

**ACCOUNTABILITY FOR RUSSIAN
ATROCITIES IN UKRAINE**

HEARING

BEFORE THE

**COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE**

ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

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ACCOUNTABILITY FOR RUSSIAN ATROCITIES IN UKRAINE

WEDNESDAY, MAY 31, 2023

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:17 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Robert Menendez presiding.

Present: Senators Menendez [presiding], Cardin, Shaheen, Coons, Murphy, Kaine, Booker, Van Hollen, Risch, Romney, Ricketts, and Young.

OPENING STATEMENT OF HON. ROBERT MENENDEZ, U.S. SENATOR FROM NEW JERSEY

The CHAIRMAN. The Senate Foreign Relations hearing will come to order.

For well over a year now we have seen the horror of Putin's illegal unprovoked invasion and the brutality he has inflicted on the people of Ukraine. Russian airstrikes have destroyed schools, flattened apartment buildings, killed mothers and babies in maternity wards.

We have witnessed deliberate strikes on bomb shelters where children and their caregivers have gone for protection, attacks on civilian nuclear facilities, and a systematic targeting of civilian infrastructure. It is a nightmare that does not let up.

According to international human rights organizations, Russian forces have occupied government buildings, village schools, airport hangars, whatever they could find, and converted them into makeshift torture chambers where they beat, electrocute, and threaten to mutilate Ukrainian detainees.

They have kidnapped Ukrainian children, raped Ukrainian women and girls, executed Ukrainian men, and starved innocent Ukrainian civilians from Bucha to Kherson to Mariupol.

Make no mistake, these acts are war crimes and crimes against humanity, mass atrocities that Putin and his underlings must be held responsible for. Even as the war rages on in Ukraine, we must do everything we can to gather and preserve evidence on these atrocities to lay the groundwork for justice.

Ambassador Van Schaack, I want to hear from you about what the U.S. Government is doing to support these efforts. I commend the State Department for early on in the war calling Russian atrocities what they are, war crimes, and the Department's determination earlier this year that these crimes amounted to a widespread

and systematic attack against Ukraine's civilian population—in other words, that they are crimes against humanity—is laudable.

Now, Ambassador, I commend you personally for your tireless effort and work shining a light on atrocities around the world to combat impunity, not only for Russian crimes, but also war crimes and crimes against humanity in countless other conflicts from Burma, to Syria, to Ethiopia to North Korea, but it cannot just be you and your colleagues at the Department of State and Justice. Our entire government and the international community must always follow up with actions.

Ukraine's Prosecutor General has chronicled more than 88,000—88,000—alleged war crimes and crimes against humanity to date. Eighty-eight thousand, and that number continues to grow.

Thanks to the testimony of brave Ukrainians who have suffered unspeakable horrors and risked their lives so that we can know the truth, the world and this body are rallying to seek accountability because not taking concrete actions to bring Putin and those responsible for these atrocities to justice would set a dangerous precedent.

Last year on a bipartisan basis, Congress gave the executive branch important new authorities to provide information and other support to the International Criminal Court's war crimes investigation, and I commend the ICC for issuing arrest warrants for Putin and his so-called commissioner for children's rights.

Here in the United States, while we may be saying the right words and calling out these crimes, the Administration has not used the tools we have provided to help hold Putin accountable.

It is simply inexcusable. It calls into question our resolve and commitment to justice. There are real consequences to this inaction and the rest of the world is taking note.

Now, I know there are many who support assisting the ICC, including our witness today. The State Department has encouraged working with the ICC to bring Putin to justice, but it is no secret that the Department of Defense is the holdup.

I asked the Department of Defense to participate in today's hearing so we could better understand why they are blocking implementation of federal law.

Whatever they are thinking, a refusal to implement the law is unacceptable in this situation, blocking critical U.S. assistance for investigations into atrocities in Ukraine and is dangerous to our system of government.

The Defense Department does not get to pick and choose which laws it will obey. Let me repeat that. The Defense Department does not get to pick and choose which laws it will obey.

The United States needs to provide full support for investigations that could lead to holding Russian officials accountable.

As we continue to hear about Russian forces boiling people's hands in water, systematically raping women while threatening their children, killing innocent civilians in cold blood, we cannot sit and do nothing.

Much of the world has come together in impressive unity in response to this unjust war, but we must make sure our efforts do not end with condemnation. We must seek and deliver accountability.

Ambassador Van Schaack, I look forward to exploring with you what more can be done to ensure that Putin and others are brought to justice for their war crimes, crimes against humanity, and aggression, including by supporting the ICC.

We must show that this is about more than words. There must be and will be accountability for the crimes against the Ukrainian people.

With that, let me turn to the distinguished ranking member, Senator Risch, for his comments.

**STATEMENT OF HON. JAMES E. RISCH,
U.S. SENATOR FROM IDAHO**

Senator RISCH. Thank you, Mr. Chairman.

To start with, let me say that for the record I am in absolute full agreement with the remarks that the chairman made in his opening statement on all the subjects that he covered.

I am glad we are discussing this important subject here today. I wish we would have had time to—had a Ukrainian witness here who could testify as to the horrors, although most of it—that has all been publicized and I understand time is always an issue and I am—like the chairman, I would like to have had somebody here from the Defense Department to talk to us about why they think they do not have to comply with the laws that we pass.

That would make sense. We will—we are not done with that yet. I am sure they know that.

The atrocities Putin has committed in Ukraine very quickly rose to the level of genocide after Russia's full-scale invasion of Ukraine, February 2022. In fact, this committee passed my resolution last Congress labeling the despicable crimes against Ukrainians as such.

Russian forces have deliberately targeted civilians and civilian infrastructure in their campaign to erase Ukraine off the map.

One of the most egregious and blatant crimes was the Russian bombing of a maternity hospital in Mariupol last March. Countless citizens—civilians have been killed in their own beds.

The international community must remain steadfast in documenting and prosecuting Putin's war crimes. The vast range of these crimes requires a multi-pronged response with a variety of jurisdictions to cover every aggressor from the master planners to the foot soldiers.

I welcome the ICC's recent decision to issue arrest warrants for Putin and the Russian commissioner for children's rights for their despicable roles in the deportation of hundreds of thousands of Ukrainians to Russia, in particular children.

The filtration camps where Russia is detaining, interrogating, and torturing Ukrainian citizens before transferring them into Russia are particularly depraved as Russians steal Ukrainian children away from their families by the thousands.

Beyond the ICC's work, the Office of the Ukrainian Prosecutor General has recorded over 85,000 potential war crimes, as the chairman noted. It is important that Ukraine exercise its jurisdiction over crimes it can prosecute domestically.

I am proud that the United States has provided essential assistance for the documentation of the war crimes and this committee is going to see that that is enforced in our oversight capacity.

We cannot allow Putin and his cronies to get away with the vicious crimes they are committing. Impunity is not an option.

I look forward to hearing from you, Ambassador, on the different avenues to pursue justice as well as what else the United States can do to increase its support for accountability for the Ukrainian people.

Thank you, Mr. Chair.

The CHAIRMAN. Thank you, Senator Risch.

As the Ambassador-at-Large for Global Criminal Justice, Ambassador Van Schaack advises the Secretary of State and other department leadership on issues related to the prevention of and response to atrocity crimes including war crimes, crimes against humanity, and genocide.

Ambassador Van Schaack is a world-renowned scholar on human rights law, international justice issues with significant experience in practice and academia.

She taught most recently at Stanford Law School where she directed Stanford's international human rights conflict resolution clinic.

We welcome you, Ambassador. Your full statement will be included in the record without objection. I would ask you to summarize it in about 5 minutes or so—obviously, you see there is a fair amount of interest in the committee—so we can have a conversation with you.

With that, you are recognized.

**STATEMENT OF THE HONORABLE BETH VAN SCHAACK,
AMBASSADOR-AT-LARGE FOR GLOBAL CRIMINAL JUSTICE,
U.S. DEPARTMENT OF STATE, WASHINGTON, DC**

Ambassador VAN SCHAACK. Wonderful. Good afternoon.

Mr. Chairman, Ranking Member Risch, and distinguished members of this committee, thank you so much for the opportunity to address you today. It is really an honor and a privilege to appear before you as the sixth U.S. Ambassador-at-Large for Global Criminal Justice.

Senators, as President Zelensky so aptly noted earlier this month, there can be no peace without justice in Ukraine. This is justice for the millions of people whose lives have been disrupted and destroyed as a result of this senseless, unlawful, unprovoked terrible war of territorial conquest launched by President Putin.

My office, in collaboration with other offices within the U.S. Government and many international partners, sovereign and civil society, is working to strengthen five pathways to justice, to uphold the international norms that we all hold dear, and to ensure that those most responsible for these abuses are held to account. We welcome your support in each.

The first pathway involves international courts and institutions. Our efforts here include working to establish and then to renew the mandate of the United Nations Commission of Inquiry devoted to Ukraine, multiple invocations of the Moscow Mechanism of the Organization for Security and Cooperation in Europe.

We have also sought to intervene in Ukraine's case before—against Russia under the Genocide Convention before the International Court of Justice.

Then, finally, as mentioned, the prosecutor of the International Criminal Court has made his first move, has opened an investigation into the matter in Ukraine and has successfully achieved two arrest warrants.

We are grateful for the bipartisan legislation that Congress has enacted in support of the ICC's investigation in Ukraine, which may be the most consequential war crimes investigation in human history since Nuremberg.

The second pathway to justice aims to strengthen and increase the capacity of Ukrainian institutions to document, investigate, and prosecute crimes in Ukrainian courts. This is the frontline of justice.

The Ukrainian Office of the Prosecutor General as mentioned has now recorded almost 90,000 potentially prosecutable crimes. Through the Atrocity Crimes Advisory Group funded by my office with the European Union and the United Kingdom, we are providing expert assistance and advice, capacity building, expert training on the whole range of prosecutorial and investigative needs of the Prosecutor General, working with them in Kyiv and in the field to strengthen their ability to prosecute these cases and to sift through these 90,000 potential prosecutable crimes.

This includes very focused attention to the scourge of conflagrated sexual violence that we know is rampant in Ukraine, as documented by the United Nations and other reputable bodies.

The third pathway to justice is supporting strategic litigation that may happen in third states. In Europe, we have witnessed the mass mobilization of prosecutorial and investigative authorities operating under the Eurojust umbrella to coordinate strategies, track potential defendants, and share information and evidence.

The United States is participating in these efforts through memoranda of understanding with individual states through engagement with the joint investigative team formed by a number of European states and also by working with civil society organizations, anti-impunity organizations that are providing potential evidence, witnesses, et cetera, to national prosecutorial authorities.

Prosecutions for the crime of aggression offer a fourth pathway to justice. Permitting impunity for Russia's illegal war of aggression will embolden other actors who will engage in similar blatant violations of state sovereignty, territorial integrity, and political independence.

For this reason, we are supporting the establishment of a special tribunal dedicated to the prosecution of the crime of aggression to those most responsible, one that is rooted in Ukraine's domestic system, but that is enhanced by multiple international elements in the form of personnel, expertise, structure, support, information sharing, financing.

The final pathway to justice leads here to the United States. This involves continuing to strengthen U.S. law and ensuring that the United States does not become a safe haven for those who commit international crimes such as those committed in Ukraine, but also elsewhere.

Congress has taken a monumental step in this direction by passing the Justice for War Crimes Act to enhance the federal war crimes statute, but there is more that can be done to provide U.S. prosecutors with the tools they need to prosecute international crimes.

As Deputy Attorney General Lisa Monaco said recently before the Senate Judiciary Committee, the United States lacks a crimes against humanity statute.

Crimes against humanity encompass a range of abuses including murder, torture, rape, when they are committed in the context of a widespread or systematic attack against a civilian population and pursuant to a policy of either a state or an organization to commit that attack.

They can be committed during armed conflict, but also in times of peace and so they can be quite useful in other situations such as in Xinjiang where the PRC has subjected the Uyghurs to a continuous campaign of genocide and crimes against humanity.

Passing crimes against humanity legislation will better align U.S. law with all of our friends and allies and also empower U.S. prosecutors and investigators to prosecute the whole range of international crimes.

Senators, there can be no secure or lasting peace without justice. Holding Russia to account for its war crimes, crimes against humanity, and other atrocities within Ukraine and against the Ukrainian people is foundational to the defense of U.S. values and also the maintenance of a peaceful, just, and secure world.

We welcome the support of Congress to achieve these goals, to advance these five pathways to justice, and to position the United States as a leader in international justice.

With that, I thank you and I welcome your questions.

[The prepared statement of Ambassador Van Schaack follows:]

Prepared Statement of Ambassador Beth Van Schaack

Mr. Chairman, Ranking Member Risch, and distinguished members of the Committee, thank you for the opportunity to appear before you today. It is an honor and privilege to address you as the sixth U.S. Ambassador-at-Large for Global Criminal Justice.

Senators, as President Zelenskyy so aptly noted earlier this month, there can be no peace without justice in Ukraine. Justice for the millions who have had their lives disrupted and destroyed as a result of the senseless, unprovoked, and illegal war of territorial conquest launched by Vladimir Putin.

My office, in collaboration with other parts of the U.S. Government and many international partners, is proceeding along five pathways to justice to uphold the international norms we all hold dear and to ensure those responsible for the abuses we see in Ukraine are held to account. We welcome your support for each.

The first pathway involves international courts and institutions. Our efforts here include working toward the establishment and renewal of the UN Independent International Commission of Inquiry on Ukraine and three invocations of the Moscow Mechanism of the Organization for Security and Co-operation in Europe. The United States has also sought to intervene in support of Ukraine's case before the International Court of Justice against Russia under the Convention on the Prevention and Punishment of the Crime of Genocide. Finally, the Prosecutor of the International Criminal Court has opened an investigation into the Situation in Ukraine, which received an unprecedented number of state referrals. Since then, two arrest warrants have now been issued for the transfer and deportation of Ukrainian children into Russia. We are grateful for the bipartisan legislation Congress has enacted to support the ICC's investigation in Ukraine.

The second pathway aims to increase the capacity of Ukrainian institutions to document, investigate, and prosecute war crimes in Ukrainian courts. The Ukrain-

ian Office of the Prosecutor General has now recorded more than 80,000 incidents that may constitute prosecutable crimes. Through the Atrocity Crimes Advisory Group, alongside the UK and the EU, we are providing expert technical assistance, capacity building, and comprehensive training in international criminal law and practice to assist Ukrainian investigators and prosecutors in Kyiv and out in the field. This includes attention to the scourge of conflict-related sexual violence that has been widely documented by the UN and other bodies.

The third pathway is aimed at supporting strategic litigation in other courts around the world. In Europe, we have witnessed the mass mobilization of prosecutorial and investigative authorities operating under the Eurojust umbrella to coordinate strategies, track potential defendants, and share information and evidence. The United States supports these efforts through memoranda of understanding with different states, through engagement with the Joint Investigative Team that was set up through Eurojust, and by working with civil society organizations that are providing potential evidence to national authorities.

Prosecutions for the crime of aggression offer a fourth pathway to justice. Permitting impunity for Russia's illegal war of aggression will embolden other actors to engage in similar blatant violations of state sovereignty, territorial integrity, and political independence. We are thus supporting the establishment of a special tribunal dedicated to prosecuting those most responsible for the crime of aggression: one that is rooted in Ukraine's judicial system but enhanced with international elements in the form of personnel and expertise, structure, and support (including in terms of funding and cooperation).

The final pathway leads here to the United States. This involves strengthening U.S. law and ensuring that the United States does not offer a safe haven to those who commit international crimes, such as those being committed daily in Ukraine. Congress took a monumental step in this direction by passing *The Justice for Victims of War Crimes Act* to enhance the federal war crimes statute. There is more that can be done to provide U.S. prosecutors with the tools they need to prosecute international crimes. As Deputy Attorney General Lisa Monaco recently testified before the Senate Judiciary Committee, the United States lacks a statute criminalizing crimes against humanity.

Crimes against humanity encompass certain abuses—including murder, torture, and rape—committed as part of a widespread or systematic attack directed against any civilian population and pursuant to or in furtherance of a state or organizational policy to commit such an attack. They can be committed during an armed conflict but can also take place in times of peace, such as the ongoing crimes against humanity and genocide that PRC authorities have continued to inflict on Uyghurs and members of other ethnic and religious groups in Xinjiang. Passing crimes against humanity legislation will better align U.S. law with that of our friends and allies and empower U.S. prosecutors and investigators to prosecute the whole range of international crimes.

Senators: there can be no secure or lasting peace without justice. Holding Russia to account for its war crimes and other atrocities within Ukraine and against its people is foundational to the defense of U.S. values and the maintenance of a peaceful, just, and secure world. We welcome support from Congress to achieve these goals, advance each of these pathways to justice, and position the United States as a leader in international justice. Thank you and I welcome your questions.

The CHAIRMAN. Thank you, Ambassador. We will start a round of 5 minutes.

Last year I was at the International Criminal Court at the Hague. I spoke with the Prosecutor General of the Hague. We had a good conversation.

I understand that the Department of Defense has expressed concerns that assisting the ICC's investigation could open the door to prosecutions of U.S. service members, something that has largely been dismissed by legal experts.

I raised this issue with the Prosecutor General. It was not his intention by any stretch of the imagination to do that. If anything, he actively solicited the support of the United States, particularly in information to substantiate the cases.

Do you share the concerns that has been raised by the Department of Defense?

Ambassador VAN SCHAACK. I will say at the outset that in my role as the lead diplomat in the international justice space I would work tirelessly to ensure that no U.S. personnel would be brought before the ICC if that were ever to come to pass again.

I do not think that that is an acute risk at this time. The prosecutor has already announced that he has deprioritized any investigation into international forces in Afghanistan and is instead turning his attention as is appropriate to ongoing crimes against humanity being committed by the Taliban, by ISIS-K, and by other nonstate actors in Afghanistan.

In addition, we know that the court operates under a principle of complementarity so that if the national system steps up, the court will step back.

That is what the prosecutor has said, and we have a robust system of military justice and we now have the new War Crimes Act, and so we are in a very good position to take care of any matters that might emerge in the future in some future hypothetical situation.

I do not think the argument that by assisting in this matter, which involves the nationals of a nonstate party, we are at all undermining our ability to robustly protect against any charges that might be brought or any interest in U.S. personnel in the future.

The CHAIRMAN. I appreciate that analysis because my own discussion with him in front of other members—our members—he said exactly the same thing. I do not understand why the Department of Defense is not providing critical information so that we can ultimately get accountability here.

Why does the State Department support providing information and other assistance to the ICC's Ukraine investigation? What do we have to contribute to the cause? You mentioned some of it in your opening statement. How critical is our assistance versus other sources?

Ambassador VAN SCHAACK. It is extremely hard to imagine the United States standing on the sidelines in this investigation, given all that we have done, the investment that we have made in Ukraine, the investment that we have made in pursuing justice in Ukraine.

We are uniquely positioned to assist with this investigation, given the unique assets that we have, the intelligence that we have, the brilliance of our diplomats and our subject matter and regional experts within the State Department and elsewhere.

There are many ways that we could be supporting this investigation, including with respect to witness protection, insider witnesses that may want to give testimony. All of that are ways that we have in the past assisted with international prosecutions before international and hybrid courts.

There are a range of ways that we could be of assistance and none of that would, I think, jeopardize. In fact, I think it strengthens our position vis-à-vis the court because it shows us that engagement works.

It is important to maintain open lines of communication with international organizations, not just the court, but other international organizations that might make decisions that we might disagree with.

It is important to engage in constructive helpful assistance when we can because that shows that we are a good faith trusted partner in this regard.

When we have issues with an international organization, we know who to call. We have lines of communication open. We have built a relationship of trust that we can then rely on and call upon if we are ever again finding ourselves in a defensive posture.

The CHAIRMAN. Senator Coons, who was with me on this trip and who has been pursuing some legislation in this regard, heard the same thing and one of the things that we heard is that the ICC has never had the nature of the challenge of a nation state as large as Russia as an adversary, in a sense, of course, because Putin dictates what that nation state does.

For example, how does the ICC protect witnesses who speak truth to power about Putin's atrocities, the reach of—we have seen in the Skripal and other attacks of what Russia is capable of doing, going far outside of its borders into other countries to pursue people who speak out against the regime?

What more does the ICC need to do to protect witnesses and victims to protect its own security and cybersecurity infrastructure? This is unlike anything the ICC has ever undertaken and so can you speak to that?

Ambassador VAN SCHAACK. You are exactly right and I have heard the same thing in my visits to the Hague and when the registrar and other key principals of the ICC have come here to the United States.

The court feels like it is under assault. This is an adversary like they have never seen and it has the skills and ability to infiltrate the institution in ways that previous situation countries did not present.

You may have read recently there was an attempt to place an intern that was masquerading as a Brazilian graduate student. We are now prosecuting that individual for spying and other measures here in the United States because they were living undercover here.

These are the means that they are taking in order to try and protect themselves against this particular investigation, and given our tech sector, given our excellent cybersecurity understanding and skills and personnel, we are again uniquely positioned to be able to audit what sort of protections the court has and to be able to make recommendations about how they can strengthen their ability to protect evidence, but also to protect those witnesses.

No matter how much open source evidence is out there and we know it is—there is reams, terabytes, being generated—these cases still always will rely upon individuals, as you say, willing to speak truth to power, willing to step up and put themselves and their families at risk because they can tell a story.

They can bear witness to what they have experienced. We need to keep those individuals safe or these cases will not be able to proceed effectively.

The CHAIRMAN. We need to keep them alive.
Senator Risch.

Senator RISCH. Thank you, Mr. Chairman.

Ambassador, I think it is pretty obvious to most people that the issue we are talking about here is not a partisan issue. Do you agree with me in that regard?

Ambassador VAN SCHAACK. I do, and I really do appreciate the bipartisan cooperation that we have seen here on the new legislation and just in supporting my work and the work of my office and this whole portfolio.

Senator RISCH. I appreciate that. There are some loud voices who dissent that—about our—any involvement in Ukraine and they get a lot of ink, but my experience up here in Congress is that that is a pretty thin, thin layer. Are you in agreement with that with your dealings with Congress?

Ambassador VAN SCHAACK. I do. I feel like I have had nothing but support from many of the members and the staffers that I have spoken with.

Senator RISCH. All right. I appreciate that.

Interesting, the—both the chairman and I talked about it in their opening statements, the fact that the—for whatever reason the Department of Defense is pushing back on doing what we, Congress, told them to do and as the chairman has indicated, we are not going to tolerate an agency saying, well, we do not like that law so we are not going to enforce it. We will be doing something about that.

The other thing I would point out for the record here is that I was intimately involved in drawing that legislation. Obviously, when you are dealing with the ICC, you are always cognizant of the fact that there could be pitfalls and that there could be a problem putting U.S. servicemen in jeopardy.

We scrupulously avoided that and had specific language to see that that did not happen. Yet, we wind up with the same criticism after it has passed.

Again, I want to note for the record I was not contacted by anybody from the Department of Defense as we drafted that legislation.

We did not draft it under a bushel basket. It was out in the open. We put out the text. Nobody came forward and said this was a problem and now they are talking about it being a problem.

I hope you will join us in pressing them to do what certainly needs to be done here.

Ambassador VAN SCHAACK. Yes. Thank you, Senator. I agree that the legislation is very carefully crafted. It is surgical, in fact, and all of the other protections of the American Service Members Protection Act remain in place, in addition to the more than 100 bilateral treaties that the State Department negotiated with partners in which the various parties promised not to refer their nationals to the court.

All of those protections remain in place. There are ways that we can provide assistance without jeopardizing U.S. personnel.

Senator RISCH. Well, and that is exactly what it was designed to do. It was to provide assistance without in any way affecting the other strong provisions that have been in place for many, many years and has worked—have worked very well. Glad to hear you reiterate that and we will be reiterating it with the Department of Defense soon.

Could you go into—with your background and experience and legal training, could you talk about in detail how an international tribunal for the crime of aggression could be established to address Russia's actions in Ukraine? I am talking about now something—I guess what I envision in that regard is something separate from ICC.

Ambassador VAN SCHAAK. Right.

Senator RISCH. I would really appreciate hearing your thoughts on this.

Ambassador VAN SCHAAK. You are exactly right that the ICC does not have jurisdiction over the crime of aggression in this matter because Russia has not ratified the Rome Statute. That has given rise to proposals to establish a dedicated special tribunal in this regard.

The Ukrainians see the crime of aggression as the original sin, essentially, that unleashed all of the other war crimes and crimes—

Senator RISCH. Rightfully so.

Ambassador VAN SCHAAK. Rightfully so, and that is why we are indeed supporting the creation of this. As we looked at the different models and as I drew upon my own academic experience, but my experience as a practitioner with international and hybrid tribunals, I was guided by five main principles.

Number one, we want to maximize accountability for the crime of aggression.

Number two, we want to create an institution that is nimble and efficient in its ability to work.

Number three, we want to create an institution that is legally sound within the U.N. Charter system and under the extant international law.

Number four, we want to make sure that this is complementary to other efforts that are out there, including the ICC, but also the International Center for the Prosecution of Aggression that has been stood up in the Hague.

Then, finally, we want to garner widespread, cross-regional, international support for this effort. In looking at all of those factors and at the various models we have landed upon a proposal for an internationalized special chamber or special tribunal that would be deeply rooted within the Ukrainian national system, but would benefit from assistance from a number of international sources. States, even private sector could be assisting this endeavor.

This could take the form of secondments of personnel in the way that the United States has always done with international courts and courts around the world. It could take the form of funding, information sharing, cooperation.

This entity could be based outside of Ukraine for security reasons, but then moved back into Ukraine when the time was ripe, and it has the added benefit of continuing to invest in the Ukrainian judicial system, prosecutorial authorities, et cetera, which we know will pay long dividends into the future as Ukraine continues to modernize and to reform itself and to align itself with the rest of Europe.

That is why we have and are proposing an internationalized tribunal. We are promoting this in an entity called the “Core Group”

that Ukraine has convened in order to bring experts together both at a diplomatic level, but also at a technical level to explore the various models and to try and find a consensus to be able to move forward.

Senator RISCH. That is a really important effort. I know I am out of time, but I want to ask—pursue one more question, if I might.

I was fascinated—as we all know, common law develops, whether it is the Anglo-Saxon common law, whether it is international law, and I was fascinated by the—I think it was the Germans' use of what one would call international jurisdiction or unified jurisdiction.

I forget the exact name that they used. They actually used it and convicted some people as a result of atrocities in Syria.

How does—first of all, are you familiar with the concept? I assume you are.

Ambassador VAN SCHAACK. Yes.

Senator RISCH. Then, secondly, is there some thought given to using that as a jurisdictional foundation for this type of an organization we are thinking about setting up?

Ambassador VAN SCHAACK. Yes. You are referring, I think, to universal jurisdiction or extra territorial jurisdiction. The United States has that in our own penal code. We call it present in jurisdiction because we do have usually an added requirement that the defendant be present here in the United States.

It does not matter the nationality of the perpetrator, the nationality of the victim, or the place where the crime was committed. Because these are international crimes, all states have been essentially deputized to prosecute these crimes.

I am very familiar with the German experience. It has been remarkable to see. They have been able to move against high-level figures of the Assad regime in Syria and also members of ISIL who have found themselves in Germany, and they have, I think, in many respects inspired other European states to utilize crimes that were on the books, but that had not really been used.

Aggression does not work as well under that model precisely because many states have not codified the crime of aggression in their domestic penal codes.

Ukraine does have a provision. It is sort of a sovereign trespassing kind of a provision and they are doing some active prosecutions now for that crime within their domestic system.

I think they would like to see an internationalized effort because they see Russia's war as not just an assault on their territory, but an assault on the whole international rules-based order, the U.N. Charter system writ large, and they want the international community involved in this effort.

That is a secondary reason to, I think, pursue more of an internationalized body that would have a lot of international support.

Senator RISCH. I guess I would not be as concerned—I detected you are a bit concerned with countries not having a specified statute in place regarding this.

I guess where we are plowing new ground on this new jurisdictional idea—I guess I would not be as concerned about the fact that they are—that other countries did not necessarily have that in their body of law. I hope you will give that some thought.

Ambassador VAN SCHAACK. Yes. It just means they would have to prosecute for war crimes or crimes against humanity and often, you can imagine, cumulative charges that would make perfect sense.

Many of the acts of aggression are being committed by virtue of war crimes, attacks on critical elements of the civilian infrastructure. It can be done is the short answer.

Senator RISCH. Thank you. Thank you.

Ambassador VAN SCHAACK. Thank you.

Senator CARDIN [presiding]. Thank you. I am going to follow up on Senator Risch's point and reference a resolution that Senator Kaine and I filed today that supports your efforts for an international tribunal, but takes a different approach to that and I want to go through that with you, if I might.

There is no question about Russia's crime of aggressions, no question about their committing crimes against humanity and genocide. We have had hearings in this committee that have established that.

We have had hearings in the U.S. Helsinki Commission that has established the fact that this—all the conditions for genocide have been committed by Russia.

Yes, I strongly support our efforts to help the ICC. I strongly support our efforts to help the Ukrainian prosecutor in any way that we can, but these are crimes against humanity and they really do need an international tribunal, as you have acknowledged.

The problem with the approach that you are taking within the Ukrainian model is that you are using the Ukrainian system and it raises the question of perceived impartiality.

I do not know how you overcome that with the method that you are pursuing. You also will have legal immunity claims because the entity that has committed or the individuals who have committed these crimes are not going to be party to this.

To me, there is a very simple approach—establish it under the United Nations. That is the international body that is responsible, ultimately, for international tribunals.

It is—not only would bring appropriate attention to this—these atrocities, but gives us a pathway to accountability and gives us the greatest hope that it will deter future atrocities.

Tell me how—why we are not going through the entity that would remove any question of perceived impartiality and any question of immunity.

Ambassador VAN SCHAACK. Yes. Thank you for that question, Senator. A couple of responses.

Number one, I think there are serious concerns moving forward under the General Assembly on the legal front, but also on the practical front.

Starting with the legal front, the body within the United Nations system that has executive power is the Security Council. Of course, it is completely paralyzed at this matter because Russia has the privilege of the veto and it—

Senator CARDIN. I agree that normally it is Security Council, but the General Assembly has the ultimate power in the United Nations.

Ambassador VAN SCHAACK. The General Assembly, however, under the charter system can only make recommendations. It cannot take coercive action. It cannot compel states to act nor can it compel states to cooperate with anything.

The legal question is could the General Assembly create a court that could exercise compulsion against an individual, hold an individual, restrict their liberty.

Senator CARDIN. Do you not think they have a stronger claim than one state establishing an international tribunal under their law?

Ambassador VAN SCHAACK. Well, it would be an internationalized tribunal so ultimately the font—

Senator CARDIN. Whether you are using the Ukrainian system there—

Ambassador VAN SCHAACK. Right.

Senator CARDIN. —this is international. I think you run into a comparable if not more severe challenge to the legitimacy of the body—of the entities that would be coming before the tribunal.

Ambassador VAN SCHAACK. I mean, as my civil procedure professor used to always say, jurisdiction is power, and so the font of power with this Ukrainian model is through the Ukrainian national system, which has plenary jurisdiction over crimes committed on Ukrainian territory.

The General Assembly does not necessarily—it is not clear. This would be breaking some serious new ground to try and exercise coercive jurisdiction over an unwilling defendant and then to subject that defendant to limitations on their liberty if that person was ultimately convicted.

That is the legal concern, but I do want to talk about the practical concern, which is speaking to our diplomats in New York there is some serious concern about whether we have the votes within the General Assembly to create a body of this nature.

If you look at the voting patterns, what we see is general resolutions that are calling for justice, condemning Russia's actions, et cetera, garner in the range of 140 votes. The minute that the General Assembly is asked to do something, that drops considerably.

Even just blessing the creation of a register of damage got only 90-something votes. Kicking Russia off the Human Rights Council garnered only 93 votes, and there is serious concern that some of the kind of states that do not want to get caught in the revival of Cold War dynamics, they do not want to be on record here voting for something, they would abstain and so you would lose the legitimacy that comes from a strong vote.

Senator CARDIN. Oh, I understand we do not go down that path unless we had the votes.

Ambassador VAN SCHAACK. Right.

Senator CARDIN. I recognize that, but I would think that we know how to engage other countries. It cannot be a sole U.S. effort. The United States cannot sit on the sidelines, as you pointed out. It has got to be a collective action. You have got to nurture this before you take it to a vote.

It seems to me that the legitimacy here and the final attention given to accountability is worth the consideration and I would just

urge you to—I am glad to see that you are looking for an international tribunal. I think you need one.

I just do not know how you can get the—remove the perceived challenges when you are using a one-country legal system for an international tribunal. To me as an attorney, that seems like it is problematic for the type of attention you are trying to get in international legitimacy.

Ambassador VAN SCHAACK. There are legal questions as to whether—and I want to just stress your two prior questions about immunity and about impartiality as well and that is a nice segue to that.

There are some questions about whether any tribunal created under the General Assembly or within the Ukrainian system could overcome the head of state immunity of members of the so-called troika. That would, again, be an issue of first impression, really, here.

In this case, the assumption is that we would not have custody over President Putin or other members of the troika unless they were no longer in those positions, in which case either an internationalized Ukrainian court or an international body would be free to assert jurisdiction because head of state immunity dissipates when the person is no longer in that position.

On the impartiality question, I think the response to that is the international community needs to step up and invest in this process within Ukrainian courts and that ensures that it does not appear to be some version of victor's justice, that this is, in fact, scrupulously fair, that every defendant is entitled to the full due process protections, and that only those cases that are based upon the evidence and that merit conviction are actually brought to justice.

Senator CARDIN. I would just point out I think you have the same problems of getting international cooperation for an international tribunal under Ukrainian as you would under General Assembly, perhaps even more.

Senator Ricketts.

Senator RICKETTS. Great. Thank you very much, Mr. Chairman. Thank you, Madam Ambassador.

Starting in April of last year, there were horrific images of corpses littering the streets of Bucha surfaced and made the entire world realize that Putin's goal was not just territorial conquest in Ukraine, but the brutal repression of the Ukrainian people and the nightmare that began in Bucha continues to this day in Ukraine and that is why this hearing is so important.

The Ukrainian people deserve justice and I want to thank you, Madam Ambassador, for your efforts to help get the Ukrainian people that justice.

Even though we are talking about a lot of the legal and jurisdictional aspects of how to bring Putin and his cronies to justice, I want to make clear that in the short-term, the biggest single thing we can do to make sure Ukraine and the Ukrainian people get justice is to make sure that Ukraine wins and Putin loses. That has to happen.

That is where, if you just think about what the Biden administration has been doing, it has been slow to respond to the request for Ukraine with regard to the types of weapons they need. Wheth-

er it is the advanced HIMARS rockets, the Patriot missile systems, Abrams tanks, and now F-16 training, it seems like they are always a step behind, almost as if they are trying to live up to Winston Churchill's axiom about Americans that we will do the right thing after we have exhausted all other possibilities.

In this case, this erratic and slow behavior is costing the Ukrainians the opportunity to achieve the victory and also costing Ukrainians' lives, but the question I want to get into has to do with the abduction that Senator Risch mentioned about of Ukrainian children. According to Ukrainian national databases, Russia has forcibly transferred over 19,000 Ukrainian children to its territory. However, this number is likely—like much higher.

Some children have been taken from occupied areas where their parents were asked to sign a release form without being told that their children would be taken away and not coming back. Others, including those whose parents were killed by Russian forces, have been forcibly adopted into Russia.

In February, Yale University's Humanitarian Research Lab identified 32 integration camps where children are indoctrinated in Russian history, propaganda, language, and culture.

These monstrous abductions are part of a general genocide, which we have talked about already, to erase Ukraine's identity by stealing their future.

They have rightly been condemned as a war crime by the international community and with the ICC issuing an arrest warrant in March for Vladimir Putin and his children's rights commissioner, Maria Lvova-Belova.

Even though we have focused our information on this—sort of attention on this, the Ukrainian Government's NGOs, advocates, have been trying to get these children back, but the number is around 400 out of the potential 19,000 or more.

What more, Ambassador, can be done to assist parents? As a father of three children myself, this is the most heart-rending thing I can think of is having your children taken away from you never to see them again. What else can we be doing?

Ambassador VAN SCHAACK. Yes. It is a horrific feature of this war. I absolutely agree with you as a mother of two. It is terrifying to imagine what those children are experiencing and the anguish that those parents must feel, and I know that there are multiple efforts afoot.

Some of them are in the accountability space, but there is also very quiet humanitarian work being done to try and get those children back and create a list of them so we know when they were last seen, where they may have gone, trying to utilize open source investigative techniques to identify them in photographs, for example, that the Russians are trotting out of happy Ukrainian citizens as they are now being subjected to Russification and reeducation to forget their home culture.

There is much that can be done here. I was quite happy to see the ICC move forward on this as their first set of charges. It is a grave breach of the Geneva Conventions and it will be interesting to see whether there are additional charges forthcoming on the basis of that.

I share your concern and I think this is something we should be working across government to rectify.

Senator RICKETTS. Is there enough legal support for these families to be able to help recover their children?

Ambassador VAN SCHAACK. There are. There are. I have been to Ukraine and I met with the team that is focused on the families, the survivors, and they are working very hard to get them the resources they need in order to try and find where those children are and do what they can to get them back.

Many times it requires parents traveling to Russia to actually physically bring their children back and they are doing that, which is remarkable.

Senator RICKETTS. What about targeting the perpetrators of this for—again, for war crimes, prosecution, all that? Are we doing enough there to be able to target the people who are facilitating this?

Ambassador VAN SCHAACK. Well, what is remarkable about this particular crime is that the two key defendants now have essentially admitted to it and have bragged about it and have praised each other for what they claim to be doing on a humanitarian basis, when we in fact know there is no humanitarian grounds to be doing this when—especially when it is Russia itself that is creating the dire circumstances that put those children at risk in the first place.

The Yale study that you mentioned, which is funded by the State Department, they are looking through a whole series of open source information including many of these photographs and trying to use facial recognition software, for example, to identify individuals who may be future defendants in cases under war crimes and crimes against humanity for this crime base.

Senator RICKETTS. Mr. Chairman, may I just add one more question? Thank you.

Also, last week I think, the Ukrainian Government was talking about Belarus' complicity in removing about 2,000 Ukrainian children. What is the State Department doing with regard to Belarus and them going along with this horrible crime?

Ambassador VAN SCHAACK. Yes. Belarus—there is no question—is quite complicit in Russia's war of aggression in Ukraine and I think it is important to focus when we think about this aggression tribunal that Belarus and Belarusian individuals could also be subjected to prosecution under this tribunal.

We tend to focus on Russia, but to the extent that they are complicit, and one of the grounds of committing the crime of aggression is allowing your territory to be used to launch acts of aggression against a third state, and so Belarus is very much implicated in this set of crimes.

Senator RICKETTS. Great. Thank you very much, Madam Ambassador.

Ambassador VAN SCHAACK. Thank you.

Senator RICKETTS. Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman, and thank you, Ambassador, for being here.

There has been a fair amount of discussion about the Justice for Victims of War Crimes Act that was passed. I was proud to be a co-sponsor of that and I know that, as the chairman and others have mentioned, there have been obstacles to actually fully implementing the legislation.

Can you talk about—we have talked about DoD. I understand the National Security Council has also been an obstacle.

Can you talk about how you are working in the interagency process to actually administer this legislation and are there other barriers that you have encountered that this committee could be helpful with or the Congress could be helpful with?

Ambassador VAN SCHAACK. Yes. Thank you. We do proceed on the basis of an interagency consensus and so we are working very hard to reach that consensus.

Those conversations remain ongoing and we are very grateful to the new legislation. I know the Department of Justice as well is quite happy with the new prosecutorial authorities that they have.

They have created this War CAT—the War Crimes Accountability Team. They have been appointed a very seasoned senior prosecutor to be the war crimes counselor focused on looking at those cases that might have a U.S. nexus as well and contributing to what our friends and allies are doing in their own national systems within Europe. It is really a full court press here.

Senator SHAHEEN. Are you also discussing the idea of restitution and reconstruction? I notice that one of the asset forfeiture items the—those dollars were put towards Ukrainian reconstruction. Are you discussing how that will unfold as well and can you give us some insights into that?

Ambassador VAN SCHAACK. That is right. In fact, we have had the first circumstance in which an asset has been able to be liquidated, which is really exciting to see. This is going to be an enormous endeavor to rebuild, reconstruct Ukraine, given the damage that has been wrought by Russia's war of aggression.

The Ukrainians have put forward a proposal for a register of damages. That has been very well received by the international community and, indeed, the Council of Europe recently at its summit, which had not held a summit for several decades, has blessed this project. It will be based in the Hague.

The idea is that individuals, entities, groups, businesses can register the damage that they have experienced at the hands of Russian perpetrators, that when there are a body—a pool of assets made available those could go towards helping to assist those individuals to compensate them for the harm—the tangible harm, the psychological harm—but also the business harm that small businesses have experienced.

The idea is to build eventually some sort of a claims commission that would be able to adjudicate those claims and help those individuals and businesses get back on their feet.

Senator SHAHEEN. I think that would really be helpful and if there is anything that we can do to be—to support that please let us know.

Ambassador VAN SCHAACK. Great. Thank you.

Senator SHAHEEN. You also talked about the commission on aggression that could be formed. One of the other sad commentaries

on so many conflicts is the sexual assault and rape element that is so much a part of crimes and particularly war crimes and, obviously, we have seen a number of reports about that with respect to the war in Ukraine.

One suggestion that has been made to me and I would like to get your analysis of, is the idea of setting up a separate commission that deals only with those sex crimes.

Do you have any thoughts about whether that might be helpful and if that would set up a duplicate process that would not be helpful or if—because that has been such a focus of so many conflicts that that would help to shine a light on our ability to address those kinds of crimes?

Ambassador VAN SCHAACK. Yes. Thank you, Senator Shaheen.

We know that these crimes are historically underreported and under prosecuted and for the reasons that we all understand, including stigma that is associated with this in families and communities, and I think we all need to work to rectify that.

One of the main goals of the Atrocity Crimes Advisory Group that I mentioned that we are funding and supporting with the UK and the EU is to bring more of a survivor-centered approach to prosecutions in Ukraine, and the Prosecutor General is often the first to admit that that was not really the way they had done things.

Witnesses were witnesses for the prosecution, they were asked to give their testimony, and then they were asked to go on their way, and he really wants to change that and I think he is genuinely devoted to changing that and thinking about his war crimes unit as being kind of a pilot, in a way, that could then extend into his other areas of prosecution.

He is very keen to strengthen the ability to prosecute conflict-related sexual violence and we have a number of experts that have been deployed through the Atrocity Crimes Advisory Group that have deep experience in this way to do trauma-informed investigations and prosecutions.

Whether or not we need a whole separate body, it is interesting. I would like to think about it a little bit. Obviously, I always want to shed light on this—on these crimes because they are so underreported.

I think it is important that we acknowledge that they exist and we empower survivors to come forward and feel safe speaking about it.

I do know that the Prosecutor General and the International Criminal Court is very focused on this and they are doing so in a way that is trauma-informed and survivor-centric.

Senator SHAHEEN. That certainly is appreciated, I know, but that is also very much dependent upon who the individual prosecutor is and what the makeup of the ICC is thinking about at the time, and one of the advantages to codifying this kind of an effort would be that it would make it a focus for the future.

Ambassador VAN SCHAACK. I agree completely.

Senator SHAHEEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Coons.

Senator COONS. Thank you, Chairman Menendez, Ranking Member Risch, for leading this important hearing and for your joint and, clearly, shared passion about this.

As you mentioned, Chairman, earlier you and I and a bipartisan group of senators went to the Hague, met with the prosecutor of the ICC, many of their senior staff. Had long conversations about it and then acted promptly and effectively in a bipartisan way and amended the underlying statute under the—I think it is the ASPA.

For many years the U.S. Department of Defense and the U.S. Government has resisted cooperation, support, engagement with the ICC because of a concern about the potential for U.S. service members to at some point be hauled in front of the court.

We acted to amend that statute specifically in the case of Ukraine in reliance on the circumstances. Like many of my colleagues, I am outraged at Russia's conduct in Ukraine during this war.

I believe there has been something like 88,000 documented atrocities, crimes against humanity. You have gone through them, my colleagues have gone through them, and I am grateful for all the different international partners of the EU and the UN and the OSCE and the ICC.

I am struck by two quotes from earlier in this hearing. You, in response to a line of questioning, said it is hard to imagine us standing on the sidelines and you, Mr. Chairman, said the Department of Defense does not get to choose which laws it obeys.

Help me understand what the challenge is here in getting our government to cooperate with the ICC. You put it well. They have never faced a challenge like this.

Russia can be counted on, not just in the case of the Brazilian student, to infiltrate their systems, to attack witnesses, to undermine their capacity to successfully prosecute.

We have a wide range of important resources we can provide—intelligence, documentation, financial support, operational advice, partnerships in terms of protecting witnesses.

Why would we not fully partner with the ICC in this undertaking?

Ambassador VAN SCHAACK. Thank you. We have had a long-standing objection to the ICC proceeding against U.S. personnel.

Senator COONS. Understandable.

Ambassador VAN SCHAACK. That objection exists. It guides my work, all of my interactions with the court. I have that as my lodestar, in essence.

I think the fear is that if we in this matter assist with the prosecution that involves another nonparty state, another state that has not ratified the ICC treaty, that we would somehow erode our ability to protect our own service members because we are also in—we are similarly situated in the sense that we are also nonparty states.

The reality is that that argument has no purchase before the ICC and all elements of the court has already shown that.

They have already proceeded against the nationals of nonparty states in the Burma matter, for example, in the Georgia matter, in the Ukraine matter, in the Democratic Republic of Congo matter where a Rwandan was in the sights at one point.

It has no protective power before the court. What has protective power, I think, is engagement, building trusted relationships, keeping lines of communication open—

Senator COONS. Not committing gross atrocities.

Ambassador VAN SCHAACK. If there are credible allegations against U.S. service members having a credible process so that we can say we are handling this.

We are handling this ourselves because our service members deserve the full panoply of constitutional due process protections under the Uniform Code of Military Justice.

I think that we can help in this matter and also maintain the protections that we have, and as I praised the amendments, they are surgical, they are carefully crafted, and they leave a whole number of protections in place that have not—have remained untouched.

Senator COONS. Two other quick questions, if I might.

The Alien Tort Claims Act, which I think is 28 U.S.C. 1350—

Ambassador VAN SCHAACK. Fifty. Yes.

Senator COONS. —was for some time viewed as exactly the statute enabling prosecutions or actions claims for crimes against humanity. That has been narrowed.

Why not legislatively strengthen that? Why not use that as the platform for action by Congress?

Ambassador VAN SCHAACK. I think there is grounds to amend and revisit the AT Act—it is a very old statute, right. I mean, it was ratified at the founding of our nation.

Senator COONS. It is among the oldest. It was passed in 1789.

Ambassador VAN SCHAACK. As you mentioned, the Supreme Court has narrowed it considerably with their doctrines of extraterritoriality.

Senator COONS. Right.

Ambassador VAN SCHAACK. I could imagine some very discreet amendments to the Alien Tort Statute that would open it back up to individuals who have access to U.S. courts being able to advance claims against individuals or entities so long as the 14th Amendment due process protections exist over personal jurisdiction.

Senator COONS. Understood. We also met with the Prosecutor General Kostin. What else can we and should we be doing to strengthen Ukraine's ability to investigate, to document, to prosecute, to hold accountable perpetrators of war crimes in Ukraine?

Ambassador VAN SCHAACK. I think there is more that the Department of Justice could do if they had the resources to do so in terms of seconding their expert personnel to work side by side with Ukrainian prosecutors.

I know the attorney general is very keen to do that. He and the Prosecutor General have developed a very close relationship, very trusting relationship. While I am working through civil society actors, through academic entities, through experts that have been drawn from the world's war crimes tribunals, we have a lot of expertise in house.

I cannot fund that with the kind of funding that I have, but our INL office can help with the Department of Justice. That would be another way that I think we could continue to assist the Prosecutor General in the momentous task that he has ahead of him.

Senator COONS. Thank you, Ambassador. Thank you for your work in this area. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Young.

Senator YOUNG. Thank you, Mr. Chairman.

Welcome, Ambassador.

Ambassador VAN SCHAACK. Good afternoon.

Senator YOUNG. Good to be with you. Last month, Senator Rosen and I introduced the Ukraine Human Rights Policy Act. This would, among other things, establish a process for Congress to nominate individuals for human rights sanctions through CAATSA.

Through this legislation it is our hope and fervent belief that we can ensure that U.S. has the authority to respond to the Russian Government's atrocities and continue to uphold our commitment to stand with the Ukrainians in their fight for democracy as well as their own humanity.

Can you describe our government's current processes for selecting both on-the-ground perpetrators and senior officials for targeted sanctions for human rights violations and tell me to what extent the process is working or not working?

Ambassador VAN SCHAACK. Indeed. Thank you, Senator, for that question.

We have a sanctions coordinator now within the United States State Department, which is very helpful working with Treasury and Commerce to coordinate the whole range of sanctions that do exist.

I know that we have deployed them very robustly in the Russia context. More than 7,000 individuals, for example, has been subject to travel bans under 7031(c).

We have a number of—dozens of individuals who have been subjected to individual sanctions. We have the Wagner Group, of course, also subject to sanctions.

The key, of course, is to have designation packages. We need to know the individual's name, but we also often need to know some biometrics in order to be able to tell banks around the world to freeze assets if they happen to have them. It is not enough to say there is a grainy photograph of some dude in Bucha that we want to sanction. We need to have information.

To the extent that we can continue to collect that information from all available sources, the Ukrainians are very keen to assist us in this regard.

They want to see these sanctions authorities exercised to the maximum extent possible as well, but also civil society actors who often have unique sources of information, and my office is funding a number of these civil society organizations that want to feed into these sanctions packages.

Senator YOUNG. If this legislation were to pass and Congress were empowered to nominate individuals for human rights sanctions through CAATSA, how would the interaction between your office and the sanctions coordinator have to change?

Ambassador VAN SCHAACK. I do not know that it would. I would have to look at the legislation. I apologize, I have not seen the draft text. I am happy to take that back and give it a close read.

We work quite closely with them. It is really their job, though, so we are often more in a support role. If we come across names that we think are appropriate in any situation in which we know we have a sanction authority, we will help them.

We often are also quite encouraging of them to make sure that our sanctions parallel justice processes that are happening around the world, including at the ICC.

If we have a sanctions authority, we should be sanctioning individuals who are also being prosecuted by the ICC. They have reasonable grounds to believe they have committed atrocity crimes. We would be keen to be of assistance in that regard.

Senator YOUNG. That is—we will follow up with the draft legislation—

Ambassador VAN SCHAACK. Please do. Thank you.

Senator YOUNG. —and if you have any technical feedback, I welcome that.

We would all agree that that people who commit war crimes and crimes against humanity have to be held criminally accountable, though it remains an open question as to how this can best be accomplished.

How do you assess the likelihood of any sort of accountability for Russia's atrocities in Ukraine? Is it likely to be confined to those who are plucked off of the battlefield or is there a way that we can ensure it is broader in scope as we look, God willing, to a day in which the conflict ceases?

Ambassador VAN SCHAACK. My hope is that the various pathways to justice that exist will be ready, prepared to move forward the minute there is a target of opportunity, but you have put your finger on the real challenge, which is custody over the accused.

There are individuals in Ukrainian custody and those cases have been able to proceed. They also have the ability to proceed in absentia. We do not in our courts, and many courts do and many courts do not, depending on their national legal framework.

Those cases, though, in absentia are sometimes unsatisfying, as you can imagine. You want to see that defendant in the dock having to answer to those particular charges.

This is a long game, though, those of us in this work. In fact, just today the Yugoslavia tribunal issued its final judgment now decades after the war in the former Yugoslavia. Then, likewise, last week, the final—one of the few final Rwandan genocidaires was captured in South Africa and now will be brought to justice.

We have to think about this in terms of generations, not in terms of the next year. My goal is to collect evidence, preserve that evidence, strengthen the systems so that the foundation is laid for when we do get that individual who chooses to travel, who gets tossed out of Russia, whatever the circumstances, fall into custody, we are ready. Evidence is available, charges can be pressed, and that case can move forward.

Senator YOUNG. You have just anticipated sort of my next line of questioning because I would not expect—we certainly cannot bank on a Russian Government, however constituted, once violence has ceased to cooperate and send their own nationals to us, though a variety of carrots and sticks can be brought to bear.

How should our bilateral diplomatic behaviors towards Russia change until Russia were to comply with international criminal justice efforts?

Ambassador VAN SCHAACK. Yes. I mean, we are all hopeful, I think, for a political transformation within Russia and the hope is that the Russian people and that others in leadership positions recognize the terrible disaster that this has been for Russia militarily, but also in terms of their just standing on the international stage.

They are an international pariah. Their assets are frozen around the world. They cannot travel. Many of them will not be able to travel.

You are hearing all sorts of limitations that have been placed upon Russia and Russian figures because of the terrible decision to invade Ukraine.

We need to, I think, strengthen relationships as we have tried to do always with moderates, with reformers, with those democratic champions, with civil society actors that stand ready to try and build a genuine civil society movement within Russia, but there is only so much one can do while Putin remains in power.

Senator YOUNG. Thank you.

The CHAIRMAN. Thank you.

Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Mr. Chairman, and thank you, Madam Ambassador.

Ambassador VAN SCHAACK. Thank you. Good afternoon.

Senator VAN HOLLEN. Good afternoon. As you just said in response to Senator Young, and I think you got to the core of the issue, this is the long game.

It is essential that we send the message that we will pursue the long game and pursue the perpetrators of crimes against humanity and these other crimes until we achieve justice, and I think the example you gave from Yugoslavia is a good one of that persistence.

Because we can essentially make determinations and findings of war crimes, crimes against humanity, genocide determinations, but, as you said, unless we can find a way to get essentially jurisdiction over the individual, we are not able to follow through with the prosecution. Is that right?

Ambassador VAN SCHAACK. That is right.

Senator VAN HOLLEN. Okay. One of the things Congress did recently was try to provide more avenues for the Administration to get jurisdiction over the individual, including through extradition.

My question is have you been able to use any of those additional tools with respect to prosecuting these war crimes and do you have any plans in place to do so?

Ambassador VAN SCHAACK. Yes. Thank you.

I think the DOJ is probably a little bit better positioned to answer that question. I am grateful to that and I am very grateful that Congress recently has helped align our statutes with those of our closest friends and allies in Europe who have very robust prosecutorial authorities and a kind of constellation of overlapping statutes to be able to do this work.

This is about international cooperation. These are transnational crimes. You may have a witness who is located in one country testifying in proceedings in another country against an individual who

is found in a third country who committed crimes in a fourth country.

We need to be coordinated and extradition is a really key tool in this regard.

Senator VAN HOLLEN. Are you aware of any examples where we, the Justice Department, is seeking extradition where a third country is not agreeing to—

Ambassador VAN SCHAACK. I am not. I can, though, if you will indulge me, point out a little gap that does exist in the penal code that I have not mentioned, but I know that DOJ cares deeply about and that is the ability to seek the extradition of a perpetrator who would torture a U.S. citizen.

Because we have what is called present in jurisdiction, the defendant needs to be present in the United States for us to press charges against that person and we cannot seek their extradition if they are not present under crimes that require their presence.

You have to have presence of the person to press those charges and you cannot seek extradition unless they are present. It is a little bit of a catch-22.

If you were to do a very surgical amendment to 18 U.S.C. 2340 to allow for present in jurisdiction, if we knew that U.S. citizens had been subjected to torture abroad we could seek the extradition of those individuals and I know that DOJ would appreciate that.

Senator VAN HOLLEN. Well, we look forward to working with you to close the loophole. I think there is probably strong bipartisan agreement to do that.

Ambassador VAN SCHAACK. Okay. Yes. That is a little tiny loophole. It is inadvertent and so it is a quick fix.

Senator VAN HOLLEN. Let me follow up. The chairman made the point, which I agree with, which is that we pass legislation instructing all agencies in the U.S. Government to cooperate with the ICC and provide evidence that would support their prosecution of war crimes.

The Defense Department is clearly dragging their feet. My question to you is what has the impact of that been? In other words, what evidence might we have been able to supply to the ICC that we have not supplied because DoD has not been cooperative?

Ambassador VAN SCHAACK. We generally do not discuss the types of information that gets shared. It is, I think, safe to say that there is a range of very actionable information that we have been able to collect that might be very helpful to a justice process anywhere and we can share that with other entities.

We can share that with the Commission of Inquiry for the UN. We can share that with individual states that might be prosecuting. We can share that with the Prosecutor General. We cannot share it with the ICC.

Senator VAN HOLLEN. Because of the position DoD has taken, right?

Ambassador VAN SCHAACK. Because we do not have consensus yet on that on moving forward.

Senator VAN HOLLEN. The one agency that is not consenting is DoD. Is that right?

Ambassador VAN SCHAACK. You did hear, I think, the Secretary of Defense at the Appropriations Committee.

Senator VAN HOLLEN. It is just a yes or no. I mean, I do not think we are, right?

Ambassador VAN SCHAACK. Yes.

Senator VAN HOLLEN. The Defense Department is not cooperating in that way, right?

Ambassador VAN SCHAACK. Yes.

Senator VAN HOLLEN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kaine.

Senator Kaine. Thank you, Mr. Chair.

Ambassador Van Schaack, good to see you. It is Van Schaack, right? Van Schaack?

Ambassador VAN SCHAACK. Van Schaack, yes. Perfect. Yes.

Senator Kaine. I want to ask you about 2014. A lot of the focus has been—

Ambassador VAN SCHAACK. Yes.

Senator Kaine. —on justice and accountability following the February 2022 invasion of Ukraine by Russia, but this was an invasion that began in 2014. If you can talk about efforts to pursue accountability against Russia for abuses in Ukraine that began in 2014. Just a couple—

Ambassador VAN SCHAACK. Yes. We forget that, do we not, but that this war really did begin in 2014, and while it was not—you did not see the level of horror that you see today, there were war crimes committed then and we do not even have access to some of those territories to have full sense, and we have seen as Bucha was mentioned as the Ukrainians take back their territory you see the consequences of Russian control and occupation very starkly.

There are a number of efforts underfoot. In fact, the project that I am funding, we had begun to fund before 2022. It was a much smaller project. We have had to scale that considerably in light of the massive explosion of war crimes and other atrocities being committed since 2022.

Already, there was a project in place to support the Prosecutor General and exploring how to bring potential cases to the extent they had custody over any individuals and had witnesses and evidence available to do that.

The United Nations also has a—has had a longstanding monitoring mission focused on Ukraine that has been collecting information from the beginning and so that information is all available and can be shared with prosecutorial authorities around the world.

Senator Kaine. Talk to us a little bit about the challenges of dealing with abuses committed by the Wagner Group as an example of a nonstate agency.

The ICC probably set up with a certain kind of defendant or target in mind. The Wagner Group is a nonstate actor. Talk a little bit about the challenges that that presents.

Ambassador VAN SCHAACK. Yes. There is no question that the Wagner Group is a malign force wherever it is—finds itself, across the Sahel and other places, Central African Republic. Now we are seeing in Libya and, of course, moving into Ukraine.

They are a nonstate actor, but most of the crimes that are prosecutable either in our domestic system, in other courts' domestic systems, and at the ICC make no distinction between state actors and nonstate actors.

They can be held responsible for any war crimes, crimes against humanity, or other depredations that they might commit wherever they may find themselves, and I know that the prosecutor of the ICC is very interested in looking at Wagner in part because they are operative in so many of the other situation countries where he already has jurisdiction and is investigating. To the extent that we can be of assistance in that regard, I think that could help further isolate and neutralize Wagner around the world.

Senator Kaine. I would like to change topics. I sometimes do this in a hearing. I take advantage of a great witness not on the advertised topic, but on something that —

Ambassador Van Schaack. Okay.

Senator Kaine. —you have as an expertise and that is Venezuela.

Ambassador Van Schaack. Yes.

Senator Kaine. With you here, I just am—I want to ask about it. In this hemisphere, an estimated 7 million people have fled Venezuela since 2015, rivaling the 8 million that have fled Ukraine. I will be reintroducing the AFFECT Human Rights in Venezuela Act which would direct the Department to push for an extension of the independent U.N. fact finding mission to investigate gross violations of human rights in Venezuela.

That mission issued a detailed report last September assessing that the Venezuelan Maduro regime through the state's intelligence services have committed crimes against humanity including torture, extrajudicial killings, sexual violence.

The ICC has indicated its intention to resume the investigation. What is your assessment as you liaise with the ICC about their ongoing efforts in Venezuela, and what lessons can we draw from the fact finding mission in Venezuela about documenting crimes against civilians?

Ambassador Van Schaack. Yes. Thank you, Senator Kaine. I know this has been a longstanding interest of yours and the Venezuelan people really do deserve our full attention here.

Ukraine is important, but I take my title very seriously. I am the Ambassador-at-Large for Global Criminal Justice and so I do try and get out into the field and to other situation countries and to continue to push for justice there.

The fact-finding mission we supported that very strongly. They have done excellent work. Their reports are quite telling in terms of documenting the various crimes against humanity that have been committed across Venezuela when it comes to innocent protesters, when it comes to members of the opposition.

The courts have become tools of repression rather than tools of justice and all of that has been scrupulously documented by the fact-finding mission.

As you mentioned, there is an ICC investigation there. The prosecutor has been there. He tried, I think valiantly, to work collaboratively with the Maduro government in order to encourage them to do their own investigations here and to show good faith in terms of rooting out the perpetrators of violence against protesters and others and I think he has reached the end of his rope in this regard and now has moved to be able to reopen that investigation and to

move forward in a more adversarial context and adversarial posture.

Senator Kaine. Is there a chance that some of the other nations in the region that have resumed relations with the Maduro government—Colombia and Brazil—could—if they would be willing to do so, could effectively pressure the Maduro government to be more cooperative with the ICC?

Ambassador Van Schaack. I would certainly hope so. I mean, that case exists because of a then unprecedented collective referral by the region to the ICC.

This was the region saying we want the international court engaged here in Venezuela. We cannot manage it ourselves. We cannot manage it on a regional level. We need the international court involved.

I would hope that they would follow-up on that commitment to justice and also continue to put pressure on the Venezuelans to participate and cooperate with the work of the ICC, but also to do this work—the hard work—internally in order to bring justice.

Senator Kaine. I would hope that they would do the same thing, especially since Colombia is very much on the front line of consequences of the disaster in Venezuela and they should not be reticent to call it out and encourage the Maduro government to cooperate with the ICC.

Ambassador Van Schaack. Yes. Indeed, I was just in Colombia. They are on the forefront of transitional justice with their own system and so I think they see the value of investing in the justice sector here.

Senator Kaine. Thank you.

Ambassador Van Schaack. Yes. Thank you.

Senator Kaine. Mr. Chair, I appreciate it.

The Chairman. Let me thank you, Senator Kaine, for raising these issues. I share Senator Kaine's concerns and interest in this regard and I appreciate your pursuing it.

Ambassador, let me just say I have sat and presided over a lot of hearings. I have declared some of them in which I have—some of the worst hearings I have ever presided over and I—you were there, right?

[Laughter.]

The Chairman. The one I was talking about. This is one of the best—

Ambassador Van Schaack. Please tell me there is a “but.” Please tell me there is a “but” here.

The Chairman. This is one of the best hearings I have presided. I appreciate your clarity and your directness in terms of your answers to questions—

Ambassador Van Schaack. Thank you.

The Chairman. —something that is refreshing that maybe you could hold a seminar at the State Department about.

Ambassador Van Schaack. Thank you.

Senator Risch. I concur.

The CHAIRMAN. The record for this hearing will remain open until the close of business on June 1, 2023. Please ensure that questions for the record are submitted no later than tomorrow.

With the thanks of the committee, this hearing is adjourned.
[Whereupon, at 3:37 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

RESPONSES OF AMBASSADOR BETH VAN SCHAAK TO QUESTIONS
SUBMITTED BY SENATOR BENJAMIN L. CARDIN

Question. Legality of an International Tribunal to Prosecute Crimes of Aggression Against Ukraine: It is near-universally recognized that Russian individuals directed by the Russian Federation's Government have committed thousands of crimes against humanity, attempted genocide, and war crimes since it began its invasion of Ukraine in February 2022, and they must be held accountable. It is also clear that existing courts—including the International Criminal Court and Ukrainian domestic courts—are not fully equipped to hold accountable the Russian Federation and Russian officials for the distinct crime of aggression. Due to the particulars of the way that Article 8 (bis) was incorporated into the Treaty of Rome, heads of government—such as Vladimir Putin, who personally ordered the invasion and thus committed the crime of aggression—are beyond the reach of the ICC. During the hearing, you mentioned that the Biden administration is pursuing a hybrid tribunal, blending Ukrainian and international law, rather than a purely UN-created tribunal. However, I am concerned this method would not be strong enough to hold Putin and his Russian cronies personally accountable due to generally accepted norm that domestic courts cannot pursue heads of foreign states. You mentioned that the hybrid system idea came about partly over concerns regarding the legality and practicality of an independent international court created by the UN General Assembly.

However, the UN General Assembly has voted to create court systems before, including the Extraordinary Chambers in the Court of Cambodia (ECCC). While one could argue that the ECCC is a unique case that was ultimately integrated into the Cambodian legal system, when the ECCC's creation was first contemplated, it was not originally envisioned to be a tribunal within the Cambodian Court system. Additionally, "Uniting for Peace" resolution 377A(V), adopted by the General Assembly on November 3, 1950 states that:

"Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations."

Given this legal precedent at the UN General Assembly on creating an independent international tribunal and its resolution calling for collective measures during a breach of peace, why is it the Biden administration's position that this process is politically difficult and "legally challenging"?

Answer. We think it is essential that a Special Tribunal for the Crime of Aggression against Ukraine have a firm legal basis to enhance its legitimacy and mitigate allegations of partiality or illegitimacy. A United Nations General Assembly (UNGA) resolution cannot be the legal basis for such a court. Under the United Nations Charter, the UNGA's authorities are limited in this area to making recommendations to United Nations (UN) member states. The UNGA does not have authority to overcome rules of international law or authorize coercive actions.

In relation to the precedents you reference, the Extraordinary Chambers in the Courts of Cambodia was established within Cambodia's national judicial system. Its focus was the prosecution of Cambodian individuals for crimes in Cambodia; thus, the issue of immunities applicable under international law to foreign officials was

not presented. The agreement between the UN and Cambodia, which the UNGA approved, did not purport to establish the court nor did it purport to overcome rules of international law or vest the court with powers beyond what a Cambodian court would otherwise have.

The Uniting for Peace mechanism clarified the UNGA's ability to recommend collective measures to address threats to international peace and security, but the mechanism did not expand the UN General Assembly's authorities in this space beyond recommendatory ones. States must draw on other available authorities under international law or domestic law as a basis for implementing such recommendatory action. Uniting for Peace did not confer upon the General Assembly the powers of the Security Council.

Ukraine has convened a Core Group to discuss the technical legal issues presented by the imperative of prosecuting the crime of aggression. We are committed to working with Ukraine and the Core Group in addressing these, and other complex, legal issues.

Question. Practicality of an International Tribunal to Prosecute Crimes of Aggression Against Ukraine: During the hearing, you mentioned that an independent international tribunal would not be practical due to the reluctance of some countries to vote in favor of it at the UN General Assembly. However, any such tribunal on Russian aggression in Ukraine—hybrid or fully international—would face this same issue of nations seeking to avoid “taking a side.” One might have thought, in late 2021, that it would politically be difficult to persuade NATO members and many other like-minded nations to come to the aid, militarily and otherwise, in support of Ukraine's self-defense. Yet a difficult task has been accomplished thanks to principled and determined American leadership.

Why can't the United States Government similarly overcome doubts and hesitation by the countries of the world in holding Russia's head of government and his senior cronies accountable for the crime of aggression—which they have so blatantly and unapologetically committed?

Answer. The Ukrainians rightfully see Russia's aggression—which began in 2014 and greatly intensified in 2022—as having unleashed all the subsequent horrors they have experienced. The United States agrees. We condemn Russia's war of aggression and efforts at territorial conquest. We understand that permitting impunity for Russia's malign conduct will embolden other actors to engage in similar blatant violations of state sovereignty, territorial integrity, and political independence. We therefore support developing a special tribunal on the crime of aggression against Ukraine.

There are limitations under international law for all models under consideration, including in regards to the issue of immunities. In any case, it is important to emphasize that the imagined tribunal could still investigate and formulate charges against high-ranking officials, including Putin. Additionally, head of state immunity no longer applies once Putin is out of office. And many individuals who would not benefit from head of state immunity might be prosecutable now if they were sufficiently involved in planning, preparing, initiating, and waging Russia's war of aggression.

An aggression tribunal would be unprecedented in the modern era and, as a result, there are many legal and practical issues that will need to be worked out, including those related to immunities, definitions, custody, and others. It is important to get this right. We look forward to working with partners, including Ukraine, on these complex issues.

Question. Impartiality of an International Tribunal to Prosecute Crimes of Aggression Against Ukraine: I also remain concerned that an international tribunal rooted in Ukrainian law would not be seen to be fair and impartial given that it is taking place within the legal framework of the country being invaded.

What are the prospects that jurors or judges without a strong opinion could be marshalled to participate in such proceedings?

Answer. The State Department is committed to working with Ukraine to ensure that a Special Tribunal on the Crime of Aggression against Ukraine adheres to principles of due process and impartiality embedded in international law, both in practice and in perception. We support a tribunal that is highly internationalized, including having non-Ukrainian judges, non-Ukrainian prosecutors, and other non-Ukrainian staff, to ensure that the Tribunal benefits from international expertise and to mitigate any perceptions of bias. We have supported similar types of courts in the past, such as the Kosovo Specialist Chambers, the Extraordinary African Chambers, and the Special Criminal Court in Central African Republic, which were

established within the states' own judicial systems, but internationalized through the appointment of international judges, prosecutors, and staff.

Question. How would the hybrid court overcome accusations of impartiality it would inevitably face not only from Russia—but also Ukraine's allies and trading partners and the judgment of history?

Answer. To overcome allegations of impartiality and to guard against perceptions of illegitimacy, it is essential that a Special Tribunal on the Crime of Aggression against Ukraine be founded on a firm legal basis and enjoy widespread international support. The model we support is the only one of the two in current discussions with a clear legal basis under international law that respects the UN Charter. It is also the one most likely to garner widespread and diverse international support. Such an internationalized tribunal will be more likely to enjoy dependable financial support as compared with other past tribunals whose funding has withered over time. By rooting the court within Ukraine's judicial system, international investment will not only capacitate accountability for the crime of aggression, but it will also enhance Ukraine's own domestic processes, further institutionalize the rule of law, and enable multiple forms of international support that will have a lasting impact for generations thereafter.

We are committed to the Special Tribunal ensuring respect for fair trial guarantees, especially as it is important to mitigating perceptions of bias, including providing defendants with applicable legal protections, and ensuring that only those cases that are based upon evidence and merit conviction are actually brought to justice.

In the Nuremberg and Tokyo tribunals, although defendants faced justice in courts established by the victors of World War II, the tribunals' dedication to fair and impartial legal adjudication underpinned the validity of their rulings and secured their legacy as foundational mechanisms in the development of international criminal law. It will be essential that a Special Tribunal similarly uphold the highest standards of justice, and we are committed to working with Ukraine and partners to enable that.

