

A D D E N D U M
to
HOLDING RUSSIAN KLEPTOCRATS AND
HUMAN RIGHTS VIOLATORS ACCOUNTABLE
FOR THEIR CRIMES AGAINST UKRAINE

This Addendum is available at:

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**Written Statement of Deborah Enix-Ross, President of the American Bar Association
Submitted to the Senate Judiciary Committee for the hearing on “Holding Russian
Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine”
April 19, 2023**

Chairman Durbin, Ranking Member Graham, and members of the Committee:

On behalf of the American Bar Association (ABA), I appreciate the opportunity to submit this statement for the record of the Senate Judiciary Committee’s April 19, 2023 hearing on “Holding Russian Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine.”

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As a national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. For more than 30 years and in more than 100 countries, the ABA, through our Rule of Law Initiative, Center for Human Rights, and International Law Section, has worked to protect human rights, and promote justice, economic opportunity, and human dignity through advancing the rule of law.

The ABA has condemned¹ the Russian Federation’s unlawful invasion of Ukraine and recommended a number of actions to ensure accountability for perpetrators of atrocity crimes,² including those outlined below.

Supporting Paths to Justice for Atrocities Including the International Criminal Court

The United States and other governments around the world have demonstrated leadership in supporting Ukraine’s efforts to preserve evidence of atrocities and to pursue justice and accountability for international crimes committed in Ukraine. Among these efforts, the International Criminal Court (ICC) is currently investigating allegations of atrocity crimes occurring in the territory of Ukraine, including war crimes and crimes against humanity, and recently issued arrest warrants against President Putin and another senior Russian Federation official. These efforts are among the many crucial investigations the ICC is conducting around

¹ American Bar Association House of Delegates, 2022 Annual Meeting, Resolution 405 (August 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/405-annual-2022.pdf>.

² American Bar Association House of Delegates, 2023 Midyear Meeting, Resolution 506 (February 2023), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2023/506-midyear-2023.pdf>

the world, including in situations where (unlike Ukraine) there are no credible domestic prospects for accountability for atrocities.

The ABA has [previously encouraged](#) the United States [to assist](#) the ICC's investigations and proceedings, recognizing the ICC's unique and crucial role in pursuing justice against those most responsible for atrocity crimes. Congress recently amended important provisions in U.S. law to allow greater cooperation with respect to the ICC's investigation in Ukraine. But the administration has reportedly not yet used this authority to provide additional support to the ICC's investigation. The ABA therefore [recently urged](#) the administration to "release to the International Criminal Court (ICC) all relevant evidence in its possession that might advance the ICC's investigation of potential crimes."

The ICC's investigation complements Ukraine's ongoing domestic investigations. Initial charges and arrest warrants are focused on the deportation of children as a war crime, a priority Ukrainian officials [have welcomed](#). The ICC has unique attributes and expertise, such as its ability to hold accountable heads of state, practical experience dealing with the evidence and proceedings necessary for complex criminal cases, and a framework and separate institution that implements transformative reparations programs for victims of atrocities,³ all of which make it a crucial asset in the multilayered pursuit of justice for widescale crimes like those committed in Ukraine.

The ABA encourages Congress to continue efforts to ensure that the administration uses all tools at its disposal, including supporting the ICC's investigations, to advance justice and accountability for atrocities.

Closing the Crimes Against Humanity Gap in U.S. Law

In addition to the ICC, national courts are essential forums for justice. Many national governments are using domestic legal authority to collect and preserve evidence and to coordinate their respective investigations into the atrocity crimes committed in Ukraine. The United States has engaged with joint investigative efforts with [Eurojust](#) and supported the Prosecutor General's Office in Ukraine with their extensive domestic investigations of atrocity crimes. In the United States, with the leadership of Congress and this Committee last session, the [Justice for Victims of War Crimes Act](#) was enacted, allowing the United States to close a significant gap in its own ability to serve as a partner for accountability for war crimes should the need arise, removing jurisdictional and practical barriers to prosecuting perpetrators of war crimes if later found to be present in the United States.

But within the United States' own legal framework, there is still a significant gap that leaves a category of atrocities without legal recourse in U.S. courts. Crimes against humanity have long been recognized under international law and in the statutes of international criminal tribunals

³ Rome Statute of the International Criminal Court, art. 27, 17 July 1998, 2187 U.N.T.S. 3, entered into force (entered into force 1 July 2002, updated 11 June 2010); Trust Fund for Victims, <https://www.trustfundforvictims.org/>.

since Nuremberg, yet U.S. law currently does not provide the legal authority to prosecute perpetrators of crimes against humanity for their substantive conduct. In some circumstances, the United States may have unique access to the perpetrators, victims, or evidence of these crimes. In the domestic courts of other countries, for example, there have been many examples of prosecutions utilizing crimes against humanity statutes to successfully enable justice for atrocities committed abroad in situations where perpetrators might otherwise escape accountability.⁴ Crimes against humanity are among the most common atrocities committed around the world, and among substantive human rights statutes, crimes against humanity provisions [uniquely](#) capture the nature and scale of atrocities committed against civilians outside the technical bounds of “armed conflict,” or when perpetrators attempt to destroy a civilian “group” that is not among the limited groups listed in the Genocide Convention.

In addition to war crimes, the United States has [determined](#) that crimes against humanity are being committed in Ukraine, a conclusion also suggested by evidence in various international investigations.⁵ The ABA has [previously urged](#) the United States to [examine and address](#) gaps in U.S. law that would increase effective accountability for atrocities, and [specifically to pursue](#) a crimes against humanity statute that will provide U.S. authorities with the [tools they need](#) to pursue criminal cases that accurately reflect the planning, leadership, criminal conduct, scale, and harm inflicted through crimes against humanity. Addressing this accountability gap would ensure that the United States is not a safe haven for perpetrators of crimes against humanity and demonstrate our commitment to enabling justice that reflects the true nature, scale, and impact of atrocities in Ukraine.

Continuing to Support Ukrainian Efforts to Strengthen the Rule of Law

As part of efforts to hold perpetrators of atrocities accountable, it is also essential to continue support for civil society in Ukraine, which plays a significant role in accountability efforts by documenting and analyzing human rights violations and atrocity crimes. Ukraine has a strong and professional civil society with experience in human rights documentation even before the current war, but many organizations have now taken on the additional difficult task of documenting atrocity crimes in the midst of conflict and other activities aimed at strengthening

⁴ Domestic prosecutions for crimes against humanity committed abroad have been pursued successfully in several countries. In Germany, for example, courts have held individual perpetrators of ISIS crimes against the Yazidi accountable and have held Syrian regime officials responsible for torture and other crimes committed in Syria, two conflicts where justice for atrocity crimes is not currently possible in domestic courts and where international tribunals do not have jurisdiction. Trial Int’l, Universal Jurisdiction Annual Review (2023), https://trialinternational.org/wp-content/uploads/2023/04/TRIAL_UJAR_2023_DIGITAL_21_04_Version2.pdf. In another example, the Office of the Attorney General in Switzerland [recently indicted](#) a high-ranking former official from The Gambia for alleged crimes against humanity committed during the Jammeh dictatorship.

⁵ See, e.g., ABA Center for Human Rights, “Disappearing Human Rights Defenders: Russia’s Human Rights Violations and International Crimes in Ukraine,” September 28, 2022, https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/chr-hrd-disappearances-ukraine.pdf; UN Human Rights Council, Report of the Independent International Commission of Inquiry on Ukraine, A/HRC/52/62 (Mar. 15, 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf.

the domestic legal framework and process on investigating atrocities. Civil society should be genuinely involved in justice efforts, both on the national and international level, and the ABA encourages Congress to support civil society's critical role in the ongoing investigations of atrocities in Ukraine.

Despite the challenges of war, the international community should continue supporting Ukrainian aspirations for closer European integration by strengthening the rule of law, including continuing to build and strengthen its domestic court system and legal profession. This might include investment in physical infrastructure and institutional support, but also wide-scale trainings for judges, lawyers, and prosecutors, all of whom are adapting to the need for complex atrocity crimes investigations and proceedings, and investment in legal education.

Facilitating International Cooperation and Coordination

Cooperation and coordination within the international community, among both government and non-government actors, is critical to the effectiveness and ultimate success of accountability efforts. Therefore, the ABA also has called upon the United Nations General Assembly to request the United Nations Secretary General to develop a comprehensive set of proposals to ensure accountability by legal and physical persons responsible for war crimes, crimes against humanity, the crime of genocide, and the crime of aggression. Such proposals may include the establishment of tribunals, fact-finding bodies, and commissions of truth and reconciliation.

This would not only assist in clarifying the options for holding persons accountable for violations of international human rights and humanitarian laws, but would also assist in ensuring coordination in investigations, required evidentiary standards, and effectiveness in holding persons responsible for these violations. These proposals may also provide a framework for cooperation among various bodies that have been developed to assist in ensuring accountability, including: the Group of Friends of Accountability, comprised of 46 States, that has as one of its objectives the sharing of information among “States and relevant international organisations, institutions, and civil society to optimise the process of accountability and the delivery of justice;”⁶ the Dialogue Group on Accountability for Ukraine intended to promote dialogue across relevant national, European, and international accountability and documentation initiatives;⁷ and the Atrocity Crimes Advisory Group, established in May 2022, by the European Union, the United States, and the United Kingdom that aims to ensure efficient coordination of their support to ground-level accountability efforts.⁸

The report of the Secretary-General could provide a summary of ongoing accountability measures and mechanisms at the international, regional, and national levels, identify obstacles to

⁶ International Peace Institute, High-Level Launch Meeting of the Group of Friends of Accountability for Ukraine, March 25, 2022.

⁷ Government of the Netherlands, Ukraine Accountability Conference: a step towards justice, July 14, 2022.

⁸ US Department of State, The European Union, the United States, and the United Kingdom establish the Atrocity Crimes Advisory Group for Ukraine, May 25, 2022.

their effectiveness and gaps in current accountability efforts, and propose possible solutions to such gaps.

Conclusion

The ABA appreciates the Committee's ongoing efforts to enhance, and ensure the robust use of, the tools available for the United States to support accountability initiatives for atrocity crimes being committed by the Russian Federation in Ukraine. We encourage the Committee and Congress to continue these efforts, including by closing gaps in our own domestic law necessary to ensure that perpetrators of such crimes do not find safe haven in the United States.



Statement of Human Rights Watch

“Holding Russian Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine”

Before the US Senate Judiciary Committee

April 19, 2023

Human Rights Watch thanks the Senate Judiciary Committee for the opportunity to submit this statement for the record for its hearing “Holding Russian Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine.”

Human Rights Watch investigates and reports on violations of international human rights and international humanitarian law by states and non-state armed groups in about 100 countries around the world. Our staff is comprised of approximately 600 people from over 80 countries who are country experts, lawyers, journalists, and others who work to protect those most at risk, including civilians in wartime.

The Need for Justice in Ukraine and Beyond

The armed conflict in Ukraine since Russia’s full-scale invasion on February 24, 2022, has been disastrous for the [civilian population](#). Russian forces have committed numerous violations of international humanitarian law, including [indiscriminate and disproportionate](#) bombing and shelling of [populated areas](#). Many attacks have been with explosive weapons with wide area effects, [including cluster munitions](#), unguided aerial bombs, and [guided missiles](#).

In areas they occupied, Russian or Russia-affiliated forces have committed apparent war crimes and potential crimes against humanity, including [summary executions](#), torture, sexual violence, [enforced disappearances](#), and the [pillage](#) of art and cultural artifacts. Civilians who attempted to flee areas of fighting faced terrifying ordeals and numerous obstacles. In some cases, Russian forces [forcibly transferred](#) significant numbers of Ukrainian civilians to Russia or Russian-occupied areas of Ukraine, which is a war crime. Both [Russian](#) and [Ukrainian](#) forces have used banned antipersonnel landmines. A recent United Nations report found that both forces have been responsible for apparent [summary executions](#) and mistreatment of prisoners of war.

Serious violations of international humanitarian law committed with criminal intent—that is, deliberately or recklessly—are war crimes.

Ukrainian authorities have been conducting their own [criminal investigations](#). To support these efforts, many governments, [including](#) the [United States](#), have [offered](#) Ukraine [assistance](#) to [bolster](#) its [judicial](#) capacity and have [coordinated](#) their efforts to that end.

The International Criminal Court (ICC) opened an investigation in Ukraine in March 2022; the investigation has so far yielded two [arrest warrants](#), for Russian President Vladimir Putin and the children's rights commissioner in his office, Maria Lvova-Belova. ICC judges found reasonable grounds to believe that Putin and Lvova-Belova bear criminal responsibility for the alleged unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to Russia.

In addition to the ICC's ongoing investigation, governments and others have initiated [various accountability efforts](#) to address serious crimes in Ukraine. [Judicial officials](#) in the [United States](#) and in several other countries have opened [criminal investigations](#). The UN Human Rights Council voted in March 2022 to [establish](#) an international Commission of Inquiry to document war crimes and human rights abuses in Ukraine.

During the past year, these efforts by international bodies and governments have shown the value of developing a [multilayered approach](#) to providing impartial and credible justice for Ukraine. However, without effective coordination, there could be significant duplication of efforts and waste of financial and human resources with limited impact for victims and survivors.

In addition, the swift international response to the crimes committed in Ukraine puts into sharp focus the [unevenness and double standards](#) in access to justice for victims of serious crimes elsewhere. This threatens the legitimacy of justice when it is delivered. The United States and all governments should [work to strengthen](#) the global system of accountability, address through investigation and, as appropriate, prosecution of serious crimes under international law committed by their own personnel and nationals, and work to counter double standards for serious international crimes by ensuring consistent support for justice, wherever those crimes occur.

The Importance of the Substantive Human Rights Statutes

The use of national courts to prosecute serious human rights crimes is a key part of the emerging global system of international justice, including the use of national courts where crimes are committed in a third country. The United States was an early adopter of such laws, providing for the prosecution of torture committed in a third country based solely on the presence of the alleged torturer in the US.

The United States has an important opportunity to be a credible partner for justice by exercising law enforcement powers through the federal courts to prosecute people suspected of having committed international crimes when they are found inside the country. Today, the United States has criminal statutes to prosecute war crimes,¹ genocide,² the use or recruitment of child soldiers,³ and torture.⁴

¹ 18 U.S.C. § 2441.

² 18 U.S.C. §§ 1091, 1093.

³ 18 U.S.C. § 2442.

⁴ 18 U.S.C. §§ 2340–2340A.

These “[substantive human rights statutes](#)” are a unique and important tool in the US arsenal to enable it to contribute significantly to international justice efforts.

To date, these statutes have been used in a limited number of cases, and resulted in only one conviction, but with noteworthy results. On October 30, 2008, in the first US prosecution for torture abroad, a Miami federal jury [convicted](#) Charles “Chuckie” Taylor, Jr. of [torture and conspiracy to commit torture](#) between 1997 and 2003 while he headed Liberia's notorious Anti-Terrorist Unit during his father's presidency.

The torture statute has been used three more times since its 1994 adoption. In 2012, lawful permanent resident Sulejman Mujagic was arrested and indicted for the wartime torture of a prisoner of war (POW). Before he went on trial in the US, he was [extradited](#) to Bosnia where he was convicted of the torture of that POW and the murder of another POW. In addition, there are two [ongoing cases](#) charging torture. No further indictments have been brought under the substantive human rights statutes.⁵

Recommendations to this Committee

The current, narrow statutory framework limits prosecutions. Counselor for War Crimes Accountability at the Department of Justice, Eli Rosenbaum, [listed several of these](#) while testifying before this Committee. Last year, this Committee led the way with the bipartisan Justice for Victims of War Crimes Act, which improved the original 1996 war crimes law to permit prosecution of any war criminal found within the United States, regardless of their nationality or the nationality of their victims. As then-Ranking Member Chuck Grassley [said](#), the law is an important step for ensuring the “the US is not, and will never be, a safe haven for war criminals.”

The expanded war in Ukraine provided a key context in which these legislative changes took place. And yet, of course, the need for justice is not unique to Ukraine. Grave international crimes—in places such as the Central African Republic, the Democratic Republic of Congo, Ethiopia, Myanmar, Palestine, South Sudan, and Syria—continue to be committed with impunity, often with much less media and political attention. The victims of those crimes deserve the same access to justice as the victims in Ukraine. It is [imperative](#) that the support for accountability efforts for Ukraine should also translate into the international community's response to crises and conflicts elsewhere in the world.

To that end, we make the following recommendations:

- 1. Provide for Prosecutions for Crimes Against Humanity.** Crimes against humanity are serious offenses committed as part of a widespread or systemic attack on civilians. Crimes against humanity can be committed during peacetime as well as during armed conflict, so long as they are directed against a civilian population. The lack of US legislation expressly criminalizing crimes against humanity means many of the worst crimes on the international stage are not addressable by US prosecutors. This year the State Department made official determinations

⁵ In addition, under 18 U.S.C. § 116, there has been [indictment](#) of a Texas woman for transporting a minor outside of the United States to allegedly undergo female genital mutilation.

that crimes against humanity have been committed in [Ukraine](#) and [Ethiopia](#); however, the US lacks the criminal statute to properly and directly prosecute these crimes, should individuals alleged to have committed such crimes be found within the country. This Committee has regularly considered adoption of a crimes against humanity statute and adopting one this session would be a vital step toward empowering the US human rights accountability system.

2. **Continue and Strengthen Robust Oversight.** This Committee has a legacy of effective oversight of the US system for prosecuting serious human rights crimes, including this hearing and the “From Nuremberg to Ukraine” hearing last September. This legacy should be built upon, with this Committee requiring regular hearings and reporting requirements from relevant agencies.
3. **Strengthen the Statutory Framework.** There are several shortcomings in the substantive human rights statutes that hamper US accountability efforts. First, the failure to explicitly recognize command responsibility, which allows for commanders and civilian leaders to be prosecuted for war crimes as a matter of command responsibility when they knew or should have known about the commission of war crimes and took insufficient measures to prevent them or punish those responsible, sharply narrows the possibilities for justice. Second, while the US has jurisdiction over torture committed by Americans abroad or where the torturer is present inside the United States, there is no jurisdiction over the torture of a US citizen aboard. Third, the identification and investigation of serious human rights crimes often can take place decades after the underlying crime is committed and the person has relocated to the United States; however, in most cases the statutes of limitations for the substantive human rights crimes is approximately five to eight years. Fourth, the applicability of portions of the war crimes statute can vary depending on whether or not a conflict can be proven to be international. The need to prove the classification of a conflict beyond a reasonable doubt can present a serious barrier to war crimes prosecution, particularly where the conflicts status is ambiguous, where relevant information is classified, or classification involves a political question. Working with relevant agencies, this Committee could consider amendments to address these and other shortcomings.
4. **Remove the Death Penalty from the Table.** Human Rights Watch opposes the death penalty in all countries and under all circumstances because of its inherent cruelty and finality; the death penalty is inevitably and universally plagued with arbitrariness, prejudice, and error. The presence of capital punishment in statutes designed to promote human rights undermines their ostensible purpose. This Committee should consider amending the war crimes, genocide, and torture statutes to remove capital punishment from the table.

Conclusion

This Committee has a leading role to play in ensuring the US accountability system lives up to its promise to address serious human rights crimes. The above recommendations are just a start to ensuring that the next decade of substantive human rights statutes sees more than a single prosecution.

***Holding Russian Kleptocrats and Human Rights Violators Accountable for
Their Crimes Against Ukraine***

**Hearing before the U.S. Senate Committee on the Judiciary
April 19, 2023**

The Unconscionable Gap: Crimes Against Humanity

Written testimony of Professor David J. Scheffer

Former U.S. Ambassador at Large for War Crimes Issues (1997-2001)

Before the Senate Committee on the Judiciary

Washington, D.C.

April 19, 2023

I submit this written testimony to the Senate Committee on the Judiciary in connection with the hearing held on April 19, 2023, on “Holding Russian Kleptocrats and Human Rights Violators Accountable for Their Crimes Against Ukraine.” There is an existing gap in U.S. federal law that will undermine the stated objective of accountability, particularly with Russian kleptocrats who are aiding and abetting the war against Ukraine and with Russian military personnel, mercenaries, and military and political leaders who are responsible for crimes against humanity in Ukraine. But that gap can be filled with adoption of crimes against humanity legislation that Chairman Dick Durbin has been pursuing.

I was the first U.S. Ambassador at Large for War Crimes Issues (1997-2001) and during the 1990’s negotiated the creation of five war crimes tribunals: the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and, as head of the U.S. delegation, the

International Criminal Court (ICC). Prior to my ambassadorship, I was Senior Adviser and Counsel to the U.S. Permanent Representative to the United Nations, Dr. Madeleine Albright, from 1993 through 1996 and during those years also was a member of the Deputies Committee of the National Security Council representing the U.S. Mission to the United Nations. Since 2003, I have been a professor of international criminal law and other fields of international law at Georgetown University Law Center, George Washington University Law School, Northwestern University Pritzker School of Law (where I was the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights), Katholieke Universiteit Leuven in Belgium, and currently Arizona State University (Washington). I am well versed in the law pertaining to war crimes, crimes against humanity, genocide, and aggression. I was the U.N. Secretary-General's Special Expert on U.N. Assistance to the Khmer Rouge Trials (2012-2018) and am a Senior Fellow of the Council on Foreign Relations.

I recently co-authored with Krisin Smith an article in *Just Security* that is on point with this hearing and is entitled, "Congress Should Close the 'Crimes Against Humanity' Loophole," on February 17, 2023, at <https://www.justsecurity.org/85135/congress-should-close-the-crimes-against-humanity-loophole/>. Our detailed reasoning for moving forward on crimes against humanity legislation (with links to sources) is set forth in the *Just Security* article. I also provided written testimony ("The Importance of Adopting the Justice for Victims of War Crimes Act and the Crimes Against Humanity Act" dated October 4, 2022) for the Committee's September 28, 2022, hearing titled, "From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity." I recite below points of continued relevance that I also raised in that testimony of last year.

At the September 28, 2022, hearing, Senator Marsha Blackburn, seconded by Senator Thom Tillis, pointed to the human rights violations suffered by the Uyghurs and Tibetans in the People's Republic of China and by others in Iran and North Korea. The senators essentially asked how gaps in U.S. law could be filled to cover those responsible for this mistreatment. Director Eli M. Rosenbaum of the Department of Justice correctly answered that since these countries are not involved in armed conflicts, any war crimes law would be irrelevant but that a crimes against humanity law would apply to the perpetrators of such international crimes if it were to exist in the federal criminal code. Director Rosenbaum explicitly called out this deficiency in the federal criminal code in both his written and oral testimony before the Committee and noted the impunity under current U.S. law that Russian perpetrators would enjoy for such heinous crimes. (See <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Rosenbaum%20-%202022-09-281.pdf>.)

Indeed, one can point to the atrocities occurring not only in China, Iran, and North Korea but also in Burma and Venezuela where no significant armed conflicts are occurring and yet where investigations of such actions against civilian populations should focus on crimes against humanity. No aliens who are perpetrators of crimes against humanity in these countries or elsewhere should be entitled to sanctuary from criminal prosecution in the United States any more than a perpetrator of any other atrocity crime, such as war crimes or genocide, committed anywhere in the world should enjoy sanctuary from criminal prosecution in the United States.

The reality remains that today the United States is a safe haven for perpetrators of crimes against humanity, which the United States supported the prosecution of before the Nuremberg and Tokyo Military Tribunals after World War II and more recently before the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone,

and the Extraordinary Chambers in the Courts of Cambodia. The Justice for Victims of War Crimes Act finally closed the gap for alien perpetrators of war crimes by using present-in jurisdiction to cover any alien who commits war crimes abroad and then enters the territory of the United States.

But until crimes against humanity legislation with present-in jurisdiction is enacted into U.S. law, an alien perpetrator of a crime against humanity need not fear prosecution in the United States. Most of our European partners and other allies now have crimes against humanity firmly entrenched in their domestic criminal codes and thus do not face this glaring inconsistency that cripples the Department of Justice and Department of Homeland Security from denying alien perpetrators of crimes against humanity entry into the United States (see below) or, if they are found within the United States, from prosecuting them as perpetrators of crimes against humanity.

Imagine how effective would be the influence on Russian kleptocrats and Russian, Communist Chinese, Iranian, North Korean or Burmese perpetrators if they knew that if they entered the United States, then such individuals would seriously risk arrest and prosecution for crimes against humanity if not immediately, then ultimately as they traveled or settled within the country. (Granted, the highest level leaders might enjoy head of state immunity and thus avoid indictment or prosecution, but they would be shamed into raising the defense, which remains available only while they hold their office.) The growing word of the risk surely would deter many alien perpetrators of crimes against humanity from even trying to enter the United States. There is no plausible reason why crimes against humanity should be excluded from criminal liability because to exclude it, as current law provides, admits that the United States welcomes alien perpetrators of crimes against humanity (who might include Russian kleptocrats) onto its

territory essentially to engage in tourism or business or even to reside in the United States. Is this country destined to remain a safe haven for perpetrators of crimes against humanity? That obscene outcome is the prospect of the current gap in the federal criminal code but it is unconscionable for it to continue into the future.

Prosecutors in the war crimes tribunals frequently charge both war crimes and crimes against humanity for actions taken during an armed conflict. This is because the two types of crimes are of a different character and yet both can occur, sometimes including identical factual events on the ground, during a war. There are many convictions in the tribunals that include, for the same individual, both war crimes and crimes against humanity.¹ An individual can mastermind or participate in a widespread or systematic attack directed against a civilian population, knowing the existence of such an attack, and thus in the middle of an actual war commit a particular crime against humanity without necessarily violating the Geneva Conventions or the law and customs of war or, depending on the circumstances, such an individual also can commit a parallel war crime. For example, Russian artillery and missile attacks on civilian targets in one Ukrainian city might constitute a war crime but combined with similar attacks in several Ukrainian cities might also qualify as a crime against humanity because such shelling demonstrates the character of a widespread or systematic attack on the civilian population of Ukraine and with knowledge of such attacks.

Russian actions to unlawfully deport and unlawfully transfer Ukrainian children to Russia are charged as war crimes in the International Criminal Court's recent arrest warrants against Russian President Vladimir Putin and Russia's Commissioner for Children's Rights in the Office

¹ The jurisprudence of the International Criminal Tribunals of the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court is replete with many examples.

of the President of the Russian Federation, Ms. Maria Alekseyevna Lvova-Belova. (*See* <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.) It will not be surprising if these charges expand, and thus be amended by the ICC Prosecutor, to encompass crimes against humanity as well in the future.

It is important that the federal criminal code cover three possibilities, namely to enable prosecution of both war crimes and crimes against humanity against the same individual *and* to prosecute individuals who only commit crimes against humanity during an armed conflict or during a situation that does not involve an armed conflict.

While crimes against humanity are still absent from the federal criminal code, it is worth noting that the federal courts have adjudicated alleged violations of crimes against humanity in many civil suits brought largely under the Alien Tort Statute (28 U.S.C. §1350) and have had no difficulty identifying crimes against humanity as part of U.S law and international law. These federal court judgments include the following cases:

<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)
<i>Doe v. Rafael Saravia</i> , 348 F. Supp. 2d 1112 (E.D. Cal. 2004)
<i>Cabello v. Fernandez-Larios</i> , 402 F.3d 1148, 1154 (11th Cir. 2005)
<i>Doe v. Exxon Mobil Corp.</i> , 393 F.Supp.2d 20, 25 (D.D.C. 2005)
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 569 U.S. 108 (2013)
<i>Sexual Minorities Uganda v. Lively</i> , 960 F.Supp.2d 304, 317-19 (D. Mass. 2013)
<i>Mehinovic v. Vuckovic</i> , 198 F.Supp.2d 1322, 1352 (N.D. Ga. 2002).
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995)
<i>In re Chiquita Brands Intern., Inc. Alien Tort Statute and Shareholder Derivative Litigation</i> , 792 F.Supp.2d 1301 (S.D. Fla. 2011)

<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> , 582 F.3d 244 (2d Cir. 2009)
<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> , 226 F.R.D. 456 (S.D.N.Y. 2005)
<i>Sarei v. Rio Tinto, PLC</i> , 550 F.3d 822 (9th Cir. 2008)
<i>Villeda Aldana v. Fresh Del Monte Produce, Inc.</i> , 305 F.Supp.2d 1285 (S.D. Fla. 2003)
<i>Quinn v. Robinson</i> , 783 F.2d 776 (9th Cir. 1986)

Introducing crimes against humanity to the federal criminal code would not be revolutionary but long overdue, following the codification of genocide (18 U.S. Code. §1091) and war crimes (18 U.S. Code §2441) in Title 18 by decades.

Finally, alien perpetrators of either war crimes or crimes against humanity or both sets of crimes should be inadmissible to the United States under federal law. That is currently not the case, which is a remarkable gap in immigration law. A review of immigration forms that require aliens to answer various questions before being admitted to the United States reveals that none of the forms ask whether the alien has committed war crimes or crimes against humanity.

However, several of the forms (CBP Form I-94W, DS-230, I-485, DS-260) ask whether the alien has ever engaged in genocide. This glaring gap in immigration law could be closed with a simple amendment to 8 U.S.C. 1182(1)(3)(E) that would strike the existing clause (iii) and insert references to a war crime and a crime against humanity in addition to torture and any extrajudicial killing.

Thank you for the opportunity to provide this testimony to the Committee.

END

U.S. Department of State, Office of Global Criminal Justice

Ambassador-at-Large Beth Van Schaack

Testimony for the Record

Senate Judiciary Committee Hearing

“Holding Russian Kleptocrats and Human Rights Violators Accountable for their
Crimes Against Ukraine”

April 19, 2023

Introduction

Mr. Chairman, Ranking Member Graham, and distinguished members of the Senate Judiciary Committee. It is an honor and privilege to address you as the sixth U.S. Ambassador-at-Large for Global Criminal Justice.

Thank you for accepting the State Department’s written submission in connection with the hearing dedicated to “Holding Russian Kleptocrats and Human Rights Violators Accountable for their Crimes Against Ukraine,” which took place on April 19, 2023. Your hearing, and your tireless work since Russia’s full-scale invasion of Ukraine, has made the U.S. government stronger in its efforts to combat international crimes and support our allies and partners, including Ukraine, in ensuring justice and accountability for the ruthless acts of violence we are witnessing daily around the world, in Ukraine, China, Burma, and elsewhere.

Last year, this Committee took the historic step of ushering through *The Justice for Victims of War Crimes Act* to update the federal war crimes statute and enable the prosecution of suspected war criminals found in the United States, regardless of the *locus delicti* or the nationality of the victims. With this jurisdictional gap now firmly closed, it has become more difficult for perpetrators to use the United States as a safe haven to avoid accountability. The new prosecutorial authorities also will enable the United States to do its part in delivering justice for victims of brutal and illegal acts committed under the guise of war.

The United States now has the opportunity to build on this important foundation and exercise further leadership in international justice and accountability through

supporting prosecutions for the crime of aggression and domestically criminalizing crimes against humanity.

Russia's full-scale invasion of Ukraine is a manifest violation of the UN Charter. This is a war of aggression and territorial conquest that has included widespread war crimes and crimes against humanity. In March of last year, Secretary Antony Blinken announced that, based on information then currently available, the U.S. government assessed that members of Russia's forces were committing war crimes in Ukraine. Earlier this year at the Munich Security Conference, Vice President Kamala Harris announced our determination that members of Russia's forces and other Russian officials have committed crimes against humanity on a widespread and systematic basis, including torture, sexual violence, and the deportations of civilians. And just last month, the Department announced U.S. support for a tribunal dedicated to prosecuting the crime of aggression against Ukraine.

Indeed, members of Russia's forces have committed international crimes in every region in which its military has been deployed. These include the unlawful transfer of Ukrainian civilians—including thousands of children—within Russia-occupied and -controlled parts of Ukraine and the deportation of thousands of Ukrainian civilians to Russia as part of its so-called filtration operations—a grave breach of the Fourth Geneva Convention.

My office, together with partners throughout the U.S. government, is actively working on preventing further atrocities, documenting the commission of international crimes, and pursuing justice on behalf of victims.

While Congress has strengthened the U.S. ability to prosecute war crimes domestically, there is more that can be done to combat the remaining components of Russia's criminal campaign in Ukraine: the crime of aggression and crimes against humanity. In my statement, I will detail our efforts to stand-up and support an internationalized tribunal based in Ukraine's judicial system dedicated to prosecuting the crime of aggression. I will also detail how this Committee can close a remaining critical gap in our federal laws by enacting domestic crimes against humanity legislation.

Supporting Comprehensive Accountability for the Commission of International Crimes, Including the Crime of Aggression

Following the Second World War, the prosecution of the crime of aggression—“crimes against the peace” in the lexicon of the era—was deemed necessary to reinforce the inviolability of the principles of territorial sovereignty and political independence that Nazi Germany so egregiously violated through its multiple invasions across Europe. Over 75 years later, the investigation and prosecution of this crime has again become imperative to reaffirm and reinforce the principles that undergird the UN Charter, which Russia has so flagrantly violated with its invasion of Ukraine.

The U.S. government’s broader approach to the crisis in Ukraine involves three main pillars: (1) strengthening Ukraine’s hand on the battlefield so it can be in a better position at the negotiating table; (2) alleviating the humanitarian crisis caused by Russia’s unprovoked war; and (3) supporting multiple pathways towards justice and accountability. My office is working to strengthen this third pillar. To this end, and together with the broader U.S. government and many friends and allies, we are pursuing several lines of efforts to promote justice and accountability for Ukraine.

Four pathways to justice exist, and we are working to enhance each. The **first** pathway involves international courts and institutions. Our efforts here include working toward the establishment and renewal of the Independent International Commission of Inquiry on Ukraine and twice invoking the Moscow Mechanism of the Organization for Security and Co-operation in Europe. The United States has also intervened in Ukraine’s case against Russia under the Convention on the Prevention and Punishment of the Crime of Genocide before the International Court of Justice. Finally, the Prosecutor of International Criminal Court received an unprecedented number of state referrals to open his investigation into Ukraine. 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. There are thousands of war crimes investigations already underway, with investigators and prosecutors working under harrowing conditions. Nonetheless, the Ukrainian Office of the Prosecutor General (OPG) has recorded more than 80,000 incidents that may constitute prosecutable crimes—a daunting task that would overwhelm

even the most well-resourced prosecutorial team. Alongside the United Kingdom and the European Union, we are coordinating multifaceted support to the OPG through the Atrocity Crimes Advisory Group (ACA). ACA experts—many of whom are veterans of national and international war crimes prosecutorial teams—provide technical assistance and training in international criminal law and practice to assist Ukrainian investigators and prosecutors in Kyiv and out in the field.

The **third** pathway is aimed at enabling 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. European prosecutors are opening structural investigations into the conflict in order to enable them to move quickly once a suspect comes within reach. The U.S. government is supporting 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. The Ukrainians rightfully see Russia's war of 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. There are compelling reasons to prosecute the crime of aggression in this context to preserve and protect the values the UN Charter was designed to uphold. 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.

In terms of what a tribunal dedicated to prosecuting the crime of aggression should look like, various proposals are under discussion. Since World War II, a range of international criminal justice models have emerged, and we have the benefit of having seen what works and what does not. At this critical moment, it is important to draw upon these past practices. In formulating our position, the State Department has been guided by several core principles: **maximizing accountability** for the crime of aggression; generating the **greatest international support and legitimacy** for this effort; ensuring the **effective marshaling of**

international resources, which are already stretched in the face of multiple competing crises, including those caused by this very war; ensuring best practices in terms of **fair trial and due process**; continuing to **enhance Ukraine's domestic legal capacity**; and promoting and ensuring respect for **core principles of international law**.

With these principles in mind, we favor a tribunal on the crime of aggression that is rooted in Ukraine's judicial system, enhanced with international elements in the form of personnel and expertise, structure, and support (including in terms of funding and cooperation). Such a tribunal would likely be located elsewhere in Europe to enhance security and facilitate international involvement. This includes potentially positioning the tribunal alongside Eurojust and the newly established Centre for the Prosecution of the Crime of Aggression (ICPA), which will commence investigations into the crime and begin to develop dossiers on potential perpetrators.

A tribunal with these features is the one most likely to achieve meaningful accountability for the crime of aggression against Ukraine. It is a model 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. 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. 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.

These will be the first prosecutions of the crime of aggression in the modern era. It is critical that we, as an international community, get the tribunal's establishment right and proceed in a manner that is best supported by international law and practice and that garners broad international support. We believe this is the model that can do just that. We understand, of course, there are limitations with this proposal, as there are for all models under consideration, including the issue of immunities. But that issue is implicated by other proposals as well and does not prevent robust investigations in the meantime.

We also understand this model may require the United States to work with Ukraine to ensure that its legal system, including its Constitution, permits the creation of this new court. That is an issue that may need to be confronted regardless of which model is chosen. And the international community has faced—and successfully navigated—the need to make careful changes to domestic legal frameworks to internationalize justice before in relation to other situations, including in Cambodia and Kosovo. It may take time—as international justice always has—but any potential hurdles can be overcome here as well.

Third, since it is rooted in Ukraine’s judicial system, we believe this model is the one most likely to garner diverse and prolonged international support, including the long-term funding needed for an exercise that may take years to complete if key defendants remain out of reach.

Finally, the modalities of such a tribunal remain under discussion and debate internationally, and we recognize that there will be significant legal, policy, and logistical challenges to be overcome in the weeks and months ahead.

Nonetheless, joining the many nations that have announced support for a special tribunal on the crime of aggression in Ukraine was a milestone moment for the United States. We are committed to working with Ukraine, and countries around the world, to stand up, staff, and resource such a tribunal in a way that will help support comprehensive accountability for the international crimes being committed in Ukraine. The egregiousness of Russia’s actions demands accountability. The U.S. government is behind this initiative, and we will reach out for Congressional support when discussions become concretized.

Supporting Accountability for Crimes Against Humanity

In February of this year, Vice President Harris announced Secretary Blinken’s determination that members of Russia’s forces and other Russian officials have committed crimes against humanity in Ukraine. This determination followed extensive analysis by the Department, including my office, of information indicating that members of Russia’s forces

- committed execution-style killings of Ukrainian men, women and children;
- tortured civilians in detention, including through beatings, electrocutions, and mock executions;

- committed sexual violence, including against women and girls;
- and, alongside other Russian officials, deported hundreds of thousands of Ukrainian civilians to Russia, including children.

As Secretary Blinken explained in his statement, “These acts are not random or spontaneous; they are part of the Kremlin’s widespread and systematic attack against Ukraine’s civilian population.” When it comes to the deportation of thousands of Ukrainian children in particular, President Biden observed in his remarks in Poland shortly after the announcement that Russia has “stolen Ukrainian children in an attempt to steal Ukraine’s future.”

Unfortunately, while the commission of these acts has been a central component of Russia’s war on Ukraine and its people, U.S. law currently does not allow for the prosecution of crimes against humanity, as such, even though they are arguably one of the gravest crimes known to humankind. This is notwithstanding that crimes against humanity have been a part of the international criminal law canon since Nuremberg and, historically, the United States has regularly advanced accountability for this crime in other fora.

The legal concept of crimes against humanity traces its origins to the Second World War and the Charter of the International Military Tribunal at Nuremberg. Some crimes by the Nazis—such as the mass deportation or the imprisonment and enslavement of Germany’s own citizens and the citizens of its allies in the war—could not be prosecuted under the traditional formulation of war crimes. To capture the full scope of the horrors suffered by civilians, including the Holocaust, crimes against humanity were included in the Nuremberg Charter. Senior Nazi military and other government officials were prosecuted for this crime, including those who helped to forcibly deport thousands of civilians.

The concept of crimes against humanity encompasses a constellation of acts made criminal under international law when they are 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 within an armed conflict but can also take place in times of peace, such as the crimes against humanity that PRC government authorities continue to inflict on Uyghurs, who are predominantly Muslim, and members of other ethnic and religious minority groups in Xinjiang.

Since Nuremberg, the statutes of modern international criminal tribunals, which the United States was instrumental in establishing, all contain provisions allowing for the prosecution of crimes against humanity. Over 100 countries, including almost every NATO ally, already have laws criminalizing crimes against humanity, and the trend lines suggest these numbers are increasing. In this regard, the United States is out of step with our allies and much of the globe. In the past two years alone, Germany, France, the United Kingdom, Sweden, Austria, Hungary, Finland, Switzerland, and Argentina have held trials in their national courts for crimes against humanity committed by ISIS members in Iraq and Syria, as well as by perpetrators in The Gambia and elsewhere.

The absence of a crimes against humanity statute is significant because it means that a foreign national responsible for, as an example, a massacre of civilians abroad, who makes their way to the United States, could likely not be criminally prosecuted for those acts in U.S. courts unless the same acts constituted a war crime or another crime under U.S. federal law.

Moreover, because crimes against humanity are, by definition, part of a widespread or systematic attack directed against any civilian population, and the acts comprising an attack must be committed pursuant to or in furtherance of a state or organizational policy to commit such an attack, prosecutions of these crimes are usually aimed at bringing to account individuals who commit atrocities that are in accordance with a campaign that is orchestrated and coordinated by a State or an organization. At base, most crimes against humanity implicate the conduct of senior leaders, since such figures are often instrumental in the design and execution of the state or organizational policy through which mass atrocities are committed. This is part of what differentiates crimes against humanity from ordinary crimes, like murder and rape. As a result, a U.S. law criminalizing crimes against humanity would have the benefit of making punishable any such crimes committed pursuant to the policies of a State—such as Russia—or non-state actors—such as al Qa’ida, the Lord’s Resistance Army, or ISIS.

From a diplomatic perspective, the fact that the United States lacks a crimes against humanity statute, in contrast to our closest allies and partners, weakens our ability to lead on international criminal justice and undermines our commitment to supporting justice and accountability for atrocity crimes. This

Committee has the historic opportunity to change that, as it did with *The Justice for Victims of War Crimes Act*. And in so doing, to reaffirm and return the U.S. leadership in international criminal accountability.