal claim of self-defense under Article 51, as formally transmitted to the UN

* The views expressed here are the views of the authors and do not necessarily reflect those of the U.S. Military Academy, the U.S. Army, the Department of Defense, or any other department or agency of the United States government. The information presented stems from the authors' own research and publicly available sources, not from protected operational information.

²⁸ See Meetings Coverage, Security Council, Russian Federation Announces 'Special Military Operation' in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict, U.N. Meetings Coverage SC/14803, (Feb. 23, 2022).

²⁹ *Russia Blocks Security Council Action on Ukraine*, UN NEWS (Feb. 26, 2022), <https://news.un.org/en/story/2022/02/1112802>.

³⁰ Press Release, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops, U.N. Press Release GA/12407 (Mar. 2, 2022).

³¹ *Id.*

Secretary-General, was thin gruel.³² The invasion, however, sparked a reconsideration of previously held beliefs in unexpected ways. This is particularly surprising given the largely undisputed circumstances of the invasion and the relatively straightforward nature of the conflict. Often, ambiguity and uncertainty rather than situational clarity provoke the type of inquiry and reflection the Ukraine conflict has engendered. One subject that emerged for reconsideration at the start of the conflict was the question of neutrality. Since then—and in light of numerous reports of atrocities committed by Russian forces—the question of U.S. cooperation with the ICC has also garnered much attention. Whether the United States should revise its approach to the ICC given its earlier objections to the Court remains an open question.

In all likelihood, a sense of consternation and outrage, and the desire for sanction to right a perceived wrong, motivated some to reappraise the law of neutrality at the outset of the conflict. Russia’s veto power in the Security Council precluded the possibility of an international response under Chapter VII, effectively foreclosing states’ ability to act in support of Ukraine with the imprimatur of the UN. As a result, states wishing to remain neutral—that is, unwilling to become belligerents to the conflict—were bound to respect the law of neutrality. Among other things, neutrality requires states to refrain from providing war-related goods and services to a belligerent, but even this basic obligation seemed inequitable, perhaps even unjust, given the power disparity between Russia and Ukraine and Russia’s self-evident role as the aggressor in the conflict.

For those appalled by this outcome, the concept of “qualified neutrality” appeared to provide a solution. Some states, including the United States, have long held that states need not observe strict impartiality vis-à-vis a clear victim state and an obvious aggressor state to maintain their neutral status. The U.S. Department of Defense Law of War Manual explains that “after treaties outlawed war as a matter of national policy, it was argued that neutral States could discriminate in favor of States that were victims of wars of aggression.”³³ Accordingly, before the Second World War, “the United States adopted a position of ‘qualified neutrality’ in

³² Permanent Rep. of the Russian Federation to the U.N., Letter dated February 24, 2022 from the Permanent Rep. of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. S/2022/154 (Feb. 24, 2022).

³³ OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 15.2.2 (rev. ed., Dec. 2016).

which neutral States had the right to support belligerent States that had been the victim of flagrant and illegal wars of aggression.”³⁴

The doctrine of qualified neutrality is a controversial one. It has been criticized as a way for States to circumvent their neutrality obligations when politically expedient. Critics maintain that States may only violate the law of neutrality when the Security Council has specifically identified a state as an aggressor and authorized action under Chapter VII. Russia’s position as both the aggressor in Ukraine and a permanent member of the Security Council (with veto power) has strained this bright line stance. Wolff Heintschel von Heinegg, a once committed opponent of qualified neutrality, described the situation in Ukraine as a “game changer.”³⁵ For various reasons, he explained, “neutral States can no longer be bound by an obligation of strict impartiality and a prohibition to supply the victim of aggression with the means necessary to defend itself against an aggressor State that is obviously determined to ignore core principles and rules of international law.”³⁶

In a similar way, the stark contours of the Ukraine conflict have helped revive questions about the United States’ involvement with the ICC. Perhaps the reports of atrocities and war crimes committed during the conflict will help solidify the DOJ’s interpretation of section 7433 of the American Servicemembers’ Protection Act of 2002 (ASPA).³⁷ If so, concerns regarding the potential exposure of U.S. service members to prosecution by the Court will nevertheless persist. In its entirety, section 7433 (also known as the Dodd Amendment) states,

Nothing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic [sic], Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.³⁸

The U.S. Department of Justice’s Office of Legal Counsel formal opinion from 2010 (2010 OLC Opinion) that the Dodd Amendment “does not undermine the ASPA’s evident purpose of

³⁴ *Id.*

³⁵ Wolff Heintschel von Heinegg, *Neutrality in the War against Ukraine*, ARTICLES OF WAR (Mar. 1, 2022), <https://lieber.westpoint.edu/neutrality-in-the-war-against-ukraine/>.

³⁶ *Id.*

³⁷ See ASPA, *supra* note 19.

³⁸ *Id.* at § 7433.

protecting Americans from prosecution by the ICC” may lead to increased cooperation with the ICC, but it is unlikely to quiet broader concerns by some about the Court.³⁹

The 2010 OLC Opinion concludes that section 7433 qualifies rather than clarifies the prohibitions outlined in the ASPA. In other words, the Dodd Amendment should be read to qualify the prohibitions set out in sections 7423 and 7425 so that they “do not bar United States assistance to particular ICC efforts to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity....” The phrase “international efforts” cited in section 7433 has been interpreted to encompass efforts by the ICC, thereby permitting U.S. assistance to the ICC under the limited circumstances described in section 7433.

The 2010 OLC Opinion is quick to point out that the qualifying language of section 7433 in no way undermines the protection of Americans who are the focus of the ASPA. The opinion states, “no matter how one interprets the Dodd Amendment, it has no effect on ASPA’s protections for Americans who might be investigated or charged by the ICC, including all servicemembers and Government officials.”⁴⁰ The opinion explicitly agrees with the DoD’s interpretation that “foreign nationals” as stated in section 7433 “does not cover any members of the United States Armed Forces, including permanent resident aliens.”⁴¹ The opinion also cites section 7432(4), which defines “covered United States persons” to include members of the Armed Forces of the United States.”⁴²

Nevertheless, calls by U.S. officials to hold members of Russia’s armed forces accountable at the ICC for war crimes and crimes against humanity could undermine the United States’ longstanding opposition to the Court’s exercise of jurisdiction over nationals of non-party States. In March 2022, the Senate passed Senate Resolution 546, which “encourage[d] member states to petition the ICC or other appropriate international tribunal to take any appropriate steps to investigate war crimes and crimes against humanity committed by the Russian Armed Forces and their proxies and President Putin’s military commanders, at the direction of President Vladimir Putin.”⁴³ By inviting this involvement from the international community and encouraging the ICC to take action against nationals of a non-party State, the

³⁹ 2010 OLC Opinion, *supra* note 21, at 12.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 7 n.7.

⁴² *Id.*

⁴³ S. Res. 546, 117th Cong. § 1(2) (as passed by Senate, Mar. 15, 2022).

United States is setting a precedent that will blunt future attempts to oppose the Court's jurisdiction over non-party nationals.

Since February 2022, Russia has managed to frustrate efforts to hold it accountable for its invasion of Ukraine. Its claims of self-defense and its characterization of the invasion as a "special military operation" provoked outrage, but Russia's status as a permanent member of the Security Council and the specter of its veto have stymied the international community's ability to act decisively in support of Ukraine. Without recourse to Chapter VII and the authorization of the United Nations, states have sought other ways to influence the conflict, including by providing aid to Ukraine under the doctrine of qualified neutrality. In the United States, the idea of cooperating with the ICC has also gained renewed interest. While section 7433 of the ASPA has been interpreted to permit the provision of assistance to the ICC in cases of genocide, war crimes or crimes against humanity, Russia's status as a non-party State to the Rome Statute is significant. If the ICC were to investigate war crimes and crimes against humanity committed by Russian personnel, as the U.S. Senate and others have urged, any future opposition to the Court's exercise of jurisdiction over non-party nationals, including those of the United States, will be harder to justify and support. Whether this jurisdictional concern will continue to impede full-fledged U.S. cooperation with the ICC, however, remains to be seen.

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Update: In the weeks following submission of this framing paper and the discussions held at the law and policy workshop, reports emerged that the Department of Defense continues to oppose the sharing of evidence on Russia atrocities committed in Ukraine with the ICC. Other U.S. agencies, including the Departments of State and Justice, favor providing such evidence to the Court.

FRAMING PAPER FOR SESSION ONE

RECENTLY-ENACTED LEGISLATION AFFECTING U.S. EFFORTS TO SUPPORT THE ICC IN UKRAINE AND BEYOND

Ambassador Todd Buchwald

Congress enacted various pieces of legislation in the early 2000's restricting the U.S. government's relationship with the International Criminal Court (ICC). The most prominent was the American Servicemembers' Protection Act (ASPA),⁴⁴ which among other things contained broad restrictions on cooperation with the ICC regarding military assistance to Rome Statute parties that refused to conclude "Article 98" agreements with the United States, and regarding the ability of U.S. armed forces to participate in U.N. peacekeeping operations if exposed to the possibility of ICC assertions of jurisdiction. The legislation also contained authority to use military force to free U.S. persons – as well as what it called "covered allied persons" – that might be detained or imprisoned by, or on behalf of, the ICC.

There were amendments to ASPA over time, but its basic restrictions on U.S. cooperation with the ICC remained in place. Notwithstanding the restrictions, however, a separate provision of ASPA – the Dodd Amendment (section 2015 of ASPA)⁴⁵ – created a substantial exception. Specifically, the Dodd Amendment exempted from the ASPA restrictions to rendering assistance by the United States "to international efforts to bring to justice . . . foreign nationals accused of genocide, war crimes or crimes against humanity."⁴⁶ A memorandum from the U.S. Department of Justice's Office of Legal Counsel (OLC) in 2010⁴⁷ confirmed that the international efforts to which assistance could be provided under the Dodd Amendment included the ICC. The Dodd Amendment thus cleared the way for the provision of various forms of U.S. actions that were supportive of the ICC's work, including most prominently U.S. facilitation of the surrenders of key ICC fugitives Bosco Ntaganda and Dominic Ongwen.

⁴⁴ ASPA, *supra* note 19, at §§ 7421-7433.

⁴⁵ *Id.* at § 7433.

⁴⁶ *Id.*

⁴⁷ 2010 OLC Opinion, *supra* note 21.

Meanwhile, a less prominent piece of legislation – section 705(b) of the Foreign Relations Authorization Act for Fiscal Years 2000 and 2001 (FY 2000-01 FRAA) – prohibited obligation of funds “for use by, or support of, the International Criminal Court,”⁴⁸ and the carve-outs of the Dodd Amendment did not apply to these restrictions. The 2010 OLC memorandum interpreted section 705(b) as prohibiting the provision of any funding (as opposed to in-kind) assistance to the ICC, and the provision even of in-kind assistance for generalized institutional support (as opposed to support for particular investigations or prosecutions of foreign persons accused of atrocities).⁴⁹

More recently, there has been a remarkable outpouring of congressional support for ICC efforts in the wake of the Russian invasion of Ukraine and widespread reports of atrocities, both at the political level and in terms of operative legislation. These operative provisions include both provisions that modify the existing legislative restrictions on the ICC (*i.e.*, ASPA and section 705 of the FY 2000-01 FRAA) and more general provisions that policymakers will need to implement. With a view to providing background that will be helpful for Session 1 of the workshop, this paper quotes and/or explains these operative provisions, and then sets out questions that would appear to warrant consideration as policymakers chart a path forward in dealing with the ICC in the period ahead.

It is worth noting that the paper does not address a series of important issues separate from the new legislation that policymakers will need to deal with, including issues connected with:

- the need to protect intelligence and law-enforcement information;
- the potential for testimony of current or former U.S. executive branch officials;
- proposals for creation of a venue to investigate and prosecute the crime of aggression;
- the extent to which U.S. government support for the ICC’s activities in Ukraine could be affected by its concerns about ICC activities in other countries; and
- U.S. government views about—

⁴⁸ FY 2000-01 FRAA, *supra* note 20, at § 705(b).

⁴⁹ See 2010 OLC Opinion, *supra* note 21.

- ⇒ the ICC's posture of the ICC towards states that are not parties to the Rome Statute;
- ⇒ complementarity as an organizing principle for the ICC's activities;
- ⇒ immunity issues.

It is also worth noting that the paper does not address amendments to the War Crimes Rewards Expansion Act⁵⁰ that were enacted but do not appear to substantially affect US policy towards the ICC regarding Ukraine. Nor does it address two other pieces of legislation that were not enacted (but could be of significant importance if enacted in the future):

- the Multilateral Leadership Act,⁵¹ introduced by Representative Castro and others, which, if enacted, would protect certain multilateral organizations, including the ICC, from the prospect of future sanctions under the International Emergency Economic Powers Act (IEEPA)⁵²; or
- the crimes against humanity legislation⁵³ introduced by Senator Durbin and others.

RELEVANT LEGISLATION ADOPTED BY THE 117TH CONGRESS

OVERALL CLIMATE OF CONGRESSIONAL SUPPORT

There has been a remarkable outpouring of political support for the ICC in the wake of Russia's invasion of Ukraine and widespread reports of atrocities. This is reflected in numerous expressions of support.⁵⁴ Perhaps most noteworthy is the unanimous Senate adoption of Senate Resolution 546, introduced by Senator Graham, which referred to the ICC as "an international tribunal that seeks to uphold the rule of law, especially in areas where no rule of law exists," and "encourage[d] member states to petition the ICC or other appropriate international tribunal to take any appropriate steps to investigate [Russian] war crimes and

⁵⁰ War Crimes Rewards Expansion Act, Pub. L. 117-273 (2022) (introduced as H.R. 4250, 117th Cong. (2022), <https://www.congress.gov/117/bills/hr4250/BILLS-117hr4250enr.pdf>).

⁵¹ H.R. 8372, 117th Cong. (2022), <https://www.congress.gov/117/bills/hr8372/BILLS-117hr8372ih.pdf>.

⁵² 50 U.S.C. § 1701 *et seq.* (2018) ("IEEPA").

⁵³ S. 1346, 111th Cong. (2010), <https://www.congress.gov/111/bills/s1346/BILLS-111s1346rs.pdf>.

⁵⁴ See Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for US Policy Shift on Int'l Criminal Court*, JUST SECURITY (April 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-wave-for-us-policy-shift-on-intl-criminal-court/>.

crimes against humanity.”⁵⁵ In addition to this kind of rhetorical support, Congress also passed – and the President has signed into law – operational pieces of legislation (described below) that form an enhanced legislative framework for U.S. support for ICC activities, at least in Ukraine. In the words of Senator Graham: “I didn’t think it was possible but [Putin] did it — and that’s for him to rehabilitate the ICC in the eyes of the Republican Party and the American people.”⁵⁶

The overall political context suggests important questions for policymakers that cannot be divorced from consideration of the operational pieces of legislation described below, including:

- What now are congressional expectations and what steps, if any, should the U.S. government take to meet them—either in connection with the specific legislation described below, or more generally?
- How, if at all, should the U.S. executive branch build upon this congressional support in working to enhance the ICC’s prospects for successful investigations and prosecutions of ICC crimes in Ukraine, and in improving its overall relationship with the ICC?

SPECIFIC OPERATIONAL PIECES OF LEGISLATION

1. Exception to ASPA to allow ICC “investigative activities” in U.S. territory: Section 7073(a) of the Consolidated Appropriations Act for Fiscal Year 2023⁵⁷

Section 7073(a) of the FY-2023 Consolidated Appropriations Act (FY-2023 CAA) amended section 2004(h) of the ASPA so that it shall not apply with respect to activities that—

“(A) relate solely to investigations and prosecutions of foreign persons for crimes within the jurisdiction of the International Criminal Court related to the Situation in Ukraine; and

(B) are undertaken in concurrence with the Attorney General.”

⁵⁵ S. Res. 546, 117th Cong. (2022), available at <https://www.congress.gov/bill/117th-congress/senate-resolution/546>.

⁵⁶ Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>.

⁵⁷ FY-2023 CAA, *supra* note 16, at § 7073(a).

Explanation: Section 2004(h) of the ASPA provides that agents of the ICC are prohibited from conducting “investigative activity”⁵⁸ in the United States (or any territory subject to U.S. jurisdiction). There are questions about exactly what qualifies as “investigative activities” and what qualifies as the conduct of such activities “*in the United States*” (*e.g.*, might a phone interview conducted from abroad with a person in the United States fall within the ambit of this restriction?).

For its part, the Dodd Amendment can be relied upon to overcome restrictions on the rendering of assistance by the United States to international efforts to bring to justice foreign nationals accused of atrocity crimes (genocide, crimes against humanity and war crimes). However, because section 2004(h) was formulated as a restriction *on agents of the ICC*, rather than on the rendering of assistance *by the United States*, the Dodd Amendment was not interpreted as providing authority that would enable the ICC to conduct investigative activity otherwise restricted by section 2004.

Under the new section 7073(a) of the FY-2023 CAA, the section 2004(h) restriction will no longer apply to ICC investigative activities that “relate *solely* to investigations and prosecutions of foreign persons for [ICC crimes] *related to the situation in Ukraine*” (emphasis added). However, the exception can be utilized only if the investigative activities are undertaken “in concurrence with the Attorney General.”

Potential legal questions include:

- What qualifies activity as “related” to the situation in Ukraine—*e.g.*, does it include any activity that the Prosecutor seeks to pursue that falls within his current investigation? Are there other potential cases that might be considered as “related” to the situation in Ukraine—*e.g.*, potential investigations of the Wagner group that extend beyond Ukraine—even if not Ukraine-specific?
- Will/should the Attorney-General delegate his authority to concur?
- What form will any such concurrence take?
- How particularized will/should the U.S. government make any such concurrence—*e.g.*, should concurrence be limited to specific named activities, extend to any activities (or a

⁵⁸ ASPA, *supra* note 19, at § 7423(h).

broad range of activities) that the Prosecutor may want to undertake, or something in-between?

- To what extent, if any, should the U.S. government ask the Prosecutor to divulge information about the particulars of his prosecutorial program as part of the process of considering whether the Attorney General should provide the needed concurrence?
- Will any desire or need for such information interfere with the Prosecutor's perceived need to maintain prosecutorial independence or to maintain confidentiality? To the extent there are competing interests, how should the U.S. government deal with them?
- How does the U.S. government deal with such situations in other contexts not involving the ICC—*e.g.*, under mutual legal assistance treaties (MLAT's), or in connection with the *ad hoc* tribunals? What lessons can be learned from the manner in which the U.S. government deals with such issues in other contexts—*e.g.*, when we are faced with efforts by prosecutors in foreign countries or other international courts to obtain testimony or evidence in the United States?

2. Expansion of Dodd Amendment to cover Ukraine:

Section 7073(b) of the Consolidated Appropriations Act for Fiscal Year 2023⁵⁹

Section 7073(b) of the FY-2023 Consolidated Appropriations Act amends the Dodd Amendment to read as follows:

(a) ASSISTANCE.—Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity, *or from rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.* (emphasis added)

(b) AUTHORITY.—Assistance made available pursuant to subsection (a) of this section may be made available notwithstanding section 705 of the

⁵⁹ FY-2023 CAA, *supra* note 16, at § 7073(b).

Foreign Relations Authorization Act, Fiscal Year 2000 and 2001 (22 U.S.C. 7401), except that none of the funds made available pursuant to this subsection may be made available for the purpose of supporting investigations or prosecutions of U.S. servicemembers or other covered United States persons or covered allied persons as such terms are defined in section 2013 of this Act.

(c) NOTIFICATION.—The Secretary of State shall notify the Committees on Appropriations, the Committee on Foreign Relations of the Senate, and the Committee on Foreign Affairs of the House of Representatives, of any amounts obligated pursuant to subsection (b) not later than 15 days before such obligation is made.

For ease of exposition, this section discusses each of the new paragraphs of the Dodd Amendment separately.

(i) Explanation of Ukraine language in new section 2015(a) of the Dodd Amendment regarding investigations and prosecutions “related to the situation in Ukraine”:

The italicized language above is the portion of subsection (a) that has been newly added. Under the previous language, the U.S. government could overcome ASPA restrictions on rendering assistance to ICC efforts to bring to justice foreign nationals “accused” of atrocity crimes. This language appears to have been interpreted as barring reliance on this authority to provide assistance at the early stages of an investigation when the Prosecutor is developing a crime base but prior to the existence or issuance of “accusations” against foreign nationals. It is not entirely clear exactly what qualifies as an “accusation” for these purposes. Nevertheless, the result of such an interpretation is that the ASPA restrictions would continue to prevent the U.S. government from rendering assistance to ICC efforts in a situation country before “accusations” crystallize (or—even after such “accusations” crystallize—for investigative activities in such a country insofar as they are not related to the persons who have already been “accused”).

Under the newly added language, the Dodd Amendment can now be used to overcome otherwise applicable restrictions under ASPA regardless of whether an “accused” foreign national has yet been identified, so long as the assistance is being provided for investigations and prosecutions of foreign nationals “related to the situation in Ukraine.”

Potential legal questions include:

- What is the test for determining whether assistance is “related” to the Situation in Ukraine?
- To what extent, if any, must the U.S. government be in a position to verify that assistance provided under the new Ukraine language will not also benefit ICC efforts that are not related to Ukraine—*e.g.*, that it might benefit ICC activities in situations in other countries in which U.S. support has at least some prospect of being helpful for ICC efforts in investigations or prosecutions of—
 - ⇒ persons outside the situation in Ukraine to the extent an “accused” has not yet been identified?
 - ⇒ the crime of aggression (which is not covered by the original version of the Dodd Amendment, although this crime is not prosecutable for Ukraine before the ICC at present)?
 - ⇒ U.S. nationals (or dual nationals)?

(ii) *Explanation of language in new section 2015(a) on support for “victims and witnesses”:*

The amended language also provides that the authority in the revised version of the Dodd Amendment to assist with investigations and prosecutions related to the Situation in Ukraine ***includes*** support for “victims and witnesses.”

Thus, in addition to the questions above, potential legal questions include:

- What constitutes “support” for victims and witnesses?
- Given that the new amended language applies to assistance for ICC investigations/prosecution “including” support for victims and witnesses, to what, if any, extent does the U.S. government need to be prepared to ensure that such witness/victim support actually assists the ICC’s investigations or prosecutions?
- In this connection, is there a risk that justifying support for victims as constituting *support* for ICC investigations/prosecutions in Ukraine may undermine arguments—in contexts outside Ukraine—that restrictions on assistance for the ICC do not affect the ability of the U.S. government to provide support for victims? If so, are there steps that might be taken to mitigate that risk?

(iii) Explanation of new section 2015(b). The background of this provision lies in section 705(b) of the FY-2000-01 FRAA, which provided as follows:

“None of the funds authorized to be appropriated by this or any other Act may be obligated ***for use by, or for support of, the International Criminal Court*** unless the United States has become a party to the Court pursuant to a treaty made under Article II, section 2, clause 2 of the Constitution of the United States on or after November 29, 1999.”

The 2010 OLC Legal Memorandum discussed this provision extensively. In that memorandum, OLC first concluded that the section 705(b) restriction applied permanently, notwithstanding the fact that it was contained in annual authorization legislation. OLC then interpreted the restriction on obligating funds “for support of” the ICC as prohibiting the provision of generalized support to maintain or sustain the ICC as an institution—regardless of whether such support was provided in the form of funds or in-kind assistance—but did not block the U.S. government from providing support for particular cases. However, OLC interpreted the restriction on obligating funds “for use by” the ICC as a categorical prohibition on actually providing funds to the ICC for any purposes. The result was that the U.S. government could not provide direct funding even if that funding would be made available only for particular cases for which the U.S. government was permitted to provide in-kind support.

In principle, under the newly-added section 2015(b), direct funding is no longer blocked to the extent that assistance is permitted under the amended Dodd Amendment. (Note that the removal of this blockage would not eliminate the need to affirmatively identify an available funding authority, and to comply with whatever obligations are normally tied to the use of such funds under that authority—*e.g.*, any relevant reprogramming notification requirements.)

Under the “except” clause at the end of section 2015(b), the authority to make direct funding available under this provision will not permit the U.S. government to make funds available “for the purpose of supporting investigations or prosecutions of, *inter alia*, covered United States persons or covered allied persons” as such terms are defined in section 2013 of ASPA. The phrase “covered allied persons” is defined to include relevant personnel from NATO countries or from countries designated by the President under the Foreign Assistance Act as “major non-NATO allies,” but only so long as the country is “not a party to the International Criminal Court and *wishes its officials working on its behalf to be exempted from the [ICC’s]*

jurisdiction.” There have been various proposals⁶⁰ to designate Ukraine as a major non-NATO ally, but no such designation appears to have been made. (If such a designation were made, there could be questions about whether funds could be made available under section 2015(b) to support ICC investigation or prosecution of Ukrainian personnel as part of the ICC’s activities in Ukraine, though the fact that Ukraine has accepted the ICC’s jurisdiction under Article 12(3) of the Rome Statute⁶¹ could make funding for such purposes possible under the language that is italicized above).

Potential legal questions include:

- What funding authorities might be affirmatively available as a source of a contribution? What, if any, special authorities or restrictions might apply to such funding, separate from the ICC-specific legislation described in this paper?
- Given the fungible nature of funds as opposed to in-kind assistance, what, if any, additional steps might need to be taken in order to guard against the possibility of funds being utilized in a manner that benefits the ICC’s efforts for activities not related to the situation in Ukraine?
- Given the inclusion of specific language against using this authority to make funds available for investigations or prosecutions of “covered U.S. persons” or “covered allied persons,” what, if any, steps (beyond any steps needed under the previous bullet-point) might need to be taken in order to guard against the possibility of funds being utilized in a manner that benefits the ICC’s efforts to investigate or prosecute any such persons?
- Assuming the U.S. government desires to make cash contributions to support the ICC’s efforts in Ukraine, to what extent would the U.S. government need to earmark the funds to be used only for Ukraine, and how might any such need to earmark funds be coordinated with the desire/need of the ICC Prosecutor not to accept funding that is earmarked for specific investigations or prosecutions?
- The same question applies to any support of an institutional nature that the U.S. government might want to make—*e.g.*, of equipment or personnel or cyber-security—

⁶⁰ See Letter from Helsinki Commission, to Joseph R. Biden, U.S. President (Mar. 11, 2022), <https://www.documentcloud.org/documents/21410594-helsinki-commission-letter-to-president-biden-march-2022>.

⁶¹ Rome Statute, *supra* note 10.

that at least potentially could or would benefit the ICC for purposes beyond the investigations and prosecutions of the Situation in Ukraine?

- If Ukraine were designated as a major non-NATO ally under the Foreign Assistance Act,⁶² would any additional steps be needed to ensure against the possibility of U.S. support being used in connection with investigations or prosecutions of relevant Ukrainian personnel?

(iv) Explanation of new section 2015(c). Section 2015(c) requires the Secretary of State to provide 15-day advance notification to the foreign affairs oversight committee before using the authority of subsection (b) to obligate funds. The provision is not written so as to suggest that this would be a reprogramming notification, but there may be a need to submit a reprogramming notification under the authorities that apply to the underlying funds that would be being made available.

Potential legal issues include:

- How specifically or generally should the executive branch frame its notifications to the oversight committees under section 2015(c)?
- Does the obligation to provide 15-day advance notification to the oversight committees apply only if the U.S. government wants to provide actual funding to the ICC, or does it also apply if the U.S. government wants to provide in-kind assistance that is not case-specific?
- Does the fact that the Secretary of State must notify the congressional oversight committees under new section 2015(c) of the Dodd Amendment provide a path for addressing interpretive issues in a practical manner?
- Note: Similar questions apply with respect to the reporting requirements under section 5948(d) of the National Defense Authorization Act for Fiscal Year 2023 (FY-2023 NDAA),⁶³ which in relevant part requires the President to report to the relevant oversight committees within 90 days of enactment—see Item 6 below.

⁶² Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424.

⁶³ FY-2023 NDAA, *supra* note 18, at § 5948.

3. Section 7073(c) of the Consolidated Appropriations Act for Fiscal Year 2023⁶⁴

Explanation of section 7073(c). Section 7073(c) provides as follows:

“(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed to modify the existing roles or authorities of any Federal agency or official.”

Potential legal questions include:

- What, if any, steps should the U.S. government take (or avoid) in light of this provision?

4. The Justice for Victims of War Crimes Act⁶⁵

Explanation: Each of the four Geneva Conventions provides as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.⁶⁶

Under previous legislation—18 U.S.C § 2441—the U.S. government lacked statutory authority for fulfilling this obligation in cases where a perpetrator was present in the United States if neither the perpetrator nor the victim of the alleged offense was a U.S. national. This new legislation fills that gap by allowing “present in” jurisdiction. Among other things, the new legislation opens the possibility of war crimes prosecutions in U.S. courts for persons that have committed war crimes in Ukraine.

In order to undertake **any** war crimes prosecution under amended section 2441, the Attorney General, his or her Deputy, or an Assistant Attorney General must certify that “a

⁶⁴ FY-2023 CAA, *supra* note 16, at § 7073(c).

⁶⁵ Justice for Victims of War Crimes Act, *supra* note 17.

⁶⁶ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

prosecution by the United States is in the public interest and necessary to secure substantial justice.” The authority to make this certification cannot be delegated. If the prosecution is based on this new “present in” jurisdiction—*e.g.*, if it does not involve a U.S. person as perpetrator or victim—the certification must be made by the Attorney General or his Deputy, who is required, among other things, to weigh and consider whether the offender can be removed from the United States and prosecuted abroad, as well as “potential adverse consequences for nationals, servicemembers, or employees of the United States.”

Potential legal questions include:

- What, if any, procedures should be put in place in advance to ensure that the U.S. government is in a position to proceed under this new legislation in the event a case arises involving possible prosecution of a person suspected of committing war crimes in Ukraine?
- What, if any, statements should the U.S. government make regarding its willingness to rely on this authority if an appropriate case arises?

5. Section 6512 of the FY-2023 NDAA⁶⁷

Explanation: Section 6512 requires the U.S. Director of National Intelligence (DNI) to designate a senior official to serve as the intelligence community coordinator for Russian atrocities accountability, with duties that include identifying and disseminating relevant intelligence, identifying analytic needs and priorities, addressing collection gaps, and collaborating with others across the intelligence community. The DNI must report to the Congress within 30 days of enactment [note: before the date of the February 3 workshop] the name of the Coordinator and a strategy for collection of information; and provide an additional support by May 1 on the relevant intelligence community activities.

Potential legal questions include:

- What, if any, measures should be taken in implementation of this provision beyond those already in place?

⁶⁷ FY-2023 NDAA, *supra* note 18, at § 6512.

6. The Ukraine Invasion War Crimes Deterrence and Accountability Act

Section 5948 of FY-2023 NDAA⁶⁸

Explanation: This legislation contains strong hortatory language regarding Russian atrocities in Ukraine. Among other things, it states that it is U.S. policy to collect, analyze, and preserve relevant evidence and information, to help deter the commission of further Russian atrocities, and to continue efforts to pursue accountability for atrocities in Ukraine and “to leverage international cooperation and best practices in this regard.” It also requires a detailed report from the President to the foreign affairs, armed services, judiciary, and intelligence committees within 90 days of enactment. Among other things, the reports must address “steps taken to coordinate with, and support the work of, allies, partners, international institutions and organizations”; and on the “process for a domestic, foreign, or international court or tribunal to request and obtain from the United States Government information related to war crimes or other atrocities” committed during the Russian invasion.

Potential legal issues include:

- Should the responsibility to submit the report to these committees be delegated and, if so, to whom?
- How should the responsibility for preparing the report be organized?
- What should be the role of the intelligence community coordinator now mandated under section 6512?
- What, if any, language could be included in such a report regarding any legal points that may be identified in connection with the interpretation or implementation of any of the provisions under the ASPA or the new legislation described above?

⁶⁸ *Id.* at § 5948.

SESSION ONE SUMMARY

ASSESSING THE CURRENT U.S. LEGISLATIVE FRAMEWORK GOVERNING U.S. COOPERATION WITH THE ICC AND ITS IMPLICATIONS FOR COOPERATION WITH THE ICC UKRAINE INVESTIGATION

In this session, participants considered the impact of recently enacted U.S. legislation, including the FY-2023 Consolidated Appropriations Act (CAA),⁶⁹ the Justice for Victims of War Crimes Act,⁷⁰ and the FY-2023 National Defense Authorization Act (NDAA)⁷¹ on the legal framework governing U.S. cooperation with the ICC. In particular, participants discussed the extent to which this new legislation expands the domestic legal authority for the United States to cooperate with the ICC, in the context of the ICC’s investigation in Ukraine. This analysis inevitably required evaluation of the pre-existing legislative framework that had restricted U.S. cooperation with the ICC—including the American Servicemembers’ Protection Act of 2002 (ASPA) (including the so-called “Dodd Amendment”),⁷² and the Foreign Relations Authorization Act for Fiscal Years 2000 and 2001 (FRAA),⁷³ as well as executive branch interpretation of that legislative framework as embodied in a 2010 Department of Justice Office of Legal Counsel (OLC) opinion.⁷⁴

The pre-existing legislative framework, as interpreted by the U.S. executive branch, would have hindered the United States from cooperating with the ICC Ukraine investigation in a number of respects. The framing papers (above) for Session One describe these limitations in more detail, but key provisions of the pre-existing law contained broad restrictions against supporting ICC activities.⁷⁵

⁶⁹ FY-2023 CAA, *supra* note 16, at § 7073.

⁷⁰ Justice for Victims of War Crimes Act, *supra* note 17.

⁷¹ FY-2023 NDAA, *supra* note 18.

⁷² ASPA, *supra* note 19, at §§ 7421-7433.

⁷³ FY-2000-01 FRAA, *supra* note 20.

⁷⁴ 2010 OLC Opinion, *supra* note 21.

⁷⁵ Pre-existing law restricted the United States from supporting the ICC in various ways, including “the provision of financial support, services, or law enforcement cooperation; the transfer of property or other material support; intelligence sharing; the training or detail of personnel; the arrest or detention of individuals; the ability of U.S. courts and state and local governmental entities to respond to ICC requests for cooperation; and ICC investigative activity in the United States.” ASIL TASK FORCE REPORT 2021, *supra* note 9, at 8. For a detailed analysis of these restrictions, see *id.* at 8-11.

The Dodd Amendment, however, carved out a capacious exception to these restrictions, by providing that nothing in the ASPA prohibits the United States from assisting in international efforts to bring to justice foreign nationals accused of genocide, crimes against humanity, and war crimes: “Nothing in [the ASPA] shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic [sic], Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes, or crimes against humanity.”⁷⁶ In the 2010 OLC legal opinion, the U.S. executive branch interpreted the Dodd Amendment as permitting some U.S. cooperation with the ICC, but nonetheless concluded that the Amendment did not cover many aspects of such cooperation, including “general institutional support to the ICC not sufficiently connected to efforts to bring particular individuals to justice (*i.e.*, general training or capacity building).”⁷⁷ In addition, the Dodd Amendment, as interpreted by the OLC memo, did not overcome restrictions on ICC investigative activity in the United States or a restriction contained in the FRAA that barred any direct funding support for the ICC.⁷⁸ And, as noted in the framing papers for Session One, there has been some debate about whether the exception in the Dodd Amendment, permitting U.S. support for “accused” foreign nationals, barred assistance at the early stages of an investigation before the issuance of accusations (whether formal or informal) against individuals.

The new legislative provisions signed into law at the end of 2022, in particular the provisions of the FY-2023 CAA, address each of these restrictions, opening up much broader legal authority for the United States to cooperate with the ICC Prosecutor’s Ukraine investigation. Participants therefore discussed in great detail the scope and impact of these new provisions. (Appendix B contains the full text of the relevant portions of these recently-enacted laws.)

⁷⁶ ASPA, *supra* note 19, at § 7433.

⁷⁷ See ASIL TASK FORCE REPORT 2021, *supra* note 9, at 9.

⁷⁸ For a more detailed discussion of the FRAA restrictions, see *id.* at 10. In the Consolidated Appropriations Act of 2021, Congress prohibited funds under the State Department from being made available to the ICC but allowed funds to be used for some technical assistance training, assistance to victims and witness protection, law enforcement, and other activities. Pub. L. No. 116-260, § 7049(b); see also ASIL TASK FORCE REPORT 2021, *supra* note 9, at 10.

DISCUSSION OF SECTION 7073(A) AND 7073(B) OF THE FY-2023 CONSOLIDATED APPROPRIATIONS ACT IN RELATION TO THE DODD AMENDMENT

Section 7073(a) of the FY-2023 CAA authorizes ICC “investigative activities” in U.S. territory “related to the Situation in Ukraine,” with the concurrence of the Attorney General.⁷⁹ Prior to this new legislation, the ASPA was interpreted to prohibit the investigative activities of agents of the ICC within the United States or U.S. territory, specifically barring “any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.”⁸⁰ This new provision now explicitly permits such investigative activity as it pertains to Ukraine, subject to the concurrence of the Attorney General. In addition, section 7073(b) of the FY-2023 CAA widens the authority provided in the Dodd Amendment, which had carved out some exceptions to the ASPA restrictions, now permitting the United States to provide support to “the International Criminal Court to assist with investigations and prosecutions of foreign nationals specifically related to the Situation in Ukraine.”⁸¹

Participants first addressed what is meant by “related to the Situation in Ukraine,” including how broadly the term “related” might be applied geographically. There was a suggestion that “related to” could encompass investigation of acts outside the physical territory of Ukraine, such as those within Belarus, that might be linked to the Ukraine investigation. Many participants favored a relatively broad interpretation of “related to.”

Participants then explored the meaning of the term “Situation” in the new legislation, highlighting that it has a specific meaning under the Rome Statute and in ICC practice. It was suggested that the use of a capital “S” confirmed that the term in the new legislation intentionally reflects the current ICC usage and therefore would include investigative activities related to an ICC-designated “Situation.” Thus, for example, there was discussion of the temporal scope of the meaning of the “Situation in Ukraine,” as set forth in the new legislation, and it was pointed out that Ukraine’s first declaration accepting the ICC’s jurisdiction under Article 12(3) of the Rome Statute covered the period 21 November 2013 to 22 February 2014,

⁷⁹ FY-2023 CAA, *supra* note 16, at § 7073(a).

⁸⁰ ASPA, *supra* note 19, at § 7423(h).

⁸¹ FY-2023 CAA, *supra* note 16, at § 7073(b).

and that its second Article 12(3) declaration covered the period from that time forward.⁸² In this connection, when the ICC Prosecutor Karim Khan announced his intention in February 2022 to seek authorization to open an investigation of the Situation in Ukraine, he specified that the investigation would cover a period beginning from 21 November 2013 and that he intended to include “any new alleged crimes” on Ukrainian territory in the period going forward.⁸³ Therefore, some participants observed that if “Situation” in the new U.S. law refers to the term “Situation” as defined by the ICC, it should encompass the investigation dating back to 2013.

Finally, there was discussion related to the ICC Prosecutor’s statements that he would not accept contributions earmarked specifically for the Situation in Ukraine,⁸⁴ and the implications of such statements for his ability or willingness to accept U.S. assistance specifically tied to, and limited to, the Situation in Ukraine. Several participants expressed optimism that, although the issue may need attention, details could be worked out in ways that would facilitate cooperation.

REFLECTIONS ON THE UNDERLYING LEGAL FRAMEWORK FOR U.S. COOPERATION WITH THE ICC, INCLUDING THE ORIGINAL DODD AMENDMENT, PRIOR TO THE NEW LEGISLATION.

As a backdrop to analyzing the new Ukraine-focused legislative provisions, participants discussed the scope of permissible U.S. cooperation with the ICC under U.S. law prior to the 2022 legislation. It was noted that, under the Dodd Amendment as interpreted in the 2010 OLC opinion, the scope of in-kind support permitted under U.S. law for ICC investigations or

⁸² See First Declaration, Embassy of Ukraine to the Kingdom of the Netherlands (Apr. 9, 2014), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>; Second Declaration, Embassy of Ukraine to the Kingdom of the Netherlands (Sep. 8, 2015), https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

⁸³ Statement of Karim A.A. Khan Q.C., Prosecutor, Int’l Crim. Ct., on the Situation in Ukraine: “I have decided to proceed with opening an investigation,” <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁸⁴ *Pursuing Justice for Mass Atrocities: A Conversation with ICC Prosecutor Karim Khan*, UNITED STATES INSTITUTE OF PEACE (Apr. 26, 2022) (hereinafter “A Conversation with ICC Prosecutor Karim Khan”), <https://www.usip.org/events/pursuing-justice-mass-atrocities-conversation-icc-prosecutor-karim-khan>; see also Ryan Goodman, *How Best to Fund the International Criminal Court*, JUST SECURITY (May 27, 2022), <https://www.justsecurity.org/81676/how-best-to-fund-the-international-criminal-court/>.

prosecutions of particular persons was relatively wide, but that general “institutional support” had been considered impermissible.⁸⁵

Participants also discussed whether the “accused of” language in the original Dodd Amendment required a specific individual (named or unnamed) to be identified (publicly or privately), indicted, under investigation, or under sanctions, or whether the legislation should in fact be interpreted so as to require that an accusation in the form of an arrest warrant or summons to appear be lodged against an individual before U.S. support could be provided. Participants also observed that the text of the original Dodd Amendment did not specify that the ICC must make an “accusation” for statutory purposes. It was also noted that, if such an “accusation” were required, a private indication to the United States that a particular individual was under investigation might be sufficient.

In addition, participants discussed the provision in the ASPA under which the restrictions on cooperation in sections 7423 and 7425 of the ASPA do not apply with respect to specific matters taken in the exercise of the President’s Constitutional authority as Commander-in-Chief or the executive power under the Constitution.⁸⁶ Several participants noted that this was not designed as a “nuclear option” but rather as an alternative route to cooperation based on the President’s Article II powers.

⁸⁵ 2010 OLC Opinion, *supra* note 21, at 26.

⁸⁶ ASPA, *supra* note 19, at § 7422(c) (“The President is authorized to waive the prohibitions and requirements of sections 7423 and 7425 of this title to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority—

(1) notifies the appropriate congressional committees of the intention to exercise such authority; and

(2) determines and reports to the appropriate congressional committees that-

(A) a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of section 7424 of this title is in effect;

(B) there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;

(C) it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and

(D) in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:

(i) Covered United States persons.

(ii) Covered allied persons.

(iii) Individuals who were covered United States persons or covered allied persons.”).

DISCUSSION OF THE EXTENT TO WHICH THE NEW LEGISLATION WIDENS DOMESTIC LEGAL AUTHORITY FOR THE UNITED STATES TO COOPERATE WITH THE ICC IN THE SITUATION IN UKRAINE

There was extensive discussion of the fact that the new statutory provisions in Section 7073 of the FY-2023 CAA removed prior legal impediments under ASPA and the FRAA to U.S. assistance to the ICC related to the Situation in Ukraine. In particular, the new legislation would remove any prohibition that might exist under certain interpretations of the Dodd Amendment against providing assistance for efforts in the period before accusations against specific persons had emerged or been lodged.

Participants emphasized that the text of the new provisions was broad and superseded virtually all limitations on U.S. cooperation with the ICC with respect to the Situation in Ukraine. For example, participants commented that the original Dodd Amendment text appeared to create two categories of instances in which the United States could cooperate with the ICC: instances in which individuals are “accused of genocide, war crimes or crimes against humanity” and instances involving specifically named individuals (or members of specifically identified armed groups) in the statutory text. Participants noted that this amendment now creates a third category: the “Situation in Ukraine.” The placement of the third category in a separate clause along with its broad wording (*i.e.*, “Situation” and explicit reference to the ICC), participants observed, strongly indicate that it encompasses all forms of assistance to the ICC related to the Situation in Ukraine.

Multiple participants observed that the context of the legislation, along with various statements made by Congressional leaders who drafted the provision, strongly indicate that Congress clearly supports the ICC investigation of the Situation in Ukraine. In short, Congress’s purpose is clear, and there would be no negative political blowback if the U.S. executive branch were to decide to cooperate tangibly with the Ukraine investigation. Furthermore, multiple participants noted that, because the ICC Prosecutor is already at the investigation stage of his work, any potential problems that might have existed if the Prosecutor were still at the “preliminary examination” stage do not need to be addressed. Participants concluded that the question whether the United States *should* provide assistance to the ICC Prosecutor’s investigation in Ukraine would need to be considered as a matter of policy (discussed in Session Two), as it is not precluded by domestic law.

Participants discussed whether use of these new authorities related to Ukraine might prejudice debates or arguments about whether the authority to provide assistance to the ICC for situations outside Ukraine, under the original Dodd Amendment, depends on “accusations” being lodged against individuals.

Participants observed that the notice requirement in the Dodd Amendment, which requires the Secretary of State to notify certain Congressional committees of funds obligated to cover the cost of U.S. assistance to the ICC,⁸⁷ provides the executive branch with the opportunity to clarify its intent and protect future interests associated with these authorities.

INFORMATION SHARING

Participants raised various issues related to sharing information with the ICC. Even though participants agreed that the new legislation widens the scope of legal authority for the United States to share information, significant issues remain related to the ICC’s treatment of confidential and classified information. Participants noted that information the United States has shared in the past with international criminal tribunals has usually taken the form of lead and background information for investigative purposes, as opposed to evidence intended for use in court. Participants also acknowledged that it was challenging to gather and share information during ongoing armed conflict.

Participants identified one particularly significant concern: even if information is selectively shared with the prosecutor, ICC rules and jurisprudence permit the Trial Chamber to require disclosure to defense counsel when it concludes that information is potentially exculpatory,⁸⁸ an issue that is discussed further in Session 3. United States preference has therefore been to declassify information wherever possible before sharing it. Participants recalled successful information sharing in the 1990s with the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). One participant suggested the United States should consult those practices and lessons learned. Others emphasized, however, that the ICTY and ICTR operated under different rules, which prevented the disclosure of

⁸⁷ ASPA, *supra* note 19, at § 7433(c).

⁸⁸ *Rules of Procedure and Evidence, Rule 76 (Pre-trial disclosure relating to prosecution witnesses) and Rule 77 (Inspection of material in possession or control of the Prosecutor)*, U.N. Doc. PCNICC/2000/1/Add.1, INTERNATIONAL CRIMINAL COURT (Nov. 2, 2000), <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>.

information provided to the Prosecutor on a confidential basis, without the consent of the provider, where that information was used solely for the purposes of generating new evidence. Consequently, those rules required the Prosecution to request permission from the United States to use confidential information at the prosecution stage that was confidential information that had been shared at the investigation stage.⁸⁹

Some participants noted that, under the restrictions on investigative activities in ASPA section 2004(h), it had been possible for persons residing in the United States to fly to other jurisdictions to provide information to the ICC Prosecutor. This kind of workaround could be costly and burdensome and could entail problems for persons whose ability to leave or re-enter the United States might be subject to restrictions. Participants noted, however, that the expanded authorities related to Ukraine in section 7073(a) of the FY-2023 CAA could be used to make such workarounds unnecessary.

Participants also discussed precedents for section 7073's requirement that the Attorney General must concur in any ICC investigative activity within the United States. In particular, some participants suggested that this authority could be delegated to a lower-ranked official and that the concurrence requirement likely was not intended to be overly burdensome; furthermore, it would be possible to provide concurrence for a range of circumstances, rather than on a strictly case-by-case basis.

Further discussion of practical challenges related to information-sharing is discussed in Session Three.

JUSTICE FOR VICTIMS OF WAR CRIMES ACT

Participants emphasized the importance of this new legislation, which closes a gap in U.S. law. Prior to this new amendment, existing law provided jurisdiction for the United States to prosecute war crimes domestically, but only when the victim or perpetrator was a U.S. national. The new legislation expands criminal jurisdiction to permit U.S. prosecution of war crimes perpetrated abroad by non-citizens against non-citizens, if the alleged perpetrator is present in the United States, thus placing the United States into compliance with the enforcement provisions of the Geneva Conventions and eliminating the original 5-year statute

⁸⁹ For a detailed discussion of this issue, see ASIL TASK FORCE REPORT 2021, *supra* note 9, at 24 & 107 n. 144.

of limitations.⁹⁰ Participants noted that this legislation could now be used as the basis for prosecuting war crimes committed in the context of the conflict in Ukraine, regardless of the nationality of the victim or perpetrator, if the alleged perpetrator subsequently turns up in the United States.

Participants noted, however, that some ambiguities remain as to the scope of the new provision. First, participants discussed whether the Justice for Victims of War Crimes Act encompasses *ex post facto* jurisdiction, on the ground that it would deny a defendant protection from prosecution for acts that had not been subject to federal jurisdiction when the act was performed (the principle of *nullum crimen, nulla poena sine lege*). Some participants observed that, because it is a debatable question, defense attorneys in the United States are likely to raise this issue, and it is an area ripe for legal scholarship. Other participants pointed out that these crimes are universally prohibited (including under the Geneva Conventions, which the United States ratified in 1957) and argued that, therefore, there is a strong argument that jurisdiction could be exercised under this new legislation to prosecute persons for conduct that occurred before its enactment. Others suggested that relevant statutes of limitations may restrict prosecutors' ability to use the legislation to reach back to past conduct, at least with respect to conduct that was time-barred at the time the new law was enacted. It was also noted that jurisprudence arising from prosecutions in the U.S. military commissions at Guantánamo Bay could shed some light on the retroactivity issue.⁹¹ Others pointed out that the International Law Commission considered, but did not seek to resolve, this issue in its work on crimes against humanity⁹² and that *ex post facto* concerns do not arise as a matter of international law in war crimes prosecutions.⁹³

⁹⁰ Justice for Victims of War Crimes Act, *supra* note 17.

⁹¹ For example, the U.S. Court of Appeals for the D.C. Circuit vacated the conviction of Guantanamo detainee Ali Hamza Ahmad Suliman al Bahlul for the offenses of material support for terrorism and solicitation under the Military Commissions Act of 2006, on the ground that the actions that formed the basis for the convictions took place before the enactment of the MCA and were not traditional law-of-war offenses; therefore, the convictions violated the U.S. Constitution's *Ex Post Facto* Clause. *See* Al Bahlul v. United States, 767 F.3d 1, 29-30 (D.C. Cir. 2014) (en banc). The U.S. courts have not resolved whether conviction for conspiracy under the MCA would constitute an *Ex Post Facto* violation. *See id.*, cert. denied, 583 U.S. __ (U.S. Oct 10, 2017) (No. 16-1307).

⁹² U.N. Special Rapporteur, *Second Report on Crimes against Humanity*, ¶ 73, U.N. Doc. A/CN.4/690 (2016).

⁹³ *See* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1996, VOL. II (PART TWO) at 38, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf (including within its Draft Code of Crimes Against the Peace and Security of Mankind "Article 13. Non-retroactivity" ("1. No one shall be convicted under the present Code for acts committed before its entry into force, 2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law

Second, it was also noted that questions remain regarding the specific war crimes covered under the Act. Participants observed that some other countries reduce ambiguity in domestic war crimes legislation by codifying a list of war crimes regardless of conflict classification. The statute does not currently provide such a list, but rather incorporates existing law-of-war treaty provisions by reference. In addition, some participants emphasized that U.S. courts may conclude that the context in which the alleged war crime arises, for example whether an offense is a Common Article 3 offense arising in relation to non-international armed conflicts or instead is a grave breach arising in relation to international armed conflicts, should be considered an element of the crime. Therefore, prosecutors may not be able to charge such offenses in the alternative if there is ambiguity as to conflict classification (which would not be the case for the conflict in Ukraine). As such, for this legislation to be useful in other contexts, it would be helpful to have greater clarity about the elements of the specific war crimes encompassed in the Act.

Finally, one participant noted that the U.S. Department of Justice is working on partnering with other U.S. departments or agencies, such as Customs and Border Protection, to promote initiatives that would facilitate reporting by refugees and other individuals arriving from conflict situations regarding war crimes and help in the gathering of evidence.

LEGISLATION ESTABLISHING INTELLIGENCE COORDINATOR FOR RUSSIAN ATROCITIES ACCOUNTABILITY AND THE UKRAINE INVASION WAR CRIMES DETERRENCE AND ACCOUNTABILITY ACT

Participants discussed the impact of both provisions enacted in the NDAA, the provision legislatively requiring the establishment of an Intelligence Coordinator and a corresponding report,⁹⁴ as well as the provision stating that it is U.S. policy to collect, analyze, and preserve relevant evidence of atrocities in Ukraine and requiring a report to Congress.⁹⁵

or national law.”); *see also, e.g.*, *In re Altstötter*, 14 I.L.R. 278, 285 (1948) (stating that under international law, the *ex post facto* rule does not create a barrier to war crimes prosecution or imposition of the death penalty) (cited in William A. Schabas, *War Crimes, Crimes Against Humanity and the Death Penalty*, 60 ALB. L. REV. 733 (1997)).

⁹⁴ FY-2023 NDAA, *supra* note 18, at § 6512.

⁹⁵ *Id.* at § 5948.

With respect to the Intelligence Coordinator, participants observed that this Coordinator would be maximally effective in supporting accountability efforts associated with Russia's aggression in Ukraine if intelligence collection priorities associated with atrocities in Ukraine were high up on the priority list, as compared with other collection priorities associated with the conflict.

With respect to the reports associated with the Intelligence Coordinator and required in section 5498 of the NDAA, it was noted that it was not entirely clear which entities within the U.S. executive branch were required to contribute to the report. Multiple participants also noted that some aspects of the reporting process could be burdensome on already strained personnel, and that the timing requirements on the reports were quite limited.

MAJOR OUTCOMES FROM SESSION ONE:

- ⇒ It is evident that Section 7073 of the FY-2023 CAA eliminated the legal prohibitions under the ASPA and the FRAA to providing assistance to the ICC related to the Situation in Ukraine.
- ⇒ It is evident that Section 7073 of the FY-2023 CAA also overcomes the prior restrictions on ICC personnel conducting "investigative activity" within the United States, as related to the Situation in Ukraine.
- ⇒ It is evident that, as to the Situation in Ukraine, there is no requirement for an ICC accusation (in whatever form) before the United States may render assistance to the ICC.
- ⇒ Many participants praised the enactment of the Justice for Victims for War Crimes Act for closing a loophole in existing law and permitting the United States to prosecute war crimes allegedly committed abroad by non-citizens against non-citizen victims when the perpetrator is present in the United States, as well as the other legislation adopted at the end of the last Congress.

FRAMING PAPER FOR SESSION TWO

ASSESSING ICC DOCTRINES AND POLICIES AND THEIR IMPLICATIONS FOR U.S. COOPERATION WITH THE ICC UKRAINE INVESTIGATION (AND BEYOND)

Ambassador Todd Buchwald

Participants in Session 2 will discuss the benefits for the United States of cooperation with the ICC Prosecutor's investigation (and potential prosecution) of international crimes committed in Ukraine, together with longstanding U.S. legal and policy concerns related to the ICC generally. This paper provides brief background in anticipation of that discussion.

The United States has long presented itself as a supporter of the principle that those responsible for atrocities should be held to account. It was a driving force behind the Nuremberg and Tokyo Tribunals after World War II,⁹⁶ the ICTY and ICTR Tribunals established by the Security Council under Chapter VII of the UN Charter,⁹⁷ and a series of other tribunals with international components.⁹⁸ The U.S. Government has repeatedly expressed—in legislation, presidential directives, military manuals, strategic messaging, and elsewhere—that it has strong national interests in accountability, compliance with international humanitarian and human rights law, the prevention of mass atrocities, and the rule of law.

The U.S. Government participated actively in the international negotiations that led to the adoption of the Rome Statute and the creation of the Court. In the ensuing period, however, it expressed strong objection to the results of those negotiations, depicted the Court as a threat to U.S. interests, and sought to isolate and discredit it. There have been marked ups and downs in the relationship thereafter, but the ICC has proved itself to be an important international actor and a flagship player in international efforts to combat atrocities, and there has developed far greater U.S. support for ICC activities over time, at least during the second

⁹⁶ Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 8 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, TIAS No. 1589.

⁹⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, annex (May 25, 1993), 32 ILM 1203 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, annex (Nov. 8, 1994), 33 ILM 1602 (1994).

⁹⁸ See, e.g., Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137.

Bush Administration, and the Obama and Biden Administrations. This dates back at least to the decision by the Bush Administration in 2005 to acquiesce in the referral by the U.N. Security Council⁹⁹ of the situation in Darfur to the ICC Prosecutor, and includes the Obama Administration's rejection of the notion of unrelenting opposition to the ICC in favor of a policy of providing case-by-case support,¹⁰⁰ where doing so would advance U.S. interests and values, consistent with the requirements of U.S. law and the longstanding commitment to protect U.S. personnel.

There was greater reserve towards the end of the Obama Administration as the Prosecutor's investigation of the situations in Afghanistan and Palestine appeared to advance. Outright hostility then emerged during the Trump Administration, including most notably in the form of President Trump's Executive Order¹⁰¹ under which sanctions were imposed against the ICC Prosecutor personally. President Biden revoked¹⁰² that Executive Order in April 2021, though even here used cautious language in doing so. The ICC Prosecutor then announced in September 2021 that he was not including cases involving U.S. persons accused of detainee abuse in the cases he was prioritizing in his Afghanistan investigation.¹⁰³

More recently, in the wake of Russia's invasion last February, there has been a remarkable surge of bipartisan support for the ICC Prosecutor's investigation of the situation in Ukraine, as reflected in: the unanimous adoption of Senator Graham's Senate Resolution 546,¹⁰⁴ the historic visit of a bipartisan congressional delegation to The Hague in November,¹⁰⁵ and congressional adoption of several operative pieces of legislation to facilitate the ICC's efforts in Ukraine during the 117th session of Congress (discussed in Session 1). More broadly, U.S. support for the ICC's efforts in Ukraine aligns closely with broader U.S. foreign policy interests in dealing with the Russian invasion, including in highlighting the cruel manner in

⁹⁹ S.C. Res. 1593 (Mar. 31, 2005).

¹⁰⁰ The White House, The National Security Strategy of the United States of America (May 2010), at https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf#page=56.

¹⁰¹ Exec. Order No. 13,928, *supra* note 13.

¹⁰² Exec. Order No. 14,022, *supra* note 14.

¹⁰³ *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, ICC-CPI (Sept. 27, 2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>.

¹⁰⁴ S. Res. 546, 117th Cong. (2022).

¹⁰⁵ Ambassador Shefali Razdan Duggal (@usmbnl), TWITTER (Nov. 4, 2022, 3:30 PM), <https://twitter.com/usambnl/status/1588614558570409985?s=20&t=hcXzvf6Vd9mjyKdO6OGz7w>.

which Russian forces have conducted their invasion, demonstrating solidarity with the people of Ukraine, among whom demands for justice run high, helping to galvanize international solidarity in opposing Russian aggression, and disincentivizing at least to some degree Russian forces from engaging in further atrocities.

Nevertheless, there appear to remain varying perceptions of the ICC in different quarters of the government, making it difficult to generalize about what “U.S. government perceptions” of the ICC currently are. Thus, some parts of the U.S. Government may be more acutely focused on the damage to international efforts to promote accountability—and the damage to the ability of the U.S. Government to provide leadership for such efforts—that a negative posture towards the ICC entails. Others may focus more acutely on the potential risk that future ICC activities might pose to U.S. interests.

The ICC, of course, has what the workshop agenda calls “doctrines and policies”—reflected in the Rome Statute, other ICC documents, and its practices—that may have implications for the manner in which the U.S. Government views it. The remainder of this memorandum sets out some of these “doctrines and policies” and provides brief background information about how they may affect U.S. perceptions and actions.

1. *Jurisdiction over crimes committed by personnel from states that are not Rome Statute parties.* This issue plays by far the biggest role in concerns within the U.S. Government about the ICC. Indeed, even President Biden has affirmed that:

“the United States continues to object to the International Criminal Court’s (ICC) assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction”¹⁰⁶

Because Russia—like the United States—is not a Rome Statute party, the many supportive statements from the U.S. Government about the Prosecutor’s investigation of Russian actions in Ukraine sits uneasily with this objection.¹⁰⁷ Maintaining the objection exposes the United

¹⁰⁶ Exec. Order No. 14,022, *supra* note 14.

¹⁰⁷ Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice, Statement of the United States at the 21st Session of the Assembly of States Parties of the International Criminal Court (Dec. 6, 2022), <https://www.state.gov/statement-of-the-united-states-at-the-21st-session-of-the-assembly-of-states-parties-of->

States to charges—including from Russia—that its stance on Ukraine is hypocritical, or that its support for the Ukraine investigation derives from political expediency rather than any supposed legal or moral considerations. Nevertheless, there appears to be lingering concern that supporting ICC action against such persons (“non-Rome Statute persons” or “non-RS persons”) will prejudice the ability of the United States to make a principled objection if the ICC at some future point asserts jurisdiction against U.S. persons. At the same time, the objection is widely viewed as lacking credibility, and many commentators have noted that there is no principled international law objection to a group of states, in effect, making a decision to delegate authority to an international institution, such as the ICC, that they would themselves have under national law to investigate and prosecute certain crimes.

Whatever one thinks about the strength of the arguments about jurisdiction over non-RS persons, the issue has plainly played a significant role in the U.S. posture towards the ICC. Indeed, until the Ukraine situation, outside Security Council referrals, *none* of the ICC investigations or prosecutions for which the U.S. Government had expressed support involved cases that plausibly involved defendants who were non-RS persons. This was true even in situations where one might think that U.S. interests would come down strongly on the side of supporting accountability for perpetrators, such as the ICC’s efforts to pursue accountability for atrocities in the situations in Myanmar (which is not a RS party) or Georgia (which is a party, but where the alleged perpetrators included nationals of Russia, which is not a party). At the same time, even for Ukraine, where the U.S. Government has publicly expressed support for the Prosecutor’s efforts, there are indications that concern about this issue has tempered the willingness of the U.S. Government as a whole to move forward in providing tangible support.

The need to address this tension between the longstanding U.S. objections to ICC jurisdiction over non-RS persons and U.S. support for the Ukraine investigation presents a centrally-important issue for the workshop to consider.

2. *Non-recognition of head-of-state immunity (or other immunity *ratione personae*)*. Under international law, as understood by the International Court of Justice,¹⁰⁸ a country’s sitting head-of-state, head of government, and minister of foreign affairs (and possibly other high-

the-international-criminal-court/.

¹⁰⁸ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14, 2002), <https://www.icj-cij.org/sites/default/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>.

level officials) enjoy immunity before the courts of another state, and this rule applies even where the crimes that the person is suspected of committing are war crimes or crimes against humanity. Thus, another state would not be able to prosecute President Biden (or Presidents Trump, Obama or Bush) while they remained in office for any acts of which they might be accused. At the same time, the ICJ said that such persons “*may* be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.” The use of the word “*may*,” however, left unclear the circumstances in which the ICJ felt this could be true.

For its part, the ICC has concluded¹⁰⁹—in a case involving then-Sudanese President Bashir—that such immunity does not apply *vis-à-vis* the International Criminal Court. Writing about this topic after his retirement from the bench, the former ICC President—who presided in that case—has contended that this conclusion is “clear cut,”¹¹⁰ including in the absence of a Security Council referral of the situation. It is easier to reach this conclusion for states that have become parties to the Rome Statute, on the theory that they agreed effectively to waive any such immunity by their acceptance of the terms of the treaty. At least in the absence of a Security Council referral, however, that conclusion is anything but clear cut for non-Rome Statute parties. Thus, it might be argued: how can a group of states—none of whom could themselves investigate or prosecute a particular person—delegate to an international institution the authority to do so on their behalf?

In practice, this immunity issue appears not to have played a central role in U.S. Government criticisms of the ICC. This is perhaps because, if one accepted the conclusion that the ICC should not assert jurisdiction over any non-RS persons, any need to assert immunity *ratione personae* would be obviated.

3. Admissibility issues (complementarity and gravity). In colloquial terms, the ICC was established to deal with cases that are the “worst of the worst.” As a legal matter, the Rome Statute seeks to ensure that ICC resources are allocated so as to focus on such cases through its provisions on complementarity and gravity. Under the Rome Statute’s principle of

¹⁰⁹ Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02856.PDF.

¹¹⁰ Chile Eboe-Osuji, *The Absolute Clarity of International Legal Practice’s Rejection of Immunity Before International Criminal Courts*, JUST SECURITY (Dec. 8, 2022), <https://www.justsecurity.org/84416/the-absolute-clarity-of-international-legal-practices-rejection-of-immunity-before-international-criminal-courts/>.

complementarity, cases are inadmissible if they are being investigated or prosecuted in a genuine manner by a state with jurisdiction or have been investigated and the state has made a genuine decision not to investigate. Meanwhile, gravity is the principle under which cases are inadmissible if a case is “not of sufficient gravity to justify further action by the Court.”

The Prosecutor himself has emphasized the importance of complementarity and gravity in ensuring that the ICC is focusing its resources and efforts on the most important cases and that its efforts are thereby best-positioned for the Court to achieve success. There nevertheless can be difficult questions about the application of these rules in practice. For example, there can be questions about how to apply the principle of complementarity at the stage where the Prosecutor is deciding whether to initiate a formal investigation, at which point the Prosecutor will not have identified any particular cases, and a state may therefore face difficulty in arguing that the cases have been or are being investigated. As another example, with respect to gravity, the Rome Statute says that a case must be of sufficient gravity in order to be admissible but gives no direct guidance on how to measure sufficiency.¹¹¹

As a practical matter, however, U.S. government concerns about whether the Court is properly directing its resources to the “worst of the worst” appear to have played relatively little role in U.S. Government decisions regarding whether to support ICC activity in particular countries. The main exception is for the two situations that the United States clearly would have opposed anyway—Afghanistan and Palestine. For example, Secretary Blinken appealed directly to the principle of complementarity in contending that ICC investigations of both the United States and Israel were unwarranted because “both have the mechanisms to make sure that there is accountability.”¹¹²

4. *Treatment of Palestine as a state.* Less than three weeks after the Biden Administration took office, an ICC Pre-Trial Chamber ruled that Palestine should be treated as a state for Rome Statute purposes, while saying that it need not rule on whether Palestine was in fact a state

¹¹¹ See Todd Buchwald, *Part I: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture*, JUST SECURITY (Nov. 30, 2020), <https://www.justsecurity.org/73530/part-i-what-kinds-of-situations-and-cases-should-the-icc-pursue-the-independent-expert-review-of-the-icc-and-the-question-of-aperture/>.

¹¹² See *Omar Asks Blinken About ICC Pursuing War Crime Allegations*, YAHOO! NEWS (June 10, 2021), <https://news.yahoo.com/omar-asks-blinken-icc-pursuing-195601975.html?guccounter=1>.

under international law.¹¹³ All three Administrations that have addressed this issue since it first crystallized in 2009—Obama, Trump and Biden—have objected strongly to this conclusion. Thus, in reaction to the ruling of the Pre-Trial Chamber and the Prosecutor’s formal confirmation that she would move forward with an investigation of the Palestine Situation, Secretary Blinken stated that “[t]he Palestinians do not qualify as a sovereign state and therefore are not qualified to . . . delegate jurisdiction to the ICC.”¹¹⁴ (Blinken—and the other senior officials who have criticized ICC action in Palestine—has also appealed to the notion that the ICC should not assert jurisdiction over Israeli persons because Israel is not a Rome Statute party).

The treatment of the Palestine investigation continues to have great potential to narrow the political space needed for the U.S. government to foster a positive relationship with the ICC. Any developments that raise the profile of the Prosecutor’s investigation of the Situation in Palestine—*e.g.*, progress towards bringing any charges against Israeli persons—could thus significantly complicate the relationship.

5. Lack of jurisdiction over the crime of aggression. The ICC lacks jurisdiction to investigate or prosecute the crime of aggression against states—such as the United States, but also Russia—that are not Rome Statute parties. This exclusion of jurisdiction was incorporated into the Rome Statute at least in large part to placate the United States.

For their part, the Ukrainians, including President Zelensky himself, have been pressing resolutely for the establishment of some kind of international tribunal in which aggression charges could be pursued, and they have argued that such a court is critical for ensuring justice and for the rule of law generally.¹¹⁵ There are any number of forms this might take, with proposed models including the establishment of a tribunal via an agreement between Ukraine

¹¹³ Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine’ (Feb. 5, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF.

¹¹⁴ Press Statement, Anthony J. Blinken, Secretary of State, The United States Opposes the ICC Investigation into the Palestinian Situation (Mar. 3, 2021), <https://www.state.gov/the-united-states-opposes-the-icc-investigation-into-the-palestinian-situation/>.

¹¹⁵ Volodymyr Zelensky, Pres. of Ukraine, We Must Create a Special Tribunal on the Crime of Aggression Against Ukraine—Address by President Volodymyr Zelenskyy to Participants of Public Debate “War and Law” in Paris (Oct. 5, 2022), <https://www.president.gov.ua/en/news/mayemo-stvoriti-specialnij-tribunal-shodo-zlochynu-agresiyi-78285>.

and the United Nations, pursuant to authorization from the General Assembly for the Secretary-General to conclude such an agreement on the UN's behalf.

Although such proposals would not involve the ICC directly, there have been questions about whether the creation of such a tribunal might ultimately divert resources away from the ICC, whether the creation of such a mechanism is based on Russia-specific considerations rather than universally-applicable principles, and how the new tribunal's efforts might need to be de-conflicted with the ICC's. At least from the perspective of the U.S. government, there could also be questions about the consistency of the legal basis for establishing such a tribunal with U.S. government legal views expressed in connection with the Kampala Review Conference about the definition of the crime, the conditions under which an international tribunal may exercise jurisdiction over aggression, and the principle of head-of-state and other immunity. Perhaps with such questions in mind, the United States has said simply that it is reviewing the various proposals and that it has "been focused on supporting existing institutions"¹¹⁶ that are already operational.

6. *Proprio motu jurisdiction.* Under Article 15 of the Rome Statute,¹¹⁷ the Prosecutor can initiate an investigation without need for a referral from any state or the Security Council. The inclusion of this authority was one of the main points against which the United States objected after Rome. The objection was said to be based on the principle that it granted too much political authority to the Prosecutor and that the Prosecutor should not be empowered to pursue cases in which no state was willing to stand up and take political responsibility for initiating an investigation.

In the particular case of Ukraine, this is decidedly a non-issue as forty-three Rome Statute parties have stepped forward to refer the Situation to the Prosecutor¹¹⁸—a remarkable showing of solidarity that obviates questions about whether there are states that are prepared to take political responsibility. Even more generally, however, the U.S. objection to *proprio motu* jurisdiction has faded in prominence and, at least since the Prosecutor's investigations in

¹¹⁶ Beth Van Schaack, U.S. Ambassador-At-Large for Global Criminal Justice, Briefing With Ambassador-at-Large for Global Criminal Justice Beth Van Schaack On Justice and Accountability for Russia's Atrocities in Ukraine (Nov. 21, 2022), <https://www.state.gov/briefing-with-ambassador-at-large-for-global-criminal-justice-beth-van-schaack-on-justice-and-accountability-for-russias-atrocities-in-ukraine/>.

¹¹⁷ Rome Statute, *supra* note 10, at art. 15.

¹¹⁸ *Ukraine*, ICC-CPI, <https://www.icc-cpi.int/ukraine>.

the Situation in Kenya during the Obama Administration, the United States has not treated the absence of a referral as precluding U.S. support.

7. *The ICC Prosecutor’s opposition to earmarked support.* From the perspective of the ICC Prosecutor, earmarked funding or other support could create at least the perception that the justice that ensues was not arrived at based solely on the law and evidence, and that the Prosecutor is bending to the political priorities of its donors. It is thus not surprising that the Prosecutor has said that “we will not accept earmarked support.”¹¹⁹

The desire/need for the ICC to reject earmarked support could complicate the ability of the U.S. government to provide support in accordance with the recently-enacted Ukraine exception under the Dodd Amendment (described in Session 1) if such support is used in a manner that also benefits ICC efforts for which the Dodd Amendment lacks exceptions.

There could also be questions about what precisely the Prosecutor considers to constitute “earmarking” that he will not accept. The Prosecutor’s rejection of earmarking relates to the idea that he must ultimately be responsible for final decisions on where his office applies its resources, but this notion may have different implications for different kinds of support. For example, the Prosecutor might treat funding that—if un-earmarked—might be used for any of the Prosecutor’s investigations differently than the way he treats the detailing of Ukrainian or Russian-speaking specialists, whose particular skills would have little or no use for other investigations, and for which accordingly there would be no higher-priority use.

8. *Treatment of classified or otherwise restricted information.* The ICC’s rules on the treatment of exculpatory information complicates the ability of the Prosecutor to assure the United States that the information it provides will not be shared, at least with the ICC judges and also potentially with defense counsel. Specifically, Article 67 of the Rome Statute requires the Prosecutor to disclose to the defense potentially exculpatory evidence in its possession and states that “in case of doubt . . . the Court shall decide.”¹²⁰ At the same time, Article 54 states that the Prosecutor may agree not to disclose lead information that “the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless

¹¹⁹ A Conversation with ICC Prosecutor Karim Khan, *supra* note 84.

¹²⁰ Rome Statute, *supra* note 10, at art. 67.

the provider of the information provides consent.”¹²¹ For their part, however, the ICC judges have ruled that they have a role in overseeing these provisions,¹²² with the result being that it is difficult for the Prosecutor to assure any information provider that he will not disclose even such “lead information” to the ICC judges, and—depending on the decision of the judges—to the defense.

The ICC’s framework for lead information thus differs from, for example, the ICTY’s. In particular, Rule 68 of the ICTY Rules of Procedure,¹²³ which is the rule requiring disclosure of exculpatory information, provides explicitly that it is “subject to the provisions of” ICTY Rule 70, which is the rule providing for the respect for confidentiality.¹²⁴ The result has been that the information can be disclosed to the defense, or to a judge, only if the consent of the information provider has first been obtained.¹²⁵ In addition, practical arrangements reportedly existed within the ICTY to facilitate information sharing, including arrangements under which providers could limit access to information to particular individuals within the ICTY Prosecutor’s office.

¹²¹ *Id.* at art. 54.

¹²² Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”) (June 13, 2008) (Trial Chamber I decision), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_03428.PDF; see also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 OA 13, Judgment (entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008”) (Oct. 21, 2008) (Appeals Chamber decision), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05884.PDF.

¹²³ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Rules of Procedure and Evidence, IT/32/Rev.50 (July 8, 2015), https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

¹²⁴ *Id.* at Rule 70.

¹²⁵ ICTY Manual on Developed Practices, UNICRI-ICTY (2009), https://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf#page=33.

SESSION TWO SUMMARY

ASSESSING ICC DOCTRINES AND POLICIES AND THEIR IMPLICATIONS FOR U.S. COOPERATION WITH THE ICC UKRAINE INVESTIGATION

Public outcry over Russian atrocities in Ukraine has not only sparked changes in the domestic legal framework governing U.S. cooperation with the ICC, in the context of the ICC's investigation in Ukraine, but it also has potentially opened up space for a policy shift in the United States' relationship with the Court. The history of U.S. policy toward the ICC is complex and has proceeded through multiple phases.¹²⁶ As noted in the framing paper for Session Two, the ICC's assertion of jurisdiction over the nationals of non-party states is the most significant obstacle to the willingness of the United States to support the Court. Additional legal and policy positions of the ICC that likely hinder U.S. support include the Court's interpretation and implementation of the principles of complementarity and gravity.¹²⁷

In this Session, participants discussed these impediments to the United States' potential collaboration with the ICC's Ukraine investigation, with a focus on the ICC's legal and policy positions that have long been the source of U.S. objection and critique. As noted in Session One, there was general acceptance that recent U.S. legislation has resolved virtually all of the domestic legal restrictions on U.S. cooperation with the ICC related to the Situation in Ukraine under the ASPA and the FRAA. Remaining impediments are thus limited to particular agencies' policy concerns, either about cooperation with the ICC generally or cooperation on specific issues that may present difficulties, and, in addition, international law-related considerations pertaining to the ICC's exercise of jurisdiction over the nationals of non-party states, as well as ICC doctrines and practices. In the discussion, participants took each of the following issues in turn: the history of the U.S. relationship with the ICC, policy advantages to U.S. cooperation with the ICC Ukraine investigation, the longstanding U.S. objection to the ICC's jurisdiction over nationals of non-party states, U.S. concerns related to the ICC's interpretation of the

¹²⁶ For an overview of U.S. engagement with the ICC, see ASIL TASK FORCE REPORT 2021, *supra* note 9, at 2-7, 13-39.

¹²⁷ Note: this workshop took place before the ICC issued arrest warrants for Russian President Vladimir Putin and Maria Lvova-Belova, the Russian Commissioner for Children's Rights. See Statement of Karim A.A. Khan Q.C., Prosecutor, Int'l Crim. Ct., on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms. Maria Lvova-Belova, *supra* note 7.

complementarity and gravity doctrines, U.S. concerns related to the ICC’s interpretation of head- of-state immunity, and possibilities for reframing the U.S. interaction with the ICC.

Although the bulk of the policy discussion regarding ICC cooperation took place in this Session, participants briefly discussed the potential benefits of ICC cooperation in Session One, noting the current state of global geopolitics. Some participants invoked the term “lawfare” to suggest that support for the ICC could give the United States a significant advantage over potential adversaries such as China and Russia. There was a suggestion that we are in a particular moment where there may be opportunities not previously available to make progress with respect to U.S. engagement with the ICC, strengthening the United States’ standing internationally, and distinguishing the United States from Russia, China and other scofflaws.

HISTORY OF U.S. SIGNING AND “UNSIGNING” THE ROME STATUTE OF THE ICC

Participants discussed the complex history of the United States’ relationship with the ICC. One participant observed that, following the original signing, President Clinton said that he would not, and would not recommend that his successor, submit the agreement to the Senate for advice and consent unless what he called “fundamental concerns” about the treaty were satisfied.¹²⁸ Several participants also noted that, with respect to the Bush Administration’s “unsigning” of the Rome Statute, that action need not last in perpetuity. Indeed, toward the end of the discussion, a few participants raised the potential advantages associated with “re-signing” the Rome Statute, or even pursuing ratification, saying that the Russian invasion of Ukraine has changed the national security calculus related to the ICC. Furthermore, they observed that the ICC could be an invaluable asset to the United States moving forward. Several participants also suggested that it would be in the U.S. interest to become a party to the Rome Statute.

¹²⁸ See President William J. Clinton, U.S., Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (Dec. 31, 2000).

POLICY ADVANTAGES TO U.S. COOPERATION WITH THE ICC UKRAINE INVESTIGATION

Several participants noted that U.S. support for the ICC Ukraine investigation would help the United States achieve its broader policy objectives in supporting efforts by Ukraine to defend itself from Russian aggression.¹²⁹ These participants noted that the United States has been providing a range of support to Ukraine. They contended that an important component of such support is assistance for investigating and prosecuting atrocities in Ukraine, including support for the ICC.

Many participants suggested that, from a policy perspective, it is difficult to imagine the United States *not* cooperating with the ICC, given the united front that many countries have established in seeking to investigate and prosecute Russians who commit atrocities in Ukraine, Ukraine's clear consent to jurisdiction, and U.S. rhetorical support for the ICC's engagement in Ukraine. Multiple participants emphasized that there is strong domestic bipartisan support for such cooperation. They noted that key Republicans, such as Senator Lindsey Graham, are now on board, which is an unprecedented shift. Indeed, subsequent to the workshop, members of Congress from both parties wrote to the Biden Administration urging it to get past this policy impasse.¹³⁰ Many participants contended that the potential benefits of cooperating with the ICC in this case appear to outweigh whatever concerns remain. As one participant asserted, the United States can no longer fight and win wars without allies, and the United States will benefit from working with its partners—who are all supporting the ICC in Ukraine—to iron this out.

ICC JURISDICTION OVER NATIONALS OF NON-PARTY STATES

The United States has long objected to the fact that the ICC asserts jurisdiction over the nationals of non-party states such as the United States, and significant discussion in this session addressed whether the United States should abandon this objection. The United States'

¹²⁹ Some participants invoked the theory of qualified neutrality, which permits a state to maintain its neutral status while providing a relatively broad range of support to another state that is the victim of aggression, *see* Alcala & Reeves, Framing Paper for Session One, *supra*, to note that the United States has remained a neutral party. These participants did not, however, suggest that any support for the ICC would violate neutrality or be contingent on a theory of qualified neutrality.

¹³⁰ *See* Letter from U.S. Senators Richard Blumenthal, Richard J. Durbin, Lindsay O. Graham, Robert Menendez, Thom Tillis, and Sheldon Whitehouse, to President Joseph Biden, *supra* note 15; *see also* Charlie Savage, *Senators Urge Biden to Send Evidence of Russian War Crimes to the I.C.C.*, N.Y. TIMES (Mar. 24, 2023).

objection to ICC jurisdiction over non-party states (outside the context of United Nations Security Council referrals to the ICC or the consent of the state of nationality of the accused) dates back to the negotiation of the Rome Statute's text.¹³¹ Participants noted that the United States has largely framed the objection as a matter of policy, though at times has suggested that the objection is based in international law without substantiating this claim with reference to any applicable international law rule. Indeed, many participants stated that the argument that international law prohibits ICC jurisdiction over non-party state nationals¹³² is unfounded.¹³³ Some also suggested that U.S. support for the ICC Ukraine investigation would require the United States to pull back from this objection, at least in part, because Russia is a non-party state. Others noted that there were multiple ways that the United States could distinguish its assistance in this matter as compared to any situation in which U.S. personnel might also stand accused of committing abuses. In particular, it was noted that Russia has launched a war of aggression in Ukraine—seeking to annex Ukrainian territory and subjugate its people—and that there are no prospects for any meaningful accountability in Russian courts. Rather, Russia has indicated that it will not prosecute any personnel within Russian occupied territory.

Participants also emphasized that many other countries do not oppose the ICC's assertion of jurisdiction over non-party states. Even so, if the United States supports the ICC's assertion of jurisdiction over Russian nationals in the Situation in Ukraine, it could be difficult for the United States to justify opposition to the ICC's exercise of similar jurisdiction in future contexts that do not involve Russia, such as the investigation into the genocide against the Rohingya, which will undoubtedly involve Burmese defendants. Some participants noted, however, that the choice may not be binary: the United States could opt for more support for (or less opposition to) the ICC, without necessarily embracing the ICC's jurisdiction over the nationals of non-party states in all instances. In this case, participants observed that the United

¹³¹ See ASIL TASK FORCE REPORT 2021, *supra* note 9, at 2-3, 41-44; see also AM. SOC. OF INT'L L., REPORT OF AN INDEPENDENT TASK FORCE ON U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT 26-29 (2009) [hereinafter "ASIL TASK FORCE REPORT 2009"].

¹³² One participant noted that this argument derived in part from the work of Professor Madeline Morris. See, e.g., Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 LAW & CONTEMP. PROBS. 13 (2001).

¹³³ See also ASIL TASK FORCE REPORT 2021, *supra* note 9, at 42 (relying on analysis in 2009 ASIL Task Force report that assessed "legal arguments that the jurisdiction of the Court over non-party nationals in the circumstances prescribed in the [Rome] Statute [is] inconsistent with international law" and concluding that such arguments are "unfounded").

States has already been signaling support for ICC jurisdiction over the nationals of non-party states (specifically Russians in Ukraine but also with respect to Rwandans who might have been prosecuted in the Democratic Republic of the Congo Situation). Participants also pointed to the precedent of President George W. Bush’s decision not to veto U.N. Security Council Resolution 1593, which referred the Situation in the Darfur region of Sudan to the ICC, although the United States has long made clear that the objection applies only in the absence of a Security Council referral or the consent of the state of nationality of the accused.¹³⁴ (Under Article 13(b) of the Rome Statute, the Court can exercise jurisdiction over a case if the Security Council, acting under Chapter VII of the U.N. Charter, refers the situation to the Prosecutor.)

Participants considered the option that the United States might distinguish the Situation in Ukraine from other contexts in which the ICC might assert jurisdiction over non-party states. For example, one participant suggested that the United States might distinguish this context on the basis that Russia is a permanent member of the U.N. Security Council, and as such would veto any Security Council resolution referring a situation to the ICC. Therefore, there are no other pathways for the ICC to exercise jurisdiction.

Participants also considered whether it was now time for the United States to “fall off” its objection to the ICC exercise of jurisdiction over non-party states, and many participants asserted that the United States should now do so. Although not all participants agreed to this idea, it received broad support within the assembled group, and participants marked the significance of the extent of support for this position. Participants noted that this objection to the work of the ICC is not the most effective way for the United States to critique or influence the Court, and the position is widely criticized by the international community, including by the closest allies of the United States. Many participants suggested that the United States might instead focus on asserting positions related to the ICC’s work that are stronger, for example by critiquing the way the ICC goes about selecting situations and cases to pursue through its application of the principles of complementarity and gravity (see discussion below), and other specific ICC policies or practices the United States finds objectionable.

Some participants highlighted the specific opportunity associated with this moment, with one participant categorizing it as a potential “Nuremberg moment” when the United

¹³⁴ For a detailed discussion of the U.S. decision not to veto the Darfur resolution, see ASIL TASK FORCE REPORT 2021, *supra* note 9, at 14-15.

States should not remain on the sidelines. In particular, these participants emphasized the broad base of public interest in international criminal justice and support for holding Russians accountable for atrocities. Furthermore, multiple participants asserted that the United States needs to make clear that it is not aligned with Russian and Chinese arguments to avoid ICC accountability, such as the objection to ICC jurisdiction over the nationals of non-party states. Instead, these participants observed, the United States should drop this objection, increase support for the ICC, and leverage this new stance to foster deeper alliances with liberal democratic states. Some participants also contended that as a matter of strategy, the ICC might be less likely to seek jurisdiction over U.S. persons if the United States were to cooperate more fully with the ICC. Other participants claimed, however, that assertions years ago that the Prosecutor would not investigate U.S. nationals turned out to be false. A few participants also pointed out that, if the United States were to back away from its objection to ICC jurisdiction over the nationals of non-party states, navigating Israel's objections to the ICC will be a challenge moving forward. At the same time, it was noted that Israel's primary objection to the ICC's jurisdiction is premised on the argument that Palestine does not qualify as a state, such that it can confer jurisdiction to the Court. Multiple participants suggested that the U.S. critique of the scope of ICC jurisdiction and the question of U.S. cooperation with the ICC should not have been merged together. These participants suggested that the United States can take issue with jurisdiction but still cooperate with the Court. One participant suggested that a statement from the U.S. President could help clarify all of these issues and put to bed competing policy arguments.

If the United States were to pull back from its objection to ICC assertion of jurisdiction over non-party states, some participants noted the value of articulating the legal theory that would underline such a policy shift. With respect to the specific legal theory supporting ICC jurisdiction, some participants favored what was called transfer theory, *i.e.*, the argument that ICC jurisdiction derives from domestic jurisdiction delegated by state parties to the ICC through ratification of the Rome Statute or by acquiescence to the ICC's jurisdiction. Because domestic jurisdiction over atrocity crimes would encompass jurisdiction over nationals of non-party states, that jurisdiction would extend to the ICC in such cases. Another participant preferred the theory that the ICC's jurisdiction over non-party states derives from its status as an international organization with international legal personality applying international law. Under this view, the ICC receives its jurisdiction as a result of the collective conferral of that jurisdiction by its member states. This jurisdiction is not derivative of their own prescriptive or

adjudicative jurisdiction, because many ICC member states do not even have legislation allowing their courts to try individuals accused of ICC crimes. Rather, under the conferral theory, states confer upon the ICC jurisdiction over the international crimes in the Court's Statute.¹³⁵ Some participants emphasized that the United States would increase its credibility with the international community by asserting a legal position that is both sound as to Ukraine but also durable in non-Ukraine contexts.

U.S. PERCEPTIONS OF THE ICC INTERPRETATION OF GRAVITY AND COMPLEMENTARITY DOCTRINES, AND THE POSSIBILITY FOR PROSECUTORIAL DISCRETION TO MITIGATE U.S. CONCERNS

Participants next considered whether the ICC's interpretation of the gravity and complementarity doctrines is an impediment to U.S. support for the Court. Under the Rome Statute's principle of gravity, cases that are "not of sufficient gravity" are inadmissible.¹³⁶ Under the doctrine of complementarity, cases are inadmissible if a state with jurisdiction is conducting an investigation or prosecution, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.¹³⁷ Many participants critiqued the ICC's interpretation of these doctrines and suggested that the current ICC approach has not been aligned with U.S. interests or the original intentions of the drafters of the Rome Statute.

Although participants observed that many aspects of these doctrines are a matter of ICC jurisprudence, and therefore would not change based on critiques from states or other experts, participants noted that there was some room for the ICC Prosecutor to exercise discretion in case selection and other policies to mitigate the impact of these doctrines. And multiple participants noted that the United States could critique the ICC's interpretation of these doctrines and offer alternative approaches that might later be adopted by the Court or the Prosecutor.

With respect to the gravity threshold, multiple participants suggested that, under the previous ICC Prosecutor, the gravity standard seemed to have diminished. Participants

¹³⁵ Leila Sadat, *The Conferred Jurisdiction of the International Criminal Court*, 99 NOTRE DAME L. REV. _ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4376240.

¹³⁶ Rome Statute, *supra* note 10, at art. 17(1)(d).

¹³⁷ *See id.*, at art. 17(1)(a)-(c); *see also id.* at art. 1, which states, "[the ICC] shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."

suggested that the ICC needs to focus on what are truly the most serious crimes. Some participants observed that the current Prosecutor, Karim Kahn, is doing a better job of focusing on the “worst of the worst” crimes.

With respect to complementarity, participants observed that, as it has been applied by the Court, the standard seemed to require nearly perfect mirroring: in other words, even if a state with jurisdiction is investigating or prosecuting a case, the ICC may not deem the case inadmissible unless the state has levied the exact same charges against the same suspect, or indeed perhaps unless the state both prosecutes and obtains a conviction. Many participants suggested that this standard is not the proper interpretation of complementarity under the Rome Statute. One participant observed that a non-criminal investigation by domestic authorities (*e.g.*, a Congressional investigation or truth commission) or a genuine criminal investigation by domestic authorities that did not lead to prosecution should satisfy the complementarity standard, resulting in non-pursuit of a case by the ICC. (Some participants also noted that, during the Rome Statute negotiations, inclusion of the complementarity standard in the Rome Statute text was in part designed to bridge the gap between the United States and other states who were less skeptical of an international criminal court with jurisdiction over non-party states.)

Participants briefly discussed whether the United States had met the complementarity standard in its investigation of detainee abuse cases linked to Afghanistan.¹³⁸ Some participants argued that, as the complementarity standard should be properly interpreted, the United States should be deemed to have met the standard given that it conducted a series of criminal and non-criminal investigations and put in place a number of guarantees of non-repetition. Several participants, however, suggested that the ICC would not find U.S. complementarity (and gravity) arguments related to past mistreatment of detainees to be convincing.

Participants also considered whether the ICC complementarity standard is a legal standard or a policy standard, with some participants noting that complementarity includes a policy component. A few participants suggested that the ICC Prosecutor might adopt a case

¹³⁸ The Office of the Prosecutor has indicated an intention to prioritize ongoing abuses by the Taliban the Islamic State-Khorasan Province in the Afghanistan situation, reducing the potential risk to U.S. personnel. Statement of Karim A. A. Khan Q.C., Prosecutor, Int’l Crim. Ct., following the application for an expedited order under article 18(2) seeking authorization to resume investigations in the Situation in Afghanistan (Sep. 27, 2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application>.

selection or prioritization policy that applies a higher threshold for complementarity. Thus, for example, as a policy matter, the ICC Prosecutor could choose not to move forward in cases where a state with jurisdiction was conducting an investigation that was not criminal in nature, or where a state initiates a criminal investigation but concludes that there is insufficient evidence to prosecute. Some participants observed, however, that even a policy of interpreting complementarity this way is malleable and could change from one Prosecutor to the next. One participant suggested that some policies are more “durable” than others, and that it would be in the United States’ interest to explore ways in which the ICC Prosecutor could be encouraged to develop such “durable” policies that align more with U.S. views of how these doctrines should be implemented. Many participants also noted that the United States would have greater influence with the ICC on such issues if it were to drop its objection to ICC jurisdiction over non-party states, which is clearly an irritant among supporters of the Court.

ICC INTERPRETATION OF HEAD-OF-STATE IMMUNITY

Participants briefly discussed issues related to head-of-state immunity under international law and as applied by the ICC. The International Court of Justice has concluded that sitting heads-of-state enjoy immunity before the courts of another state, including in the case of suspected war crimes or crimes against humanity.¹³⁹ Participants noted that the Special Court for Sierra Leone indicted Charles Taylor while Taylor was still in office as President of Liberia, and that the Tribunal concluded that head-of-state immunity did not apply in that context. Some participants suggested that, theoretically, Russian President Vladimir Putin could face similar prosecution (under a theory of command responsibility) because the ICC would likely similarly conclude that head-of-state immunity does not apply,¹⁴⁰ even to a current head of state, given the clear text of Article 27.¹⁴¹ (And, indeed, since the date of the workshop, the

¹³⁹ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, ¶ 58 (Feb. 14, 2002), <https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf#page=25>; see also Buchwald, Framing Paper for Session Two, *supra*.

¹⁴⁰ See, e.g., Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2 (entitled “Judgment in the Jordan Referral re Al-Bashir Appeal”), ¶ 1 (May 6, 2019), <https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-0> (“There is neither State practice nor *opinion juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court.”).

¹⁴¹ Rome Statute, *supra* note 10, at art. 27 (“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of

ICC has issued an arrest warrant for Vladimir Putin.) Some participants noted that the United States has at times expressed concerns about this interpretation of head-of-state immunity, and that an ICC indictment of Vladimir Putin could therefore pose a challenge for the United States. More specifically, this concern reflects the view that an international tribunal cannot assume powers unavailable to a state, *i.e.*, granting immunity to a sitting head of state without that state's consent. Note, however, that President Biden has subsequently indicated that the arrest warrant against Putin was justified.¹⁴²

POSSIBILITIES FOR REFRAMING THE UNITED STATES' RELATIONSHIP WITH THE ICC

Participants noted that the ICC is doing commendable work in Ukraine (and in other situation countries), and the United States' closest allies agree. Some participants suggested that, within the U.S. Department of Defense (DOD), there is a recognized tension between the affirmative agenda of championing accountability and the defensive agenda of protecting American personnel from politically-motivated prosecutions. Participants further noted the need to increase understanding of the ICC among DOD personnel. Some participants suggested that the affirmative agenda should govern U.S. policy moving forward, particularly since any risk to U.S. personnel has dissipated. These participants emphasized that democratic states are standing up for accountability, and nondemocratic regimes, from a defensive posture, will be the ones objecting to the ICC's jurisdictional claim over non-party states. They urged the United States to align with the democratic states. Multiple participants also noted that the ICC could be regarded as a potential asset for DOD to use in strengthening international humanitarian law if the potential policy benefits of U.S. support for the ICC is framed in ways that bolster DOD interests and equities. For example, the Court could be seen as a partner in the larger goal of deterring Russia and other adversaries from undertaking activities hostile to U.S. interests.

Several participants suggested that the United States might consider shifting its stance on the ICC as a form of "lawfare," especially to counter Russia and China. These participants observed that the United States could move away from jurisdictional objections to the ICC and instead focus on critiques of specific doctrines and policies, such as the Court's approach to

sentence.").

¹⁴² Mark Landler, *Arrest Warrant from Criminal Court Pierces Putin's Aura of Impunity*, N.Y. TIMES (Mar. 17, 2023), <https://www.nytimes.com/2023/03/17/world/europe/icc-putin-ukraine-war.html>.

implementing the principles of complementarity and gravity, that do not align with U.S. interests. Further, these participants contended that the United States should not be thinking only in defensive terms, including with respect to accountability for atrocities, but also offensive terms. They emphasized that the United States has always been a leader in international justice, so it cannot sit this one out because it is too afraid that the ICC may come after the United States in the future.

MAJOR OUTCOMES FROM SESSION TWO:

- ⇒ Many participants noted that the potential benefits of cooperating with the ICC in the Situation in Ukraine likely outweigh whatever policy or legal concerns remain. Many participants also stressed that the United States should view the ICC as an asset, not a threat, especially in the interest of national security, continuing longstanding U.S. leadership in international justice, and the need to further isolate, hold accountable, and even stigmatize Russia and the Putin Regime on the international stage.
- ⇒ More specifically, a significant majority of participants expressed hope that the United States would overcome whatever concerns may remain regarding the ICC's exercise of jurisdiction over the nationals of non-party states and move forward to tangibly support the ICC's efforts in Ukraine in line with its rhetorical support. Participants found the U.S. objections to ICC jurisdiction over the nationals of non-party states to be unpersuasive to any actors that matter, including key U.S. allies and Court personnel. Participants also noted that the U.S. objection to ICC jurisdiction over nationals of non-party states does not need to be merged with questions about whether, and to what extent, the U.S. cooperates with the ICC. Rather, these issues can be addressed separately.
- ⇒ Some participants also discussed the benefits of focusing on a more affirmative agenda, in which the United States could encourage the ICC to apply the principles of complementarity and gravity in a manner that the United States views as more faithful to the language and spirit of the Rome Statute. Participants also suggested that the United States might encourage the ICC Prosecutor to develop "durable" policies that might reflect these approaches. Participants urged the United States to take advantage of the current moment, while the Court is considering how to implement recommendations that emerged from the Independent Expert Review process on September, 30, 2020 that could alleviate the United States' concerns on these matters.

FRAMING PAPER FOR SESSION THREE

ASSESSING THE PRACTICAL CHALLENGES OF U.S. COOPERATION WITH THE ICC UKRAINE INVESTIGATION

Professor Alex Whiting

Providing assistance to the ICC Ukraine investigation—in the form of information or personnel—requires matching the potential resources of the United States to the needs and constraints of the ICC.

Information. There are at least four challenges or constraints to providing information or evidence to the ICC’s Ukraine investigation. First, because of how the ICC judges have interpreted the interaction between Articles 67(2) (on exculpatory information) and 54(3)(e) (on providing intelligence information to the ICC) of the Rome Statute in the *Lubanga* litigation, the ICC cannot accept information on the promise that it will never be disclosed to the defense in future litigation. Because of the decisions in *Lubanga*, the ultimate determination regarding the disclosure of information possessed by the Office of the Prosecutor (OTP) rests not with the Prosecutor but with the judges.¹⁴³ This extends to all information, including lead information or intelligence information.

Second, the ICC must take care when it delegates its investigative functions. Again in the *Lubanga* case, the Trial Chamber found in the Judgment that the OTP had improperly delegated its investigative functions to intermediaries without proper supervision.¹⁴⁴ If the OTP requests outside entities to collect information or evidence with a particular focus, it may retain responsibility for *how* that evidence is collected and for ensuring that the rules that constrain the OTP have been respected.¹⁴⁵ For example, if the OTP asked the United States to search for

¹⁴³ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 13, Judgment (entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008”) (Oct. 21, 2008) (Appeals Chamber decision), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05884.PDF.

¹⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment, ¶ 482 (Mar. 14, 2012) (Trial Chamber I decision), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF.

¹⁴⁵ See, e.g., Rome Statute, *supra* note 10, at art. 54 (“The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances

information in its possession for evidence related to a particular alleged crime or suspect, the instructions would likely need to include a direction to identify both inculpatory and exculpatory information.

Third, the ICC is not well-suited to manage vast amounts of information. Because of its size and competing investigations, it must focus its investigations, and typically it seeks to collect information pertinent to its focus, while also maintaining an open-ended inquiry.¹⁴⁶ When the OTP collects large quantities of information, it has difficulty in the analysis and disclosure stages.

Fourth, as is normal in any criminal investigation, the Prosecution ordinarily conducts its investigations confidentially, in particular with respect to the focus or targets of its investigations, so as to protect the security and integrity of the investigation. This may further constrain the OTP in its ability to share information with outside states or entities.

The United States and the ICC will need to try to navigate and strike balances between these various challenges to find solutions. For example, the United States will want to look for ways to convert intelligence information either into evidence that can be used by the ICC or disclosable information that can be used for leads. In terms of the substantive focus of the investigation, a mechanism should be devised for the ICC to communicate areas of interest without compromising confidentiality or delegating investigative functions.

Personnel. Seconding personnel presents several logistical and substantive challenges. First, suitable personnel must be identified and recruited. Being a successful investigator or prosecutor in a national system does not necessarily translate to success in an international setting. Adapting to the functioning of an international tribunal requires flexibility, adaptability, and creativity on top of excellent investigation/prosecution skills. In terms of required skills, it is likely that the ICC would most benefit from investigation (including interviewing), case-building, and analysis skills (including particular areas of expertise such as open-source analysis, communications analysis, military analysis, and forensic analysis). It is less likely that assistance will be needed for legal briefing because the ICC has considerable expertise already in this area.

equally.”).

¹⁴⁶ See Office of the Prosecutor, *Strategic Plan 2019-2021*, INT’L CRIM. CT. at para. 4 (Jul. 17, 2019), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf> (describing goals to conduct open-ended inquiries with focus where appropriate).

Second, because of the steep learning curve, it is optimal if seconded staff can serve for at least two years. In addition, for seconded staff to travel to Ukraine, they will require vaccinations and insurance. Further, it will be necessary to select staff who could be available to testify in the future, even after the end of their secondment (this will be particularly true for investigators and analysts).

Third, seconded staff will require training in international criminal law and the operations and procedures of the ICC. Of course, some of this training will be obtained upon starting work, but it would be optimal to provide training even before this point.

Several other countries (Canada, Sweden, the UK) have provided seconded staff and have experience doing so. The United States may want to think about the identification, selection, and training of seconded staff programmatically and consider appointing a focal point to manage it (if that hasn't been done already).

Coordination. The United States will have to consider how to coordinate its support of the ICC with assistance it may be providing or will be providing to investigators in Ukraine or third states, or to an aggression tribunal if one is established. Ukraine and third states will likely be investigating many of same incidents as the ICC, and it is not clear how much those efforts are coordinated. The United States will need to consider where its assistance might be of most use and also how information provided to one entity might later be shared with another entity. With respect to an aggression tribunal, the overlap in the inquiries would likely be rather narrow. The crime of aggression will be easily proved in this case and will not require proof of war crimes or crimes against humanity, the focus of the ICC investigation. The focus of an aggression tribunal would likely be on identifying the circle of responsible actors around Putin who could also be held responsible for the crime of aggression, which is a leadership crime. This focus would likely overlap with the ICC's inquiries, as they are certainly trying to assess who within the leadership could be held responsible for the crimes on the ground.

SESSION THREE SUMMARY

ASSESSING THE PRACTICAL CHALLENGES OF U.S. COOPERATION WITH THE ICC UKRAINE INVESTIGATION

This session addressed some of the practical challenges that could arise upon United States cooperation with the ICC Ukraine investigation. Participants structured their discussion by focusing in-depth on three primary challenges: (i) those related to information-sharing; (ii) those related to detailing and/or training personnel; and (iii) those related to the interactions between the ICC investigation and those conducted by domestic Ukrainian authorities, third-party States, or other international mechanisms or tribunals. Participants also addressed more briefly a number of other types of assistance that the United States might provide to the ICC and the issues that could arise related to that assistance. Throughout, participants also addressed challenges that could arise related to the ICC's institutional structure and culture. Participants also discussed recommendations to address these challenges.

CHALLENGES RELATED TO INFORMATION SHARING

Many participants observed that the United States would face challenges in sharing information with the ICC, but participants also suggested practices that could help mitigate these challenges. Participants focused on three issues. First, they noted the ICC's rules on disclosure require the Prosecutor to disclose incriminatory and exculpatory information that is in the Prosecutor's possession to the defense, including classified or confidential information.¹⁴⁷ Second, participants noted difficulties in establishing ongoing consistent communication with the Court and emphasized the importance of rectifying this problem to build a durable relationship of trust and mutual respect. Finally, participants noted that the Court is not well-equipped to receive and manage vast amounts of information. When the OTP collects large quantities of information, it has difficulty in the analysis and disclosure stages.

¹⁴⁷ For an analysis of this issue and a discussion of the relevant ICC *Lubanga* decisions, see Buchwald, Framing Paper for Session Two, *supra*, and Whiting, Framing Paper for Session Three, *supra*. In addition, as noted in Session One, the ICC's jurisprudence differs markedly from that of the ICTY, which allowed the United States to enter into agreements with the Prosecutor in which the Prosecutor would receive information from the United States on the condition that it would not be shared with other entities at the ICTY.

With respect to the first issue (sharing confidential or classified information), multiple participants suggested that the United States could seek to declassify information or direct U.S. investigators to pursue lead information themselves to find corroborating or other supporting information that could be shared with the ICC. Such practices, these participants observed, could overcome the hurdles to sharing confidential or classified material. Many participants observed that, in sharing information with the ICC, the United States would need to think creatively to advance beyond lead intelligence information and deliver objective evidence the United States could allow to be shared with third parties. One participant noted that all investigative efforts should be in the pursuit of justice and not just in aid of prosecution. In this participant's opinion, full cooperation—including the sharing of exculpatory information and other information potentially helpful to the defense—should not pose significant challenges.

One participant suggested that information sharing may be too difficult or unproductive to be worthwhile. In considering solutions, the same participant noted that in its direct cooperation with Ukraine, the United States is sharing its intelligence collection methods so that Ukraine can develop, on its own, much of the same information the United States is already sharing.¹⁴⁸ Where this type of method-sharing is feasible, participants noted that the ICC must take care when it delegates its investigative functions, because in the past the Prosecutor has improperly delegated investigatory activities to third parties.¹⁴⁹

Other participants contended that, in some high-profile and worthy contexts, such as Ukraine, the United States might consider simply declassifying information on a more regular basis. Participants referenced the United States' disclosure of and reliance on previously highly-classified intelligence information released to the international community to combat and

¹⁴⁸ The United States has now formalized this relationship with the Ukrainian Office of the Prosecutor General (OPG). Press Release, Office of the Spokesperson, U.S. Department of State, Supporting Justice and Accountability in Ukraine (Feb. 18, 2023), <https://www.state.gov/supporting-justice-and-accountability-in-ukraine/> [hereinafter "Supporting Justice and Accountability"] (noting that the U.S. Department of Justice has a Memorandum of Understanding (MOU) with the Ukrainian OPG); see also Justice News, *Readout of Assistant Attorney General Kenneth A. Polite, Jr.'s Trip to Lithuania*, U.S. DEP'T OF STATE (Apr. 17, 2023), <https://www.justice.gov/opa/pr/readout-assistant-attorney-general-kenneth-polite-jr-s-trip-lithuania> (announcing a new MOU with all seven members of the Joint Investigation Team (JIT) in Ukraine).

¹⁴⁹ One participant explained that, again in the *Lubanga* case, the Trial Chamber found that the Prosecutor improperly delegated its investigative functions to intermediaries without proper supervision. If the Prosecutor requests outside entities to collect information or evidence with a particular focus, it may retain responsibility for how that evidence is collected and for ensuring that the rules that constrain the OTP—including Article 54 of the Rome Statute, which sets forth the duties and powers of the Prosecutor—have been respected.

discredit Russian President Vladimir Putin’s misinformation campaigns in 2014 and 2022. Most participants supported declassification for the sake of information-sharing wherever practicable. A hybrid approach was also suggested, whereby the United States would work to declassify information that is truly obtainable only through a U.S. competitive intelligence edge. In other situations where there are other potential sources of such information, the United States would encourage the ICC Prosecutor to obtain the information through other means. For example, the U.S. State Department is funding an independent Conflict Observatory at Yale University that is using sophisticated data analytics tools to aggregate and report on open-source information emerging from the conflict that could be of great assistance to the ICC.

With respect to the second issue (establishing ongoing and consistent participation), multiple participants cited past examples in which United States communication with other international criminal tribunals yielded significant information-sharing value, even when specific intelligence could not be shared. This includes identifying third-party experts, corroborating prosecutorial theories of liability, and discouraging the pursuit of non-viable cases. These participants emphasized that this collaboration requires trust and almost constant communication, which currently would be a challenge with the ICC. They contended that the United States should aim to build such trust with the Prosecutor and the Court.

Finally, participants noted the benefits of ongoing communication between U.S. officials and the ICC to overcome challenges associated with the sheer volume of information potentially relevant to the Ukraine investigation. Several participants suggested that regular briefings with experts within the U.S. government would significantly improve communication and help all parties manage the vast quantity of potentially relevant information. Other participants suggested an alternative strategy in which the United States might narrow the volume of information potentially provided to the Prosecutor.

CHALLENGES TO DETAILING AND TRAINING OF PERSONNEL

Participants next discussed the practical challenges associated with detailing U.S. personnel to the ICC and with U.S. training of ICC personnel. One participant framed the discussion on this issue by identifying three specific personnel-related challenges and potential solutions. First, this participant observed that it can be difficult to identify personnel with the requisite qualifications who are willing to serve for a meaningful length of time. This participant recommended, therefore, that U.S. personnel detailed to the ICC should have specific

qualifications that are needed by the ICC and should be available to serve at the ICC for long enough terms to provide benefit. Second, this participant noted that U.S. personnel, whether serving on detail to the ICC or training ICC personnel, do not typically have a deep understanding of ICC culture and operations. To maximize success, it would be important to train any such U.S. personnel to better understand the ICC. Third, this participant identified the logistical difficulties associated with stationing U.S. persons at the ICC for extended periods of time—including the considerable salary and benefits packages required—and emphasized that significant planning would be needed if the United States were to decide to detail personnel at the ICC. With these challenges in mind, multiple participants also noted that personnel are most helpful when they are able to stay for at least two years and ideally longer.

Participants briefly discussed the types of U.S. personnel who could support the ICC. One participant suggested that the United States has a significant comparative advantage in prosecutors, given the nature of organized crime and other complex federal litigation in the United States, and therefore that there is a ready pool either for detailing personnel or for training. Another participant emphasized that support for the defense should not be forgotten.

A few panelists suggested that the cost/benefit analysis might counsel in favor of using U.S. personnel to help the ICC from the outside through training, rather than through detailing or secondment. Multiple participants also noted that federal regulations and policies pertaining to compensation and benefits make detailing and secondment quite costly.¹⁵⁰

Participants referred back to the discussion in Session One to note that domestic law does not prohibit the United States from detailing or seconding personnel in the Ukraine investigation. Participants observed that even under the ASPA and the original version of the Dodd Amendment, as interpreted by the 2010 OLC Memorandum, secondment would be lawful if it does not constitute institutional support and seconded personnel are not used to investigate or prosecute U.S. nationals. The recent amendments to the Dodd Amendment lift even the restriction on institutional support, as to the Ukraine investigation.

¹⁵⁰ One participant noted that it could cost as much as \$700,000 per year to the U.S. taxpayers to detail one person from the U.S. government to the ICC.

CHALLENGES POSED BY RELATED INVESTIGATIONS AND PROSECUTIONS, AND THE ONGOING CONFLICT

Participants also discussed the extent to which U.S. cooperation with the ICC's investigation into the Situation in Ukraine might be complicated by competing demands for U.S. cooperation with investigations and prosecutions conducted by the Ukrainian authorities, one or more third States, and/or another international mechanism or tribunal.

Multiple participants noted that there are currently several investigative activities underway in relation to the atrocities occurring in Ukraine, including by the Ukrainians themselves, and that the United States is actively supporting these efforts.¹⁵¹ As a result, these participants suggested that the United States should consider carefully how to navigate these ongoing efforts in Ukraine alongside any potential ICC cooperation. For example, these participants recommended that the United States should consider which investigations to prioritize, how information will flow, and what conflicts could arise among the various investigations. Participants also discussed the manner in which any potential U.S. cooperation, including its scope, could be memorialized. For example, participants discussed whether the U.S. government should consider executing a written memorandum of understanding with the ICC or Ukraine¹⁵² delineating the precise nature and scope of U.S. cooperation with the ICC Ukraine investigation, or whether it would be preferable for the cooperative process to be a more informal arrangement. One participant opined that there may be a need for something formal in the background, but that cooperation on the working level is likely more productive informally. The participant noted that there may be advantages to avoiding setting the precedent of a formal agreement, and/or having to interpret what is within or outside the scope of a formal agreement. Multiple participants also noted that on-the-ground engagement is most productive if it is consistent and informal.

Participants also discussed how any U.S. support for the ICC Ukraine investigation might intersect with the work of a tribunal to adjudicate the crime of Russian aggression in Ukraine, if such a tribunal is established. One participant made an impassioned argument in favor of establishing such a tribunal, noting that Russia's aggression is the most glaring violation of international law in Ukraine and that it should not go unaddressed. Other participants agreed

¹⁵¹ See *Supporting Justice and Accountability*, *supra* note 148.

¹⁵² See *id.* (citing the creation of MOUs between the U.S. Department of Justice and the Ukrainian OPG and JIT, after the workshop took place).

that the historical significance of such an effort would be impactful. If such a tribunal were established, a few participants opined that any substantive conflict between cooperation with the ICC and cooperation with such a tribunal is overstated. They suggested that the substantive overlap of investigative activities (to prosecute the crime of aggression, as compared to those required to prosecute war crimes, crimes against humanity, or genocide) would be fairly narrow and would likely be limited to figuring out the relevant leadership structure. Multiple participants contended, however, that the establishment of a separate aggression tribunal could create significant resource and bandwidth challenges, and some participants suggested that the potential distraction might not be worth the effort.

A few participants cited the proposal of the Netherlands.¹⁵³ The Netherlands has proposed a prosecution team—now called the International Center for the Prosecution of the Crime of Aggression (ICPA)—to investigate aggression and prepare indictments with supporting evidence as an interim step toward the establishment of a specialized tribunal.¹⁵⁴ The indictment need not be executed until a suspect or suspects are apprehended and a trial can take place, thus avoiding the prospects of a trial in absentia and resource drain from the ICC.

Participants also discussed the implications of U.S. support for various efforts to investigate and prosecute atrocities during an ongoing armed conflict. A few participants raised the question whether such investigations and prosecutions might impede efforts to end the conflict. In this regard, one participant raised the concern that an aggression investigation could embolden Russian President Vladimir Putin, making him more committed to staying in power. Multiple participants noted that, in the past, strategies to end armed conflicts have incorporated amnesties but that unconditional amnesties for atrocities are now generally unlawful under international law. Participants emphasized that the international community should develop strategies to bring the violence and atrocities to an end. Some participants

¹⁵³ See *Ukraine: Details of the European Commission's Proposal on the Special Court for Russian Crimes*, NOVA.NEWS (November 30, 2022), <https://www.agenzianova.com/en/news/ucraina-i-dettagli-della-proposta-della-commissione-europea-sul-tribunale-speciale-per-i-crimini-russi/>; *Netherlands Willing to House Special Court for Russia Invasion of Ukraine, Minister Says*, REUTERS (December 12, 2022), <https://www.reuters.com/world/europe/netherlands-willing-house-special-court-russia-invasion-ukraine-minister-says-2022-12-12/>; see also Ryan Goodman, *Toward an Interim Prosecutor's Office in The Hague for the Crime of Aggression Against Ukraine*, JUST SECURITY (January 17, 2023), <https://www.justsecurity.org/84767/toward-an-interim-prosecutors-office-in-the-hague-for-the-crime-of-aggression-against-ukraine/>.

¹⁵⁴ See *War in Ukraine: the Netherlands Working to Stop War Crimes and Fight Impunity*, GOV'T OF THE NETH. (Apr. 5, 2023), <https://www.government.nl/latest/news/2023/04/05/war-in-ukraine-the-netherlands-working-to-stop-war-crimes-and-fight-impunity>.

urged a focus on the ICC and opportunities to influence international law precedent associated with well-established legal categories such as war crimes and crimes against humanity, instead of a focus on potential future issues associated with a new aggression tribunal.

Participants also discussed whether the United States should be in the lead on proposals related to an aggression tribunal. Many participants asserted that the United States should not necessarily take the lead, despite significant focus in academic circles on the benefits of U.S. leadership. Instead, one participant suggested that the United States should focus instead on ensuring that any future aggression tribunal enjoy a broad base of support from Latin America and Africa to ensure broad international support and legitimacy.

CHALLENGES RELATED TO ICC STRUCTURE AND CULTURE

Throughout Session Three, the participants at times discussed aspects of ICC institutional structure and culture that could pose challenges to U.S. cooperation. Participants also addressed how the United States might respond to those structural and cultural challenges.

Several participants emphasized that the ICC is a permanent international organization with a more global mindset as compared to previous international criminal tribunals such as the ICTR and ICTY. To begin with, the ICC is “heavier on procedure,” than ad hoc international criminal tribunals. In addition, the involvement of multiple constituencies at the ICC makes it difficult for the Court to be as pragmatic and nimble as previous tribunals may have been in cooperating with outside entities. Further, one participant described the ad hoc tribunals as embodying a temporary, mission-driven culture that contrasted with the more slow-moving, bureaucratic culture at the ICC, where staff intend to stay for long careers. In this participant’s view, the relative success of the ad hoc tribunals could arguably be attributed to a sense of urgency inherent to the culture and the more pervasive involvement of the United States and U.S.-trained lawyers.

Participants discussed whether these cultural and institutional differences might affect U.S. cooperation. Some participants indicated that the United States would need to be more creative and proactive in working with the ICC than was the case for the ad hoc tribunals. Other participants suggested a properly motivated or suitably creative ICC Prosecutor could break through these cultural barriers. One participant considered whether the slow-moving nature of the ICC might be attractive to the United States, as it could give the United States time and

opportunity to respond to, and potentially influence, the direction of the investigation if appropriate. Many participants noted, without any objections raised, that the United States—and other States—would be more predisposed to cooperate with the Court if it delivered results efficiently. Many participants agreed that U.S. cooperation and engagement with the ICC, if done well, could be an opportunity to effect positive change in the culture of the ICC and facilitate a more efficient investigation and prosecution.

Finally, one participant noted that the discussion unfairly focused on external perceptions of the ICC as an institution while ignoring the challenges posed by the institutional perspectives of the ICC itself. Specifically, the participant suggested that the ICC views the United States with a fair amount of fear and skepticism, especially in light of the sanctions (now lifted)¹⁵⁵ imposed against ICC personnel by the United States. The participant noted that, if the United States wants any cooperative relationship with the ICC, it may need to affirmatively recognize this aspect of the relationship; otherwise, Russia and/or China may find a way to exploit it.

CHALLENGES RELATED TO OTHER POTENTIAL AREAS OF U.S. COOPERATION, SUCH AS SUPPORT FOR WITNESSES AND VICTIMS, AND OTHER FORMS OF SUPPORT

Participants also discussed the scope of potential cooperation with the ICC, and whether any challenges might arise from limiting or expanding that scope. In particular, participants explored avenues for potential cooperation associated with witness protection, the ICC Trust Fund for Victims, and arrest and transfer of suspects.

With respect to support for witnesses, a few participants strongly suggested that the United States should help protect vulnerable witnesses participating in the ICC Ukraine investigation. These participants noted that the United States has provided support for such witnesses in the past, for example when it was difficult to secure assistance from another state.¹⁵⁶ Other participants suggested that the United States should similarly cooperate in victim protection efforts.

¹⁵⁵ See Exec. Order No. 14,022, *supra* note 14; Exec. Order No. 13,928, *supra* note 13.

¹⁵⁶ For a discussion of these past examples of U.S. support for ICC witnesses, see ASIL TASK FORCE REPORT 2021, *supra* note 9, at 22-23.

Another participant discussed the possibility that the U.S. could fund the ICC's Trust Fund for Victims, established by the Assembly of States Parties under Article 79 of the Rome Statute, and witness-protection efforts. However, this participant noted that it is often difficult to source funding for assistance of this nature from the U.S. government. Participants took note of the Prosecutor's statements that he was reluctant to accept earmarked funding, and multiple participants noted that it would be difficult for the United States to provide funding to the ICC without ear-marking limitations. It was observed, however, that there may be ways to square this circle so that U.S. funding could be provided if an appropriation or source were to become available.

Participants also discussed the possibility that the United States might assist in the arrest and transfer of suspects to the ICC. One participant noted that the United States has considerable experience in assisting in the arrest and transfer of suspects indicted by international criminal tribunals, including the ICC. The participant cited instances in which the United States used its comparative financial and logistical advantages to fund rewards for assistance with successful apprehensions of suspects, or offer air transport capabilities to transfer suspects to jurisdictions closer to The Hague. For example, the United States used these capabilities to facilitate the transfer of former Congolese militia leader Bosco Ntaganda and Lord's Republican Army leader Dominic Ongwen to the ICC.¹⁵⁷ The same participant commented that the United States can also successfully leverage diplomatic pressure to aid in such efforts.

¹⁵⁷ For a detailed discussion of these instances in which the United States facilitated the transfer of suspects to the ICC, see ASIL TASK FORCE REPORT, *supra* note 9, at 22.

MAJOR OUTCOMES FROM SESSION THREE:

- ⇒ Multiple participants asserted that the United States and the ICC Prosecutor would need to be creative and proactive in pursuing a cooperative relationship.
- ⇒ With respect to information-sharing, the ICC's disclosure obligations would need to be accounted for as the United States considers what type of information it shares with the Court, and how. Many participants agreed that the United States would need to think creatively to determine ways in which it can extract shareable information from confidential or classified intelligence. Participants suggested that regular briefings between the United States and the ICC Prosecutor could then be useful to guide information-sharing and help build the relationship.
- ⇒ With respect to detailing personnel, many participants asserted that U.S. cooperation faces considerable practical challenges, with some participants suggesting that the overall benefits of detailing personnel may not outweigh the cost. Some participants suggested that U.S. support in the form of training ICC personnel might be a more effective use of resources than detailing or secondment.
- ⇒ Participants noted that the multitude of potential investigations into the ongoing crimes in Ukraine could pose competing demands and practical challenges to U.S. cooperation with the ICC.
- ⇒ Participants discussed the benefits and drawbacks of a separate tribunal for prosecuting the crime of Russian aggression against Ukraine. Nonetheless, many participants seemed to accept that the United States should support leaving open the door to jurisdiction over aggression and developing a case for prosecution of that crime in the future.
- ⇒ Most participants agreed that U.S. cooperation should extend to issues outside of the direct investigation of crimes to encompass, *inter alia*, victim and witness protection; however, some participants expressed concern that congressional appropriations limitations and/or earmarks, relevant legislation, or diplomatic concerns may limit the ability of the United States to cooperate in this regard under some circumstances.

CONCLUSION

As noted by the participants, this workshop was held at a pivotal moment in the history of the United States' relationship with the ICC. The possibilities and challenges associated with seeking justice for the atrocities committed in the context of the war in Ukraine have deep and wide-ranging potential repercussions. Whether the perpetrators of atrocities in the context of the current war in Ukraine are held accountable will be felt deeply by Ukrainians and all in the international community who sympathize with their plight. The way in which the international community navigates attempts to achieve accountability also has potential wide-ranging impacts on international law and policy.

Motivated by outrage at the atrocities being witnessed in Ukraine, the U.S. Congress took major steps in late 2022 that could potentially enable unprecedented cooperation between the United States and the ICC. We were inspired by Congress' actions to leverage the resources at GW Law School to convene legal experts to contribute their expertise and insights to the myriad complex issues associated with this topic. We were delighted that we were able to convene so many experts in the field, including many former U.S. Ambassadors for War Crimes Issues/Global Criminal Justice, along with the currently-serving Ambassador.

The workshop convened in February 2023, and we then drafted this report in the context of a constantly changing landscape throughout the spring. Even at the point of publication, the news continues to evolve. Perhaps the most significant development since we met was the ICC Pre-Trial Chamber's issuance of arrest warrants for Russian President Vladimir Putin and Maria Lvova-Belova.¹⁵⁸ No doubt, in the near future, more developments are likely to continue to reshape ongoing conversations about the extent to which the United States should cooperate with the ICC's investigation into the Situation in Ukraine.

We hope that this Report serves as a resource in those ongoing conversations, as well as a catalyst for new discussions on these and related issues. The decisions made by the United States and the ICC this year will have precedential and historical significance for years to come. Our discussion was an important start, but it only scratched the surface of the potential

¹⁵⁸ See Statement of Karim A.A. Khan Q.C., Prosecutor, Int'l Crim. Ct., on the Issuance of Arrest Warrants Against President Vladimir Putin and Ms. Maria Lvova-Belova *supra* note 7.

considerations for such decision-making. The discussion also produced some important takeaways.

The Major Outcomes are summarized above. In addition to those substantive points, the discussion brought together voices from a diverse range of perspectives who all found important points of commonality along the way. The conversation was always constructive, civil, and imbued with a sense of the importance of the moment. The participants were generous with their time, their insights, and their spirit of cooperation. We were honored to host this timely workshop, and we sincerely hope this Report will serve as a useful tool to memorialize the workshop, to inform the path forward for the United States and the ICC, and ultimately to help achieve justice for atrocities committed in the context of the war in Ukraine.

APPENDIX A

“THE BIDEN ADMINISTRATION APPROACH TO INTERNATIONAL CRIMINAL JUSTICE”

Fireside Chat between Beth Van Schaack, U.S. Ambassador-at-Large for Global Criminal Justice and Professor Laura Dickinson

The George Washington University Law School (“GW Law”) Program in National Security, Cybersecurity, and Foreign Relations Law Program, in partnership with the Program in International and Comparative Law, hosted a public “fireside chat” with Beth Van Schaack, the U.S. Ambassador-at-Large for Global Criminal Justice, on February 3, 2023.

This event offered GW Law students, faculty, and staff a glimpse into Ambassador Van Schaack’s responsibilities, current U.S. policy on international criminal justice, and future initiatives. Professor Laura A. Dickinson, the Oswald Symister Colclough Research Professor and Professor of Law, moderated the discussion. Professor Dickinson split the chat into a formal dialogue between herself and Ambassador Van Schaack, and an informal Q&A between attendees and Ambassador Van Schaack. The event was recorded and is available at https://www.youtube.com/watch?v=oab_qY7XZIY.

Professor Dickinson introduced Ambassador Van Schaack as the “perfect person for this role at this time in history” and noted that Ambassador Van Schaack has extensive experience and expertise in the field of global criminal justice that dates back long before she assumed the role of ambassador. Professor Dickinson then offered an overview of Ambassador Van Schaack’s academic, professional, and scholarly background and achievements and highlighted that Ambassador Van Schaack is the first woman to be confirmed in this position.

Professor Dickinson began the formal dialogue by asking Ambassador Van Schaack about the nature of her role and responsibilities and what she does on a daily basis.

Ambassador Van Schaack began by explaining the origins of the Office of Global Criminal Justice. She recounted that the Office was founded when Madeline Albright was Secretary of State and that it provided a direct channel to the Secretary on global criminal justice issues and

also served as the point of contact with two ad hoc international criminal tribunals: the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Over the years, the Office's mandate expanded to include a broad range of transitional justice initiatives, including commissions of inquiry and truth commissions around the world in addition to international criminal tribunals. Ambassador Van Schaack concluded by describing her office as a diplomatic arm supporting efforts to erect global tribunals, work within various interagency processes, advise the State Department leadership, and coordinate closely with the U.S. Congress on issues related to atrocity response and prevention.

Following this explanation, Professor Dickinson initiated a line of questions about the efforts Ambassador Van Schaack's office has undertaken outside of Ukraine. Specifically, she asked, "Can you tell us about the three most important areas you're working on outside of the Ukraine context?"

Ambassador Van Schaack explained that her job was enormous even before Russia's invasion of Ukraine on February 24, 2022. She stated, "[My office has] jurisdiction, essentially, over the entire world. We are not a regional office—we're a functional office. I am the Ambassador at Large for *Global* Criminal Justice, and I take those terms very seriously."

Ambassador Van Schaack then noted that she took two trips to Africa early in her tenure: first, to the Central African Republic (CAR) and Ethiopia, and second, to The Gambia and Liberia. She explained that the goal of these visits was to help conceptualize how the United States' cooperation with the international community could advance justice processes that were stalled, underway, or imagined. When she visited Ethiopia, she was there at a time of ceasefire prior to Ethiopia's cessation of hostilities agreement. Her conversations with Ethiopia focused on what an inclusive, credible, and comprehensive transitional justice process might look like. Thus, in this instance, she described her role as fulfilling a technical assistance capacity.

Ambassador Van Schaack then described her office's efforts in CAR. She noted that, to begin with, her office supported CAR financially through Congressional earmarks. She also explained that cases addressing atrocities in CAR are proceeding on three levels: 1) in national courts; 2) in a hybrid court, the Special Criminal Court; and 3) in the International Criminal Court (ICC). Ambassador Van Schaack explained that an issue she wanted to address early in her tenure concerned lingering challenges to cooperation between the Special Criminal Court and

the ICC. She stated, “I believe we’ve worked through those [issues]—which is great.” She then went on to say, “The ICC has announced that, because the Special Criminal Court is operational, it is not envisioning additional indictments in the Central African Republic Situation.”

Ambassador Van Schaack then shifted to The Gambia and Liberia. She remarked, “Both places are very similar, although 10 years apart, in that they both [suffered] terrible conflicts.” Liberia endured “sequential civil wars,” and The Gambia had “a very repressive regime.” Both have addressed past atrocities with “very strong Truth Commission process[es] that generated credible recommendations, but very few of which have been implemented.” She explained that the goal of her focus in The Gambia and Liberia was thus to “urge a process forward, empower civil society actors, offer technical support, and figure out what more the international community could be doing.”

Ambassador Van Schaack then turned to the Situation in Myanmar, which she observed, “is also terrible ... ; we think it’s still an ongoing genocide. We made a genocide determination [in Myanmar], and we’re still seeing very terrible persecution against Rohingya populations, but also other ethnic minorities and political opposition, since the coup.” As to US responses, she explained that, “[In Myanmar] we’re focused on supporting a range of pathways to justice.” She observed that, “even though it’s foreclosed within Myanmar itself ... the ICC has seized jurisdiction.” She also noted that “there’s a case before the International Court of Justice brought by The Gambia, so when I met senior leadership in The Gambia, I was able to praise them—including the president himself.”

Finally, Ambassador Van Schaack highlighted the multiple ongoing universal jurisdiction cases addressing atrocities in Myanmar: “Germany has announced a new one and is working with an NGO, Fortify Right, that has filed a case The hope is that the prosecutor will pick that up.” She went on to say, “I was able to travel to Buenos Aires to meet with prosecutors and judges there ... who are also entertaining an extraterritorial case involving events in Myanmar.” Ambassador Van Schaack explained that one of her office’s efforts with respect to Myanmar is to “facilitate the travel of complainants who are now in a refugee camp in Cox’s Bazar” to Buenos Aires to give live testimony because live testimony is what the judge in Buenos Aires prefers. She captured this process’s complexity by explaining that these complainants have “no papers,” have “never stepped foot on a plane before,” and must be safely returned to Cox’s Bazar.

Professor Dickinson proceeded to ask, “Do you see the Ukraine situation, which is really at the forefront of global discussions, diverting resources away from these other situations where there are massive atrocities occurring?”

Ambassador Van Schaack responded, “There definitely is some anecdotal evidence of that—of attention shifting. Even at the recent [International Criminal Court] Assemblies of States Parties [(ASP)] meeting, the Bangladesh representative said to someone, who then related to me, that there was not a single mention of [the Myanmar case] Here we were at the ASP, which was supposed to be about strengthening the Court, encouraging member States of the Court to recommit to cooperation, encouraging non-party States to cooperate and assist the work of the Court, and this momentous case was barely mentioned. Comparatively, there was a lot of discussion about the situation in Ukraine, including the potential Aggression Tribunal. So, the worry about distraction is there.”

However, Ambassador Van Schaack went on to reflect, “I think the flipside of that is that we have never seen the international community more united around the imperative of justice in a long time. Certainly, in the post-World War II period we had that moment of consensus where the majority of the globe came together, and then again in the mid-1990’s when the two ad hoc tribunals were created by the Security Council, [and] you again saw a recognition that the world could not stand by and allow [war crimes] to go unpunished.”

Ambassador Van Schaack asserted that she was heartened to see this international consensus around justice again and commented, “My hope is that the tide raises all boats, and the fact that we’re on record now as recognizing the imperative of accountability and the need to invest in full-scale, broad, and comprehensive accountability will then be able to redound to the benefit of other situations that cry out for justice.” She further stated, “I’m very mindful of reports and accounts and grumblings about selective justice and accusations that this is just a European endeavor.” She recognized a need to “engage much more with States and other regions that have themselves experienced abuses, or are still experiencing abuses, and hear them and bring them into a system of international justice so it is responsive to their needs.”

Professor Dickinson then reflected, “So there’s the potential for global interest in accountability for atrocities in Ukraine to catalyze other initiatives?” Ambassador Van Schaack agreed.

Professor Dickinson then shifted the discussion by asking, “Let’s talk a little bit about Syria What are the ongoing issues and challenges there?”

Ambassador Van Schaack replied, “Syria is one of the tough cases of international justice.” She went on to refresh the audience’s memory that there was an effort in 2014 to have the UN Security Council refer Syria’s case to the ICC because a Security Council referral was the only way for the ICC to assume jurisdiction, as Syria is not a party to the ICC statute. Ambassador Van Schaack stated that this is precisely the kind of situation that the ICC was designed to tackle: a situation involving broad, massive abuses, no domestic accountability, a very repressive regime, and millions of people displaced and harmed. However, both Russia and China exercised a double veto, so the referral could not move forward.

She explained, “Lots of proposals were floated about other alternatives to create some sort of an international tribunal, and none of them had the political will to move forward. So, what we have seen now is domestic courts stepping up as engines of accountability.” She called these efforts “interesting public-private partnerships between civil society organizations and survivor organizations” that are executing some functions ordinarily reserved for law enforcement. These functions include gathering evidence, analyzing that evidence, creating refined reports of chains of command or an incident debrief, working with witnesses and survivors to determine who is prepared to give testimony, and then accompanying witnesses as they give that testimony in a legal process.

Ambassador Van Schaack observed that domestic accountability for Syrian atrocities in third-party states has taken place within mostly, but not exclusively, European States that allow for exercise of extraterritorial jurisdiction. She explained, “We’ve seen across Europe, with Germany very much in the lead, a number of cases against actors from the Syrian and ... Iraq conflicts being brought to justice because [these actors,] including high-level Assad figures, have sought safe haven in European states.” She described the phenomenon of domestic courts stepping up and playing their part to enforce international law as a “new frontier of justice.” Ambassador Van Schaack concluded by saying, “It has been shown that this can be done. These are tough and expensive cases—evidence is distributed across the globe, defendants can be very powerful, there are witness intimidation issues, and yet, we’ve been able to achieve fair proceedings that have resulted in the conviction of individuals accused of extremely serious crimes.”

Professor Dickinson shifted the conversation back to Africa and asked, “You mentioned the Central African Republic and your trips to Africa. Looking at the continent as a whole, what do you think are some of the top global criminal justice issues facing the continent, and what is the U.S. position on those issues?”

Ambassador Van Schaack reminded the audience that about a decade ago African States were very early adopters of the ICC. She said, “[African States] were part of the like-minded group at Rome. They wanted a strong and independent Court. They wanted a Court that could help them deal with abuses happening in their systems that they were overwhelmed by.” She explained that the tide turned when “many of the ICC cases proceeded against African defendants, including high-level senior figures,” such as heads of state. These actions caused “a bit of a backlash across the continent, but not across the board—certain States were very much driving that backlash.” Ambassador Van Schaack went on to explain that the backlash “was happening at political levels within the African Union. Many States [nonetheless] remained strong supporters and were contrary voices to those impulses that Africa should pull back because the Court was targeting Africa.” Ambassador Van Schaack remarked, “It was often forgotten that most of the cases that were before the court were there because the African States themselves had referred them—this was not a third state referral or a Security Council referral; it was the DRC saying we can’t handle this. We need help. And the ICC was seen as a credible and important partner to be able to tackle some of the impunity challenges that they were facing.”

Ambassador Van Schaack explained that with states such as The Gambia and Liberia with broad transitional justice processes, she is focused on efforts to move those States to the next step. Ambassador Van Schaack stated that Ethiopia is in the same place, and the “cessation of hostilities agreement contains explicit language that there will be a transitional justice process that will involve accountability.” She went on to explain, “Now we have to think about what that looks like, and that would be an exercise for Ethiopian civil society, progressive thinkers there, the government, and also international partners to help shape. Our office is trying to and hoping to tee up a conversation where activists, policymakers, lawyers from Colombia, Kenya, South Africa, Cambodia—places where they’ve had a transitional justice process ... and have lessons learned—come and share and speak with their Ethiopian counterparts. [They can] say, ‘This is how we did it. I would avoid this, try this, it worked for us, it might not work for you.’ Then, Ethiopia can develop its own bespoke approach. To me, this will lead to African solutions to African problems, but with the support and assistance of the

international community, recognizing that there are voices there that want to see this work be done, and done in a way that's credible, but also fair."

Professor Dickinson agreed regarding the benefits from such interactions, noting that when she was working at the State Department in 1999-2000, she had been part of a lessons learned conference for East Timor, and it was extremely helpful.

Professor Dickinson then turned the discussion to Ukraine and asked, "Can you say a little bit about the myriad efforts that the United States is engaging in there to pursue accountability for the massive, massive atrocities that are ongoing?"

Ambassador Van Schaack replied, "It's a horrible situation. U.S. policy toward Ukraine has three primary pillars: 1) strengthening Ukraine's hand on the battlefield, and of course, we're doing that to enormous degrees; 2) the humanitarian crisis and being acutely responsive to that; and 3) accountability."

Ambassador Van Schaack remarked that her office is doing a lot with these three pillars. She stated, "Our office historically did not have programming money. Over the years, Congress has seen fit to empower us to do some direct programming in this space, and that's been really welcomed because before we had to go out hat in hand to other bureaus and offices that had programming money and try to convince them that our little priorities fit and resonated with their priorities. Now we have some money to work with, and, with some of the new supplementals, we've been given \$15 million to focus on accountability. So, ten million of that has gone to a project we're calling the Atrocity Crimes Advisory Group."

She went on to explain that this Group began its work during the tenure of Ambassador Clint Williamson following Russia's attacks on Ukraine in Crimea in 2014. Ambassador Williamson launched a capacity-building initiative to support the Ukrainian Prosecutor General to investigate and prosecute war crimes cases arising from that period. Ambassador Van Schaack stated, "That project has now been scaled [up] significantly. Clint [is now on the faculty at] Georgetown, and Georgetown is the lead implementing agency. The European Union and the United Kingdom have now joined the initiative, and it's meant to serve as a coordination mechanism to ensure we're not over- or under-investing in different accountability lines of effort, but also to ensure that the Prosecutor General has the strategic advice he needs and that his team needs to be able to do these cases effectively, but also fairly."

She went on to state, “One of the big initiatives that Georgetown took on was to take Ukrainian prosecutors to Bosnia and Croatia to talk to their counterparts and say, ‘You had war on your soil. You had terrible war crimes being committed. How did you deal with this? How did you deal with issues of witness protection? How did you empower survivors? How did you deal with resistance within your Ministry of Defense to an aggressive accountability program? How did you overcome all of those obstacles, and what lessons can we learn now that we’re facing this terrible challenge in our own system?’”

Ambassador Van Schaack continued, “We’re also looking to capacitate what we’re calling strategic litigation—litigation that would be happening not at the ICC and not in domestic courts in Ukraine, but tentatively in courts of third-party states and in other international courts.” She remarked, “Ukraine has been quite brilliant in utilizing ‘lawfare,’ [which is] somewhat of a [controversial] term, but it is part of any conflict these days. There will be a legal dimension to it. So, they have sought jurisdiction in any court that would be able to offer it—in the European Court of Human Rights, or the International Court of Justice. The International Criminal Court, of course, is engaged, and the Law of the Sea Tribunal is engaged.” She stated that the common goal in all these efforts and tribunals is an attempt to “bring attention to the breaches of international law being committed on a daily basis by Russia.”

Professor Dickinson then reflected, “So, it really is a very multilayered and multidimensional approach, with many countries, fora, and tribunals involved. Can you say a little bit about the coordination challenges?”

Ambassador Van Schaack replied, “They’re huge. I often get asked by journalists, ‘Is it chaotic? It sounds chaotic.’ And I always say, ‘It’s not chaotic, it’s decentralized.’” She explained that this is because “it is happening across multiple fora. There are many different actors, so there’s only so much one can coordinate with these actors. They’re all motivated by their own agendas, their resources, what access they have, who their clients are, etc.”

She continued, “But the point is—and this is what the Ukrainians have said—they want to see comprehensive accountability. So, wherever jurisdiction exists, if there is a defendant or a respondent within reach, then that court should be activated if there’s subject matter jurisdiction that exists.” Ambassador Van Schaack further explained that “coordination mechanisms” are a key aspect of enabling this desired accountability for Ukraine. She explained that “a massive joint investigative team (JIT)” is one part of this coordination. This team is

comprised mostly of regional states, but also some European states and the United States, who function as partners or cooperating elements. She stated that this coordination “will facilitate the sharing of information around Europe.” She explained, “Even with mutual legal assistance treaty arrangements, which help, there’s still a lot of friction in the system. There’s still a diplomatic component ... but within a JIT the prosecutors can just speak directly with each other. They can create a shared database or an evidence vault, and the Eurojust network is doing that now for Ukraine.”

Ambassador Van Schaack also noted that she believes these are models that can be applied elsewhere, and she is heartened to see regular meetings happening. She explained that “The Dutch convened a Ukraine accountability conference. The British are doing a follow up 2.0 in March 2023, in part to have all the states come together and say, ‘This is what we’re doing. This is where we’re investing. This is how we’re helping the ICC. This is what we’re doing in our domestic system.’ So, they can all compare notes, identify gaps, and then work to fill those gaps.”

Professor Dickinson then asked, “Speaking of the multiplicity of tribunals, what are your thoughts about the efforts to create a tribunal to try the crime of aggression in Ukraine?”

Ambassador Van Schaack replied, “Indeed, this is a very high priority for the Ukrainians. The Prosecutor General is here in Washington this week. They did an event at Georgetown, and this was one of his top lines of effort that he’s focusing very strongly on. There are a number of different models that have been proposed, and so it’s a really interesting exercise of institutional design.”

She explained that this exercise has raised hypothetical solutions ranging from purely domestic action to a General Assembly resolution. Ambassador Van Schaack explained the domestic solution by stating, “This could be done in domestic courts in Ukraine. They have a provision that allows for what you could envision as a prosecution for the crime of aggression. It’s not defined in the same way as the ICC Statute, Article 8, but it’s there, and they’ve done a few cases.”

Shifting to the other end of the spectrum, Ambassador Van Schaack said, “what the Ukrainians were originally asking for, although I think they’ve realized that that may be a bridge too far, would be a U.N. General Assembly resolution in which the Secretary General would be asked to stand up, through U.N. auspices, some sort of an international tribunal.”

In the middle of the spectrum, Ambassador Van Schaack noted, “You have all sorts of interesting hybrid models that one could envision. And that’s where we seem to be coalescing, if I’m channeling discussions in Europe accurately. The Dutch have now come forward with a really interesting proposal, which is to create an Interim Prosecutor’s Office (IPO). And the idea there would be a bit similar to the Kosovo Tribunal, in which an investigative team was first established under EU auspices as part of the global administration of the new territory of Kosovo.” She explained that this team’s job was “to start gathering evidence, figuring out who the defendants might be, identifying the key emblematic incidents that any accountability exercise would want to focus on, and prepping up sort of notional indictments for when there was a jurisdiction that can then operate.” She stated, “This is what the Dutch have proposed with respect to the crime of aggression—to bring together Ukrainian prosecutors, maybe secondees that could come from other systems, to gather evidence of acts of aggression, which frankly is the easy part of it.”

Ambassador Van Schaack went on to note that the “hard part” is the fact that the crime of aggression is a “leadership crime.” She stated that the following questions must be answered: “Who, beyond the top three, would we want to be focusing on, particularly if there are any head-of-state immunity issues with respect to President Vladimir Putin? Who are the key generals? Who are the key architects [of the invasion]?” She explained, “If you remember from reading the Nuremberg provisions proceedings, some of the Nuremberg defendants were acquitted on the aggression counts because it was determined they just were not in the inner circle that was designing and implementing Nazi acts of aggression. And so, likewise, who in this case are the key actors? That’s what this Interim Prosecutor Office could be doing while the international community explores the pros and cons of the different models. And, eventually, whatever they end up landing on, everything could be handed over, and the IPO could be folded into that new institution, similar to what was done with the Special Tribunal for Lebanon.”

Professor Dickinson asked, “Speaking of immunity and efforts to create a new tribunal, leaders such as President Putin might not have immunity before such a tribunal. What can you say about the U.S. position on immunity?”

Ambassador Van Schaack responded, “It’s very clear that the so-called “troika” (head of state, head of government, foreign ministers) enjoy immunity before domestic courts. The open question is to what extent an international tribunal could overcome those immunities. Article

27 within the ICC Statute seems to abrogate any sort of head-of-state immunity or other immunities that might be enjoyed by individuals who might find themselves before the ICC. So, this question of head-of-state immunity is, in part, the tail that's wagging the dog of what the forum should look like." Ambassador Van Schaack went on to state, "At some level it will remain for that institution to determine whether it's a sufficiently international tribunal whereby it's not bound by [the rule regarding domestic courts], or whether it will say, 'Without the consent of Russia and, if President Putin is still a sitting head of state, we're not in a position to exercise jurisdiction.'" She then brought up several additional key points regarding this issue: "One, head-of-state immunity doesn't attach during any investigative stage, so all of this preparatory work can be done without invoking it, and two, it's a defense, ultimately an affirmative defense, that a defendant would have to raise." She elaborated that "so much could happen between now and when some member of a troika might be sitting in front of some tribunal somewhere that would take that out of their hands, because ultimately it's owned by the state itself."

Professor Dickinson finished her questions by focusing on structural organizational issues asking, "How do you organize your office?"

Ambassador Van Schaack replied, "We have a great team. We're about 20 people—some of them are detailees and fellows. Some of them are permanent civil servant employees. We also have two Foreign Service Officers who are an incredible resource. They're generalists, so they don't necessarily come in with any knowledge at all of international criminal law, but they are so used to being quick studies that they're like sponges." She continued, "Most of [the team] are lawyers because our issues are very technical. Everybody has a regional or country portfolio and a couple of functional portfolios. I mentioned that regionally we cover the globe, so we have a Latin America team, an Asia team, a Near East team, a Middle East team, an Africa team, a Europe team, and then we have a couple of functional areas that we're very heavily invested in."

She explained that working with the ICC is one key functional area, and this area also includes information-sharing with investigative mechanisms more broadly. Ambassador Van Schaack also remarked, "I've taken on witness protection as a key initiative of the office. Witnesses are very much the soft underbelly of the system. We've seen many, many systems corroded by witness intimidation and witness protection issues, and I want to focus not only on vulnerable, percipient survivor witnesses, but also those insider witnesses whose testimony can

be so critical for bringing senior figures to justice. We need to protect those people and enable them to testify and make sure they're not retaliated against if they choose to do so. We've seen increasingly the role of insider witnesses and, for example, we know there were two individuals who defected from the Tatmadaw [the Myanmar military] who are now somewhere in a witness protection program, somewhere in Europe, cooperating with the International Criminal Court."

As to her team's schedule, Ambassador Van Schaack stated, "We meet as a team once a week at a minimum, and then we have team meetings that happen at regional levels. In addition, we have [many] informal gatherings. One of the things I love about the job is that every day is different. There's no typical day, so it's impossible to answer the question, 'What is your typical day like?' Things change constantly throughout the day. I get [to work], I get handed my schedule, and inevitably 1/3rd of it has changed by the time the day is over because something has happened and there's been an important meeting, or a development has happened, or we need to stand up a meeting very quickly to deal with an emerging or evolving situation."

Professor Dickinson then opened the floor for questions from attendees.

Professor Sean Murphy, Manatt/Ahn Professor of Law at The George Washington University Law School, asked, "The U.N. General Assembly decided last fall that it would resume Session of the 6th Committee Legal Committee for one week in April to discuss the possibility of transforming draft articles on crimes against humanity developed by the International Law Commission [ILC] into a convention. So, I'm curious what you can say about the U.S. Government's likely approach to the Session in April?"

Ambassador Van Schaack replied, "Well, of course, it's a huge honor to be here with Leila [Sadat], who first conceptualized this project and you, who are the special rapporteur in the ILC and who brought it to the point where it's at. We were part of the consensus that was looking really hard at the U.N. parliamentary rules that would get your draft articles into a forum in which one could conceptualize and create an actual treaty. I was really pleased that we were part of that. And so, the U.S. government and my office will be very active participants in that resumed Session and the next one that's being contemplated. As everybody knows, it's really hard for the United States to ratify treaties. There's an anti-multilateralism among certain members of the Senate that scares them off from going along with that. So, will we ever join such a treaty? I don't know, but I think there's a sense that it would be good to have such a

treaty, regardless. For all sorts of reasons. One, it's a concept [crimes against humanity] that finds expression in other parts of U.S. law, but there is currently no definition [of crimes against humanity in U.S. law]. People like Senator Durbin have been trying for more than a decade to draft a crimes against humanity statute, and the lack of a consensus on an international definition has hindered that. So, we've been trying to put together definitions that will work under U.S. law, but it would be nice to have an off-the-shelf definition to work with. I think for a lot of survivor groups, they often feel as if it's genocide or nothing. And so, if they don't fit the technical definition of genocide, which we know requires membership in a protected group that's specifically listed and then the very high intent to destroy that group in whole or in part, sometimes it's difficult to prove that. And when someone says, 'Crimes against humanity are happening there,' it doesn't have any meaning to them, I think in part because there isn't a treaty that enjoys broad-based ratification. So having that treaty will be useful. It's also quite inspired because it contains within it some mutual legal assistance provisions as well that I think could be used and adopted in other contexts. And it's always helpful when there is greater cooperation and mechanisms to facilitate that cooperation."

Next, a GW Law student leader of a group seeking justice for Uyghurs asked, "Can you tell us a little bit about what your office is doing to advance justice for Uyghurs and other minorities in the PRC, and can you talk about a related question of what you've done for Uyghurs and other Chinese minorities around the world who are facing extradition or persecution?"

Ambassador Van Schaack replied, "Well, first thank you for what you're doing. It's incredible that you're bringing attention and building student interest and energy around this issue because it's another one of the really tough cases. The U.S. government broadly has been pretty engaged on this matter. China's a tough case because we're so intermeshed with them economically, and there isn't a ready court with jurisdiction over events that are happening there. Also, Uyghurs, the survivors, are not generally getting out, so there aren't many complainants that can be of assistance here. So, it really is a tough case, and getting supporting documentation is a huge challenge. The humanitarian issue is also huge. I was just up in Canada, and Canada recently announced that they're going to take 10,000 Uyghurs and bring them [to Canada], in part, to protect against the transnational repression that we're seeing around the globe, in which Uyghurs who are speaking up and other dissidents, other Muslims who are speaking up, are being targeted around the world."

Ambassador Van Schaack went on to comment, “The Uyghur Forced Labor Prevention Act is a game changer. This law creates a rebuttable presumption that goods produced in Xinjiang are inherently infected by forced labor, and the importer must prove that the goods in question are *not* tainted in order to be able to import them. So, now the key question is: can we get the Europeans on board with something similar to be able to close off Western wealthy markets to goods that are being produced with forced labor? Getting that implemented and unfolding the regulations that are going to be making that statute as strong as it should be is the current challenge.”

Ambassador Van Schaack also remarked, “Sanctions are another tool that we do have. [We can continue] to sanction individuals and entities that are associated with abuses in Xinjiang. Even without access to Xinjiang, it is remarkable what can be done on the documentation front. And we did finally receive from the outgoing U.N. High Commissioner for Human Rights, Michelle Bachelet, a very strong report that acknowledged crimes against humanity—that’s where this term is so important. Her investigation wasn’t able to find genocide, but nothing in the report precluded such a finding. The U.S. government has come out with a bipartisan consensus that happened under the Trump administration, but was echoed under the Biden administration, that what is happening there is, in our estimation, an ongoing genocide. But what is the follow-up now with that High Commissioner’s report? China was quite adept at organizing votes against the simplest of resolutions that would have said, ‘Let’s continue the conversation about this report.’ And so now the question is: what can we do in the March session to reopen the fact that the issue needs to remain on the U.N. Human Rights Council’s Agenda?”

Another audience member sought to follow up on the genocide determination issue and stated, “Secretary Pompeo, in his last minutes in office, issued a determination that the U.S. government had concluded that China was committing genocide against the Uyghurs. It was reported in the press. I don’t know whether this is true or not—that he overruled the legal recommendation of the Legal Adviser’s office, which said that they were not convinced that they had the requisite intent. Secretary Designate Blinken was asked about that in his confirmation hearing, and he said, ‘I agree that genocide is being committed,’ but of course he hadn’t seen any of the evidence at that point. So, it’s been two years since that determination by Secretary Pompeo and Secretary Blinken’s statement that he agreed. Is the U.S. State Department going to lay out the facts and law on the genocide being committed by China?”

Ambassador Van Schaack answered, “Historically, of course, we don’t do that in part because so often these determinations are based upon classified information, and, if the information is not easily declassified, it’s hard [to say anything]. We do try and say as much as we can, such as what the particular elements that we’re looking at are, and which actors are most responsible. We do try and reveal as much of that as we can. We can also share information with accountability and investigatory mechanisms, such as commissions of inquiry. We can enter into arrangements with them where information can be shared with them so that it can inform their own thinking about these issues.”

Ambassador Van Schaack further stated, “We should always remember that there are five different ways that genocide can be committed, and only one of them is mass killing. That tends to be where people’s colloquial understanding of the concept stops. But, looking with greater granularity regarding conditions of life calculated to bring about the destruction of the group, through serious bodily or mental harm, in the Xinjiang situation, [we can note] the prevention of births and recognize that there can be such a thing as slow death. I think that was an innovative concept produced by the ICTY looking at some of the conditions-of-life situations, and the Rwanda Tribunal’s conclusions that, even if people are surviving a campaign of terror, they’re not thriving, and their communities are not thriving. And ultimately such conditions will lead to the destruction of the group [and therefore could constitute genocide]. So, I think we have to take the terms of the Genocide Convention on their face and apply all of those different provisions when we’re doing this.”

Professor Dickinson took the opportunity to follow up in a slightly different direction on the Uyghur situation. She stated, “You mentioned the sanctions regime and other mechanisms to try to impact business in the region, since we don’t have international tribunals with jurisdiction. These efforts highlight the importance of the role of the private sector.” She then asked, “First, with respect to China and the Uyghurs specifically, are you engaging the private sector directly? Because the private sector has been acting independently of sanctions on this issue to some degree. And then, second, beyond this particular context, globally, a lot of the information about atrocities is arising through data that’s being generated through social media and other sources through the traces of many aspects of our daily lives that are being picked up in data that is often held by private companies. So, more broadly, what are the challenges and opportunities here with respect to the private sector?” Professor Dickinson also noted that

Ambassador Van Schaack recently wrote a book chapter on this issue in a book that Professor Dickinson edited.¹⁵⁹

Ambassador Van Schaack answered, “This is a timely question. The McCain Institute just hosted an event that a few people here attended that was focused very much on this public-private partnership, bringing together some of the tech leaders with government actors and other experts. The focus was Ukraine, and it was very much around the presence of the Prosecutor General here in the United States. But I think the kind of conversations we were having about Ukraine can apply more broadly to other elements of the private sector. We are in a world now where there is so much evidence generated in the digital realm about the commission of war crimes, crimes against humanity, and genocide, so the problem is now almost that there’s too much information. How do we sift through it all and identify the best evidence that can be used? And can we get to a point where this digital information is essentially self-authenticating? So, you don’t anymore need the witness who will say, ‘I took my cell phone, I held it at this angle, I recorded this event, and then I uploaded it.’ Can all of that be happening essentially simultaneously through tech mechanisms locking down the metadata and ensuring that it can’t be tampered with? We call it hashing, essentially creating a digital fingerprint of an atrocity situation and then getting it into the hands of prosecutors who can use that information. So, that is the current challenge.” Ambassador Van Schaack further stated, “Because Ukraine is already very sophisticated technologically, they’re sort of leapfrogging ahead in many respects. So, this will be the test case, I think. And this was another thing that came out of the McCain event, which was this idea that we’re remaking the field—such as what qualifies as evidence.”

Ambassador Van Schaack then turned to the question about private sector partnerships on sanctions, stating, “It’s really important to think about just old school manufacturing and making sure that goods that are coming into our markets are not either fueling or taking advantage of human rights abuses in labor markets abroad. Those goods should not be undercutting U.S. goods that are being produced under fair labor standards. So, it seems we should be able to get private industry on board with this because we know that Chinese companies are able to undercut companies elsewhere all across the board, because they’ve got

¹⁵⁹ Beth Van Schaack, *Leveraging Big Data for LOAC Enforcement: Finding the Needle in a Stack of Needles*, in *BIG DATA AND ARMED CONFLICT: LEGAL ISSUES ABOVE AND BELOW THE ARMED CONFLICT THRESHOLD* (Laura A. Dickinson and Edward W. Berg, eds. 2023).

thousands and thousands of Uyghurs in detention who are working around the clock under horrible conditions to create goods that we're probably all wearing today." Ambassador Van Schaack concluded her response to this question by stating, "We need to get at those enablers of atrocities, just as we do the direct perpetrators. We just had a very interesting bilateral meeting between our office and the Commerce Department because I wanted to better understand what tools Commerce has. We think about Treasury and sanctions, but I didn't really understand what tools Commerce had."

Next, a GW Law student queried, "On the topic of genocide, you've mentioned there are different forms. A growing topic of interdisciplinary study is ecocide. And I just wanted to know how your office is now handling not only this new area but also the rise in climate refugees growing around the world."

Ambassador Van Schaack responded, "This is a failing of our office. We just have not been able to have the bandwidth or the internal expertise to really dive into that area. And as a result, the situation is way ahead of our own thinking about this. It's on our list for sure, and we've started to talk about it, but I think we all have to acknowledge that the climate insecurity and the changes that are being wrought coupled with food insecurity, are going to create situations where competition among groups could very easily devolve into terrible atrocity situations. And we need to be ready for that. Environmental law is one angle. Your point about ecocide is another angle: to what extent are attacks that create deliberate long-term harm to the environment actionable under existing accountability mechanisms or concepts? Or do we need a new concept of ecocide? There is an initiative to add ecocide as a fifth crime within the ICC Statute. Others have argued that a better approach would be to create a stand-alone tribunal. I think there are good arguments on both sides of that, but there's no question at all that we need to be focused on this, not only from the prevention side, but also we have to be ready when this happens and when environmental issues become more and more salient in terms of driving conflict and driving harm around the world."

A GW Law student posed the final question, asking: "We've talked a little bit about Ukraine, and recently it was announced that the Wagner Group will be considered to be a transnational criminal organization, which is interesting in light of their connection with the Russian state. So, where they are acting in places outside of Ukraine, are there efforts under way as a result of that designation to gather evidence of things they are doing? And what does

it mean to treat them as a group that's separate from the state in terms of state responsibility versus criminal acts?"

Ambassador Van Schaack responded, "The answer to your first question is that Wagner is a malign force everywhere they are found. The allegations against them are legion, wherever they are. And yet, for many of these countries, I think they see [Wagner] as the only option. If there is a U.N. peacekeeping mission, in many cases where Wagner is operating, the mission is not as strong as it needs to be. The international community isn't as focused on providing security assistance regimes [as it could be]. Governments feel under threat, and they see Wagner as a source of protection when there are no other alternatives, and so they gravitate towards that. But, as we know, it's a poisoned chalice because once Wagner is in, they don't leave, and they're enriching themselves with natural resources. So, it's a terrible situation. With respect to the designation of Wagner as a transnational criminal organization, it should be noted that a lot can be achieved without such a designation. But the designation does open a lot of doors and create certain authorities that are available and that can be deployed more quickly. I don't think it precludes a finding that Russia is ultimately responsible for what Wagner is doing. Wagner is itself doing bad things, but it's also being deployed by Russia, and it's very much a proxy for Russia. I think probably in some cases it is acting more independently than perhaps Russian [forces] would be, or Russia is just not paying attention to what Wagner is doing. But I don't think the designation would preclude a finding of state responsibility."

Finally, Ambassador Van Schaack closed with the following statement: "I want to thank everyone for your interest in transnational criminal justice and accountability and everything that you are doing with respect to groups that are really under siege around the world. This is an all-hands-on-deck moment, not just with respect to the Situation in Ukraine, but with respect to the state of the planet generally. But at the same time, we have so many creative ideas and institutions that exist, and so we need to use them and to strengthen them. And there are places for individuals, including young people, young emerging lawyers, to plug in and play a role in multiple places. I would just urge you to find what your contribution is and to lean into it."

APPENDIX B

SELECTED RECENT U.S. LEGISLATION RELEVANT TO U.S. COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT ON INVESTIGATION AND PROSECUTION OF ATROCITIES IN UKRAINE

1. The Consolidated Appropriations Act, 2023, Pub. L. No. 117–328, § 7073, 136 Stat. 4459 (2023):

WAR CRIMES ACCOUNTABILITY

SEC. 7073. (a) EXCEPTIONS FOR CERTAIN INVESTIGATIONS.—Section 2004(h) of the American Servicemembers’ Protection Act of 2002 (22 U.S.C. 7423(h)) is amended—

(1) by striking “Agents.—No agent” and inserting the following: “Agents.—
“(1) IN GENERAL.—No agent”; and

(2) by adding at the end the following new paragraph:

“(2) EXCEPTION.—The prohibition under paragraph (1) shall not apply with respect to investigative activities that—

“(A) relate solely to investigations and prosecutions of foreign persons for crimes within the jurisdiction of the International Criminal Court related to the Situation in Ukraine; and

“(B) are undertaken in concurrence with the Attorney General.”.

(b) EXCEPTION FOR CERTAIN SUPPORT.—Section 2015 of the American Servicemembers’ Protection Act of 2002 (22 U.S.C. 7433) is amended by striking “Nothing” through the end of such section and inserting the following:

“(a) ASSISTANCE.—Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity, or from rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the Situation in Ukraine, including to support victims and witnesses.

“(b) AUTHORITY.—Assistance made available pursuant to subsection (a) of this section may be made available notwithstanding section 705 of the Foreign Relations Authorization Act, Fiscal Year 2000 and 2001 (22 U.S.C. 7401), except that none of the funds made available pursuant to this subsection may be made available for the purpose of supporting investigations or prosecutions of U.S. servicemembers or other covered United States persons or covered allied persons as such terms are defined in section 2013 of this Act.

“(c) NOTIFICATION.—The Secretary of State shall notify the Committees on Appropriations, the Committee on Foreign Relations of the Senate, and the Committee on Foreign Affairs of the House of Representatives, of any amounts obligated pursuant to subsection (b) not later than 15 days before such obligation is made.”.

(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed to modify the existing roles or authorities of any Federal agency or official.

2. Justice for Victims of War Crimes Act of 2023, Pub. L. No. 117-351 (2023):

SEC. 1. SHORT TITLE.

This Act may be cited as the “Justice for Victims of War Crimes Act”.

SEC. 2. WAR CRIMES.

Section 2441 of title 18, United States Code, is amended—

(1) by striking subsection (b) and inserting the following:

“(b) JURISDICTION.—There is jurisdiction over an offense described in subsection (a) if—

“(1) the offense occurs in whole or in part within the United States; or

“(2) regardless of where the offense occurs—

“(A) the victim or offender is—

“(i) a national of the United States or an alien lawfully admitted for permanent residence; or

“(ii) a member of the Armed Forces of the United States, regardless of nationality; or

“(B) the offender is present in the United States, regardless of the nationality of the victim or offender.”; and

(2) by adding at the end the following:

“(e) NONAPPLICABILITY OF CERTAIN LIMITATIONS.—In the case of an offense described in subsection (a) and further described in subsections (c)(1) and (c)(3), an indictment may be found or an information may be instituted at any time without limitation.

“(f) Certification Requirement.—

“(1) IN GENERAL.—No prosecution for an offense described in subsection (a) shall be undertaken by the United States except on written certification of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated, that a prosecution by

the United States is in the public interest and necessary to secure substantial justice.

“(2) OFFENDER PRESENT IN UNITED STATES.—For an offense for which jurisdiction exists under subsection (b)(2)(B) (and does not exist under any other provision of subsection (b)), the written certification required under paragraph (1) of this subsection that a prosecution by the United States is in the public interest and necessary to secure substantial justice shall be made by the Attorney General or the Deputy Attorney General, which function may not be delegated. In issuing such certification, the same official shall weigh and consider, among other relevant factors—

“(A) whether the alleged offender can be removed from the United States for purposes of prosecution in another jurisdiction; and

“(B) potential adverse consequences for nationals, servicemembers, or employees of the United States.

“(g) INPUT FROM OTHER AGENCY HEADS.—The Secretary of Defense and Secretary of State may submit to the Attorney General for consideration their views generally regarding potential benefits, or potential adverse consequences for nationals, servicemembers, or employees of the United States, of prosecutions of offenses for which jurisdiction exists under subsection (b)(2)(B).

“(h) NO JUDICIAL REVIEW.—Certifications under subsection (f) and input from other agency heads under subsection (g) are not subject to judicial review.

“(i) RULES OF CONSTRUCTION.—Nothing in this section shall be construed as—

“(1) support for ratification of or accession to the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002; or

“(2) consent by the United States to any assertion or exercise of jurisdiction by any international, hybrid, or foreign court.”.

3. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, §§ 5948, 6512 (2023):

SEC. 5948. UKRAINE INVASION WAR CRIMES DETERRENCE AND ACCOUNTABILITY ACT.

(a) SHORT TITLE.—This section may be cited as the “Ukraine Invasion War Crimes Deterrence and Accountability Act”.

(b) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) in its premeditated, unprovoked, unjustified, and unlawful full-scale invasion of Ukraine that commenced on February 24, 2022, the military of the Government of the Russian Federation under the direction of President Vladimir Putin has committed war crimes that include but are not limited to—

(A) the deliberate targeting of civilians and injuring or killing of noncombatants;

(B) the deliberate targeting and attacking of hospitals, schools, and other non-military buildings dedicated to religion, art, science, or charitable purposes, such as the bombing of a theater in Mariupol that served as a shelter for noncombatants and had the word “children” written clearly in the Russian language outside;

(C) the indiscriminate bombardment of undefended dwellings and buildings;

(D) the wanton destruction of property not justified by military necessity;

(E) unlawful civilian deportations;

(F) the taking of hostages; and

(G) rape, or sexual assault or abuse;

(2) the use of chemical weapons by the Government of the Russian Federation in Ukraine would constitute a war crime, and engaging in any military preparations to use chemical weapons or to develop, produce, stockpile, or retain chemical weapons is prohibited by the Chemical Weapons Convention, to which the Russian Federation is a signatory;

(3) Vladimir Putin has a long record of committing acts of aggression, systematic abuses of human rights, and acts that constitute war crimes or other atrocities both at home and abroad, and the brutality and scale of these actions, including in the Russian Federation republic of Chechnya, Georgia, Syria, and Ukraine, demonstrate the extent to which his regime is willing to flout international norms and values in the pursuit of its objectives;

(4) Vladimir Putin has previously sanctioned the use of chemical weapons at home and abroad, including in the poisonings of Russian spy turned double agent Sergei Skripal and his daughter Yulia and leading Russian opposition figure Aleksey Navalny, and aided and abetted the use of chemical weapons by President Bashar al-Assad in Syria; and

(5) in 2014, the Government of the Russian Federation initiated its unprovoked war of aggression against Ukraine which resulted in its illegal occupation of Crimea, the unrecognized declaration of independence by the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic” by Russia-backed proxies, and numerous human rights violations and deaths of civilians in Ukraine.

(c) STATEMENT OF POLICY.—It is the policy of the United States—

(1) to collect, analyze, and preserve evidence and information related to war crimes and other atrocities committed during the full-scale Russian invasion of Ukraine that began on February 24, 2022, for use in appropriate domestic, foreign, and international courts and tribunals prosecuting those responsible for such crimes consistent with applicable law, including with the American Service Members’ Protection Act of 2002 (22 U.S.C. 7421 et seq.);

(2) to help deter the commission of war crimes and other atrocities in Ukraine by publicizing to the maximum possible extent, including among Russian and other foreign military commanders and troops in Ukraine, efforts to identify and prosecute those responsible for the commission of war crimes during the full-scale Russian invasion of Ukraine that began on February 24, 2022; and

(3) to continue efforts to identify, deter, and pursue accountability for war crimes and other atrocities committed around the world and by other perpetrators, and to leverage international cooperation and best practices in this regard with respect to the current situation in Ukraine.

(d) REPORT ON UNITED STATES EFFORTS.—Not later than 90 days after the date of the enactment of this Act, and consistent with the protection of intelligence sources and methods, the President shall submit to the appropriate congressional committees a report, which may include a classified annex, describing in detail the following:

(1) United States Government efforts to collect, analyze, and preserve evidence and information related to war crimes and other atrocities committed during the full-scale Russian invasion of Ukraine since February 24, 2022, including a description of—

(A) the respective roles of various agencies, departments, and offices, and the interagency mechanism established for the coordination of such efforts;

(B) the types of information and evidence that are being collected, analyzed, and preserved to help identify those responsible for the commission of war crimes or other atrocities during the full-scale Russian invasion of Ukraine in 2022; and

(C) steps taken to coordinate with, and support the work of, allies, partners, international institutions and organizations, and nongovernmental organizations in such efforts.

(2) Media, public diplomacy, and information operations to make Russian military commanders, troops, political leaders and the Russian people aware of efforts to identify and prosecute those responsible for the commission of war crimes or other atrocities during the full-scale Russian invasion of Ukraine in 2022, and of the types of acts that may be prosecutable.

(3) The process for a domestic, foreign, or international court or tribunal to request and obtain from the United States Government information related to war crimes or other atrocities committed during the full-scale Russian invasion of Ukraine in 2022.

(e) DEFINITIONS.—In this section:

(1) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term “appropriate congressional committees” means—

(A) the Committee on Foreign Affairs, the Committee on the Judiciary, the Committee on Armed Services, and the Permanent Select Committee on Intelligence of the House of Representatives; and

(B) the Committee on Foreign Relations, the Committee on the Judiciary, the Committee on Armed Services, and the Select Committee on Intelligence of the Senate.

(2) ATROCITIES.—The term “atrocities” has the meaning given that term in section 6(2) of the Elie Wiesel Genocide and Atrocities Prevention Act of 2018 (Public Law 115–441; 22 U.S.C. 2656 note).

(3) WAR CRIME.—The term “war crime” has the meaning given that term in section 2441(c) of title 18, United States Code.

[. . .]

SEC. 6512. INTELLIGENCE COMMUNITY COORDINATOR FOR RUSSIAN ATROCITIES ACCOUNTABILITY.

(a) DEFINITIONS.—In this section:

(1) APPROPRIATE COMMITTEES OF CONGRESS.—The term “appropriate committees of Congress” means—

(A) the congressional intelligence committees;

(B) the Subcommittee on Defense of the Committee on Appropriations of the Senate; and

(C) the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives.

(2) ATROCITY.—The term “atrocities” means a war crime, crime against humanity, or genocide.

(3) COMMIT.—The term “commit”, with respect to an atrocity, includes the planning, committing, aiding, and abetting of such atrocity.

(4) FOREIGN PERSON.—The term “foreign person” means a person that is not a United States person.

(5) RUSSIAN ATROCITY.—The term “Russian atrocity” means an atrocity that is committed by an individual who is—

(A) a member of the armed forces, or the security or other defense services, of the Russian Federation;

(B) an employee of any other element of the Russian Government; or

(C) an agent or contractor of an individual specified in subparagraph (A) or (B).

(6) UNITED STATES PERSON.—The term “United States person” has the meaning given that term in section 105A(c) of the National Security Act of 1947 (50 U.S.C. 3039).

(b) INTELLIGENCE COMMUNITY COORDINATOR FOR RUSSIAN ATROCITIES ACCOUNTABILITY.—

(1) DESIGNATION.—Not later than 30 days after the date of the enactment of this Act, the Director of National Intelligence shall designate a senior official of the Office of the Director of National Intelligence to serve as the intelligence community coordinator for Russian atrocities accountability (in this section referred to as the “Coordinator”).

(2) DUTIES.—The Coordinator shall oversee the efforts of the intelligence community relating to the following:

(A) Identifying, and (as appropriate) disseminating within the United States Government, intelligence relating to the identification, location, or activities of foreign persons suspected of playing a role in committing Russian atrocities in Ukraine.

(B) Identifying analytic and other intelligence needs and priorities of the intelligence community with respect to the commitment of such Russian atrocities.

(C) Addressing any gaps in intelligence collection relating to the commitment of such Russian atrocities and developing recommendations to address any gaps so identified, including by recommending the modification of the priorities of the intelligence community with respect to intelligence collection.

(D) Collaborating with appropriate counterparts across the intelligence community to ensure appropriate coordination on, and integration of the analysis of, the commitment of such Russian atrocities.

(E) Identifying intelligence and other information that may be relevant to preserve evidence of potential war crimes by Russia, consistent with the public commitments of the United States to support investigations into the conduct of Russia.

(F) Ensuring the Atrocities Early Warning Task Force and other relevant departments and agencies of the United States Government receive appropriate support from the intelligence community with respect to the collection, analysis, preservation, and, as appropriate, dissemination, of intelligence related to Russian atrocities in Ukraine.

(3) PLAN REQUIRED.—Not later than 30 days after the date of enactment of this Act, the Director of National Intelligence shall submit to the appropriate committees of Congress—

(A) the name of the official designated as the Coordinator pursuant to paragraph (1); and

(B) the strategy of the intelligence community for the collection of intelligence related to Russian atrocities in Ukraine, including a detailed description of how the Coordinator shall support, and assist in facilitating the implementation of, such strategy.

(4) ANNUAL REPORT TO CONGRESS.—

(A) REPORTS REQUIRED.—Not later than May 1, 2023, and annually thereafter until May 1, 2026, the Director of National Intelligence shall submit to the appropriate committees of Congress a report detailing, for the year covered by the report—

(i) the analytical findings and activities of the intelligence community with respect to Russian atrocities in Ukraine; and

(ii) the recipients of information shared pursuant to this section for the purpose of ensuring accountability for such Russian atrocities, and the date of any such sharing.

(B) FORM.—Each report submitted under subparagraph (A) may be submitted in classified form, consistent with the protection of intelligence sources and methods.

(C) SUPPLEMENT.—The Director of National Intelligence may supplement an existing reporting requirement with the information required under subparagraph (A) on an annual basis to satisfy that requirement with prior notification of intent to do so to the appropriate committees of Congress.

(c) SUNSET.—This section shall cease to have effect on the date that is 4 years after the date of the enactment of this Act.

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