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# Playing the Long Game: The Role of International Courts and Tribunals in the Russo-Ukrainian War

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**I**nternational tribunals frequently adjudicate disputes between nation-states, but enforcement can be limited or in some cases nonexistent — especially in the face of a rogue authoritarian aggressor. These limitations seem especially stark in the context of Russia's aggression in Ukraine. As war rages on the ground, legal experts in Ukraine and around the world are considering whether international judicial bodies such as the United Nations, the European Court of Human Rights, and the International Court of Justice can play a role in holding Russia accountable.

To discuss the role and effectiveness of international courts, tribunals, and adjudication mechanisms, *Judicature International* convened a panel of experts for a conversation moderated by **Paul W. Grimm**, the David F. Levi Professor of the Practice of Law and Director of the Bolch Judicial Institute of Duke Law (*Judicature International's* publisher).

Participating in the conversation were **Kim Scheppele**, the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Princeton

School of Public and International Affairs; **Paul Stephan**, the John C. Jeffries, Jr., Distinguished Professor of Law at the University of Virginia; **Harold Hongju Koh**, Sterling Professor of International Law at Yale Law School; and **Oleksandra Matviichuk**, a Ukrainian human rights lawyer and director of the nonprofit (and Nobel Prize-winning) Centre for Civil Liberties based in Kyiv. An edited version of their conversation follows.

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**PAUL W. GRIMM:** Kim, I'd like to direct the first question to you. The Ukrainian government has used legal mechanisms throughout the conflict that began in 2022. It went to the European Court of Human Rights and the International Court of Justice quite early in the conflict to seek invalidation of Russia's invasion. Can you talk a little about what this looks like in terms of these procedures and your thoughts on their effectiveness?

**KIM SCHEPPELE:** I think that Ukraine has been firing on all cylinders in the sense of trying to use all the inter-

national validation that it can get to support its side of the war. That is to say, what Russia has done in launching this war is a massive violation of international law along many dimensions. What has happened at the European Court of Human Rights is that a massive number of cases have been brought to the court, including state-to-state cases. Russia tried to quit the Council of Europe, but it was expelled before it had a chance to quit, so Russia is no longer there. That has led to a whole series of problems at the European Court of Human Rights. There are a number of pending cases, but the Russian judge is no longer sitting. The Russian staff is mostly not there anymore.

The court has decided to hear all the cases that were filed before the day that Russia actually left the Council of Europe. There will continue to be judgments coming out of the European Court of Human Rights. Of course, the question is: What happens to the enforcement of those judgments? Because the Committee of Ministers — which usually enforces the judgments of that court — no longer has

jurisdiction over Russia. I think at this stage the Court of Human Rights will make the point of making law on these cases, but I don't think anyone expects the enforcement of those judgments to happen anytime soon.

**PAUL W. GRIMM:** Paul, any comments or thoughts for anyone who may not be so steeped in international legal tribunals and mechanisms to deal with violations of international law? Some might wonder what is the value of a ruling by the European Court of Human Rights, or the issuing of a judgment that doesn't have a method of enforcement? Is there a moral imperative or some benefit other than the enforcement of a judgment that flows from this type of activity from the European Court of Human Rights?

**PAUL STEPHAN:** I'd like to answer your question but also to elaborate a little bit on your first point. I think — as does the Strasbourg Court, i.e., the European Court of Human Rights — that this war started in 2014. Since then, Ukraine has been assessing the use of not only the Strasbourg Court and the International Court of Justice, but also bringing various investment claims, as well as a case before the Law of the Sea Tribunal. Going back to when the first grave violations of international law occurred, Ukraine has done everything possible to find recourse wherever it can, and the recourse varies to some extent with the body. For example, with the investment claims — the only set of these cases I've been directly involved in — you end up with an arbitral award that you can try and convert into money just like you would a civil court judgment in a case.

Now, to your question, the direct enforcement powers of institutions

like the Strasbourg Court and the ICJ — the International Court of Justice in the Hague — are limited, particularly once a state has dropped out of the system and puts up barriers to the enforcement of money awards. Even before Russia dropped out of the Strasbourg Court in 2022, it changed its constitution in 2015 so that there was no domestic obligation to pay awards. Its membership was suspended in the Council of Europe for five years, and then it was allowed to come back because its funding provided to the Council of Europe was more important at the time than its lawbreaking. That changed with the second stage of the war, the invasion of Ukraine in February 2022.

Independent of material things like money, awards, ordering people arrested, etc., the decisions of these bodies have expressive value. Expressive value is important because the decisions can help to shape consensus by people, parties, states, and other organizations that can respond in nonjudicial but important and even coercive ways.

**PAUL W. GRIMM:** Thank you. Kim, can you comment on the enforcement mechanisms for arbitral awards?

**KIM SCHEPPELE:** Yes, though Oleksandra may know much more about this because her organization has been taking a lot of these cases to that court. Often, when the European Court of Human Rights hands down the formal part of the decision, if there is a violation found against the state in question, the decision will say that the state must pay a certain, as they call it, "just satisfaction" — a money amount, which is usually trivial. They don't issue very large fines in these cases. Compliance with the judgment usually means simply paying the fine,

and frankly, most states do it because it's easier to pay small amounts of money than to get into trouble with the Council of Europe.

Russia had usually paid just satisfaction, and even though, as Paul said, the Russian constitution was modified to change the role of its constitutional court as the final sort of certifier of whether Russia would follow the judgments of Strasbourg, until the second invasion — which is to say until 2022 — the Russian constitutional court had by and large agreed with the Strasbourg court. So, there were a number of hot-button political questions where the Russian constitutional court did not reach the same judgment as Strasbourg. But most of the time it did. By the time the war broke out, the system was not as broken as it looked. Of course, what happened when the conflict escalated in 2022 was that the Council of Europe immediately moved to suspend Russia's membership in the council.

I'm here in Europe at the moment, so I keep forgetting when I'm talking to American audiences that I should say that the Court of Human Rights is a creature of the Council of Europe and not the European Union. Russia's membership was suspended in the Council of Europe. It tried to quit at the same time. In both cases, there's some delay before the action takes effect. I think the suspension took place before the quitting, but in any event, there was a date when Russia left the Council of Europe. The cases pending at that date are still going forward.

"Just satisfaction" is when the case says, "pay €6,000 to somebody" — which is sort of a typical judgment — and the states often pay that amount. Increasingly, a group called the Committee of Ministers in the Council of Europe has insisted that when there

is an adverse judgment against a signatory state, that the state — especially if there's a repeat pattern, i.e. if there are a lot of cases showing that the problem isn't just a one-off but is a practice of the state — also implements structural reforms to the laws of the country in question so that repeat offenses will be prohibited. That's where the Committee of Ministers has mostly been naming and shaming. They don't really have other tools at their disposal, and a great many member states, including the UK, have been dragging their feet on compliance with a lot of court decisions. It's not just the obviously rule-violating countries that are refusing to take into account these kinds of broader suggestions for reform.

**HAROLD HONGJU KOH:** Paul, if I could return to the big picture: Ukraine is using its smart-power assets in a case where there's a hard-power disadvantage and the rule of law is on their side. So, Russia is using the tools of aggression and atrocity — blatantly illegal tools — to try to retain empire, and Ukraine is responding by using law and diplomacy tools consistent with the rule of law to try to maintain global order. Russia is treating this as a local struggle; Ukraine is treating this as a global struggle. Russia's short game is force; Ukraine's long game is law. Russia is talking about returning to the Soviet Union, and Ukraine is talking about Russia versus the world order.

It's within that framework that law is on Ukraine's side. It also serves an important strategic purpose because the goal is to declare Russia's actions illegal and thereby to isolate them — and particularly to isolate Putin to dissuade countries like China and India from coming in on Russia's side and thereby leaving him isolated and weak-

ened at the moment where they enter into diplomatic negotiations. It's not just a prudent strategy, but it's also one that's more likely to achieve Ukraine's strategic purposes at a time in which obviously Russia has huge, hard-power material advantages.

**PAUL W. GRIMM:** That's a great clarification. Oleksandra, I'd like to get your thoughts about this use of these various procedures we've been talking about, as someone who is there in the Ukraine. What is your perspective about the effectiveness of these procedures, the long game, the short game, and the strategic advantage versus the immediate goals that Russia seems to have there?

**OLEKSANDRA MATVIICHUK:** Let me start with one example. You are totally right: This war started not in February 2022 but in February 2014, when Ukraine obtained the chance for democratic transformation after collapse of the regime due to the Revolution of Dignity. To stop us on this path to democracy, Russia occupied Crimea, part of Luhansk, Donetsk region. I will remind you that when Russia first started the practice of the illegal transfer of Ukrainian children from an orphanage in Donbas to Russia, Ukraine submitted an appeal to the European Court of Human Rights, and these children were returned. But nine years later, Russia started large-scale invasion. And in February, in March, in April, in June of 2022 and other months, there was — and is — no international court or international organization whose decision can push Russia to stop the atrocities. That is why the problem is not just that on 16 September 2022, the jurisdiction of European Court of Human Rights stopped for Russia.

The problem is that even before

then, the court had no power to influence Russia when Russia started a massive practice of the illegal transfer of Ukrainian children, which is now subjected to investigation by the International Criminal Court. Another example: The UN Court of Justice issued intermediary measures and said that Russia has to push out their troops from Ukraine — and nothing happened. So I, as a human rights lawyer, relying on the law to define people and human dignity for many years, am now doing my job in the circumstances when the law doesn't work. I do believe that it is only temporary, but in the short term we can't rely upon a legal instrument to stop violations.

When we speak about the war, it's not to have theoretical discussions. It means people are dying, people are subject to torture, people are being raped, and we have no legal tools now to stop this.

**PAUL W. GRIMM:** That puts a sharp point very clearly in focus here. Kim, you had raised that there may be an alternate or an additional way for international law to respond when, as Oleksandra points out, other procedures have not resulted in any kind of cessation. One possible response is to remove or replace Russia from the UN Security Council's P5. Can you say more about this?

**KIM SCHELPELE:** Let me first say, to Oleksandra's point, that at the moment there is no court actively processing these cases of the kind that she talks about, and I think that is really important. I know later in the conversation we'll move toward the question of what can be done about the war crimes being conducted on a daily basis now. This is going to require an alternative tribunal, but as we think about what

are the pressures that can be brought to bear on Russia, one of the questions is what Russia's role is in the international organizations that are supposed to be upholding the rules of the international order — and, of course, the crime of aggression is a crime against, among others, the charter of the United Nations. Russia sitting there as a member of the P5 has a blocking function toward any future investigation that may require Security Council approval. In the past, most of the specialized tribunals have come through Security Council approval. It's not the only route, but it's one route.

There are a number of people who are now working on the idea that removing Russia from the P5 — the permanent five members of the Security Council who carry vetoes — might be a good campaign to start. The legal basis for that is the UN charter, written immediately in the wake of the Second World War, which identified the five powers that will have vetoes as the US, the UK, France, and then it said "China" and then it said the "USSR." With regards to China, the China voting from after World War II up until 1971 was actually what we now call Taiwan, and not the mainland. There was a vote of the General Assembly in 1971 that transferred the vote on the Security Council from Taiwan to the mainland. The Russian case is more complicated because there's already been a decision made about who is the successor state to the Soviet Union, so this is not exactly a parallel case. But because the charter says "USSR," it opens up at least a possibility that we might be able to start a campaign to say there might be multiple successor states to the USSR for different purposes, and once you have the Russia committing such a violation of the charter itself, perhaps one of the things we could argue for is the

transferring of that vote to Ukraine. And I know that Harold has his hand up and this is an area where he's a bigger specialist than me, so I would love to hear what he has to say. Oleksandra tells me there's also a move in Ukraine to do this.

**HAROLD HONGJU KOH:** First, Oleksandra and her organization are heroes in this process, and what they have been doing on the ground cannot be praised enough. Secondly, I know how frustrating it is because you can think of the laws working here like chemotherapy against cancer. It's often hard to see that chemotherapy works. It works slowly, and the patient while this is going on has to survive. That's exactly what Ukraine has been doing with its heroic military action. I think, though, we want to distinguish between what's legally possible and what's politically prudent. China is committing genocide against the Uyghurs. It's hard to think of something that would get them more intensely involved than a campaign to remove a P5 member's veto because of gross human rights violations. The United Kingdom and France really have no business having a veto anymore, given that there's an EU, and they will be extremely uncomfortable. People will accuse the United States of having violated Article 2(4) of the charter in Iraq, and such an effort would put all P-5 member into a defensive mode.

I don't think the political goal should be to remove Russia from the Security Council. It should be to empower the General Assembly to do more actions under the Uniting for Peace resolution. And there I would go back to the role of law. It's easy to think that these legal rulings have had no impact, but from the day that the International Court of Justice ruled that Russian troops or its

paramilitaries shouldn't be in Ukraine, that gave the court *prima facie* jurisdiction to decide whether violations that are being committed are continuing violations of the court's jurisdiction. So, one would hope that practically speaking, the jurisdictional issue is settled, and the damages are mounting.

A critical piece of this is to keep the amount of money that's been frozen, so that at a certain point there could be an allocation whereby some chunk of that money is designated not to be returned to Russia in the negotiation, but to be allocated to Ukraine in the case of a diplomatic negotiation. Now, if people say that courts are powerless, I'd simply point out that no court anywhere can enforce its own rulings. The whole point of *Marbury vs. Madison*, which your audience knows well, is that "it is the province and duty of the judicial department to say what the law is;" once the court rules, other actors can and must move in to try to enforce those rulings. I think that these international rulings have been critical in keeping China on the sidelines. If they start supplying lethal weapons to the Russians, they'll be in violation of some of these orders.

I think the International Criminal Court's arrest warrant with regard to child stealing has also had an impact, by getting through to Russian soldiers, particularly conscripts on the ground who are being tasked with child stealing. They have to decide if, long after Putin is gone or escaped to some dacha somewhere, they will be spending the rest of their lives in a prison in The Hague because they implemented these by "just following orders." I think that we have to wait and see what the long-term impact of the legal rulings are. I think the fact that the legal tribunals have been mobilized and so many different kinds of enforcement actions

are taking place, is furthering the isolation of Putin and the Russians, and at a time when they haven't been winning decisive military victories.

**PAUL W. GRIMM:** So, I'd like to hear from Oleksandra, and then Paul: What are your perspectives on some of these broader measures to try to change behavior on the ground by Russia?

**OLEKSANDRA MATVIICHUK:** I have two comments. First, I would like to emphasize that justice postponed is justice denied. All this hell which we now face in Ukraine is a result of the total impunity which Russia enjoyed for decades. So, the problem is not that justice moves too slowly. The problem is that Russian troops committed horrible war crimes in Chechnya, in Moldova, in Georgia, in Mali, in Syria, in Libya, and have never been punished. They have never been punished for these atrocities that they committed, and this leads to the situation that Russia starts to think they can do whatever they want.

Second, regarding the general UN system, I will start with a concrete example. Last year the secretary general of the UN came to Kyiv to visit President Zelenskyy. On the same day, a Russian rocket hit Kyiv and killed our colleague, journalist Vira Hyrych, in her own flat. It's a good sign of the ineffectiveness of the entire UN system. The problem is not only that Russia has veto power. The whole system was designed in the past century by victor states, and the system provides irrational privileges to some countries. For years, this system worked more or less effectively to prevent the worst and to respond to human rights violations. But it does not much meet the needs of current world anymore. We have to

start a profound reform of this system. Ukraine is a clear example: Even with a focus and international attention, we can't stop Russian atrocities.

When I spoke with my colleagues from Africa, they told me that this is a double standard — that Ukraine gets so much attention, and the horrible situations in Africa haven't gotten such attention. And I answered, "I feel your pain because for eight years we have had no attention." I documented war crime scenes. This war started, and I sent numerous reports to the UN Council of Europe, to European Cooperative Society (SCE), to European Union, and nothing changed. Nobody was interested really to stop this. But now, when we have gotten this attention, we can't stop atrocities. The problem is not lack of attention. The problem is with lack of an effective system.

**PAUL W. GRIMM:** What might an effective system look like, Oleksandra?

**OLEKSANDRA MATVIICHUK:** We have to set an ambitious goal: An effective international system is a system that provides human rights, defense, and security guarantees for people regardless of whether or not they live in a country with a strong military, regardless whether or not they live in a country with nuclear weapons, regardless of whether or not they live in a country which has oil and gas or other natural resources that other well-developed democracies want to buy. That is why they close their eyes for decades to what this country did to its own citizens.

An effective system has to respond to the question of how we people who live in the 21st century will defend human beings. Can we do it with the

law? Or do only weapons matter? And as a human rights lawyer, I believe that the first answer is much better for humankind.

**PAUL W. GRIMM:** Oleksandra, you and your organization and others in Ukraine have been undertaking many efforts to collect and preserve evidence for future court cases. Many different organizations — civilians as well as the government — are using all kinds of methods of trying to collect evidence. Can you describe what it is like to try to collect evidence of these outrages while there is active hostile military action taking place, with an eye towards using it in an appropriate way in a legal tribunal of some kind?

**OLEKSANDRA MATVIICHUK:** When the large-scale invasion started, we united efforts with dozens of organizations — mostly regional ones — and we built an all-Ukrainian network of local document data. We covered the whole country, including the occupied territories, and we have an ambitious goal to document each criminal episode, even those committed in the smallest village in Chkalovske, Ukraine. Working together only for one year after the large-scale invasion, we jointly documented 39,000 war crimes. This is a huge amount, but still just a tip of the iceberg. And you are totally right that now we have such digital instruments which we have never dreamed of 30 years before, during the Balkans war. People with ordinary smartphones can take essential photos and videos, and sooner or later, they will share this information. The work of [many] organizations convincingly proves that in order to record what's happened and identify perpetrators, there is no necessity sometimes even to be on the spot.

Digital technologies provide us more potential to record what happened, to collect evidence, and to identify perpetrators. In addition, we use other sources like sending in mobile groups to released territories, gather testimony of victims and witnesses, or if something happened — for example, Russian rockets shelling residential buildings — our local documenters appear quickly on the spot and make their own investigation and documentation. It has provided a lot of information for future investigations and judgment. But what I started to ask myself from March of last year was: For whom do we document all these crimes? We are faced with an enormous amount of crimes. As a lawyer, I know that the International Criminal Court will limit its investigation only to a few select cases.

Our national system is overloaded. They have officially registered more than 80,000 criminal proceedings, and 80,000 is impossible to effectively investigate, even for the best office of general prosecutor in the world during the war. It's not even the case that we are still a nation in transition, and we have to reform our law enforcement body and our judiciary. It's a question of potential, and that is why I start to ask myself: For whom do we document all these crimes? Who will provide justice for hundreds of thousands of victims of this war who will not be lucky to be selected by the International Criminal Court? And it makes me consider that if we have this huge development of digital technologies, we have to push for the development of international criminal justice and other mechanisms of accountability which help to strengthen our national system to face this challenge.

**PAUL W. GRIMM:** I next want us to

**look at criminal proceedings before tribunals and how they can provide recourse to victims who are on the ground and suffering. Of course, the International Criminal Court is one such organization. Harold, for our audience, can you put in perspective what this court does and how it operates? I think you personally have had some experience before that court that you could share with us.**

**HAROLD HONGJU KOH:** I'd like to put before your audience a bigger idea, which is a "Fragmented Nuremberg." We don't have everybody in custody. We don't have a prosecutor. We don't have a court that's ready to try the most serious perpetrators. Putin at the moment is still in power. He has hundreds of thousands of troops and nuclear weapons, so this accountability issue is going to be with us for many years.

What this means is that we have to have a multifaceted accountability process that is pushing in multiple directions which can be sustained over a long period of time. There are really four dimensions of it, not just the one that you mentioned or that Oleksandra mentioned. There is:

1. *international criminal accountability* through the International Criminal Court for certain kinds of law-of-war violations and crimes against humanity, including child stealing;
2. an effort at an *aggression tribunal*, and there's still a debate over what form that might take;
3. the creation of a prosecutor general's office, for a *domestic criminal accountability process*, supported by an atrocities crimes advisory group; and then
4. a *civil reparations process*, which

is being worked through the UN General Assembly, which has created a registry of damages.

All of these need evidence, and so what Oleksandra described is the most critical effort, which is to preserve, create, and collate evidence from multiple sources, not just official sources but official intelligence as well as crowdsourcing, etc., to create a kind of archive to serve all of these accountability processes. The main goal is that when we move into a diplomatic process with the ceasefire — and ultimately, we would hope, some kind of peace agreement — that we can ensure that accountability is still on the table.

This is what happened in Bosnia with the Dayton Peace Accords. (Slobodan) Milošević and (Radovan) Karadžić signed off on those accords, but they were also then tried in The Hague. Milošević died while the case was pending, but Karadžić has been convicted and is serving essentially a life sentence in a Hague prison. So again, the long game is law. It's painfully slow, and it will take many years — probably the rest of our lifetimes — but that doesn't mean it's not something worth doing. We don't have everybody in one place doing one kind of trial. We have to push on all of these different dimensions at the same time.

**KIM SCHEPPELE:** If I can add to that — and this may have been Harold's point number three — one of the things that's also happening is within the EU there's now an EU-based evidence collection process, or at least evidence-storage process that is being conducted through Eurojust, which is the cross-border-crimes investigating unit within the EU. The EU has put a lot of money into having this be a center for coordinating a lot of evidence. At least

within the EU circles, the idea is that a number of EU member states already have on their books criminal laws that would touch some of these crimes. The national courts of EU member states may pick up some of these cases.

For example, right now in Germany, there have now been several trials of Syrian torturers for crimes committed in Syria by Syrians against Syrians. But it happened that the Syrians wound up in Germany as part of the wave of refugees in 2015. So Germany took jurisdiction over these cases. There's a case coming up in the Netherlands along the same way. France has just decided that it probably has jurisdiction over some of these cases, and we have a pending case now in Austria, all of which are out of Syria.

Once you have that established, that many of the EU member states can within their domestic jurisdiction take jurisdiction over these crimes, then you get an even more fragmented Nuremberg, as Harold called it. But given the scale of these cases, as Oleksandra mentioned, I think the more courts we can get involved in this, the better. Of course, the more courts, the more national audiences there are, because it seems to me that one of the great resources that Ukraine has been terrific about mobilizing is international support from a lot of different places. Actually having the domestic courts of many states in Europe involved in this is also something that's going to keep the Ukraine conflict on the front burner in local newspapers here, and, therefore, keep support for Ukraine going. That can all start before the conflict is over, because these are tribunals up and running that are not affected by the conflict.

**PAUL W. GRIMM:** Oleksandra, on Kim's point of individual nations

**using their own domestic criminal law procedures and resources, I'd like you to comment. It's my understanding that, since 2022, Ukrainian courts have been hearing criminal cases brought against Russian soldiers, and some convictions have come from those cases. Can you talk a little bit about how that process has worked?**

**OLEKSANDRA MATVIICHUK:** I will start with sharing the sociological survey which was conducted last year. Ukrainians were asked what will be the main disappointment for them when the war is finished. A majority of Ukrainians, 65 percent, answered that the main disappointment for them will be impunity for Russian war crimes. Just to be clear: We work directly with people affected by this war. We document not just violations of Geneva and Hague conventions, but we document human pain. And that is why millions of Ukrainians demand justice and push for the national system to demonstrate this justice in circumstances which I tried to describe earlier. We have overloaded the national system with international crimes, and the war is still going on. This makes the task to effectively investigate criminal procedures very difficult.

That is why I emphatically say that we need international support. We need constant international involvement on the level of national investigation and national justice — to, first, provide justice for all victims of this war — regardless of who they are, what types of crime they endured, what their social position is, and whether or not international media or international organizations are interested in their case — and, second, to provide this effective investigation and justice in accordance with Article 6 of European Convention of Human Rights.

One example I often use was the first court trial after the 21st of February. It had huge media coverage and the attention of the international community. It's the case of the Russian soldier, (Vadim) Shishimarin, who was found guilty of the intentional murder of a 62-year-old civilian, Oleksandr Shelipov, near his house. I can comment from different perspectives on this case, but I will focus on one. When you read the court's decision, you see the problems of investigation to establish the whole picture of what's happening. It was not episodic or sporadic acts of violence from Russian soldiers. We now face war crimes, the methods of warfare. Russia used war crimes deliberately in order to break peoples' resistance and to occupy the country. They deliberately subjected a lot of human pain to Ukrainians, and that is why it's very important to show all connections, all links with this Russian soldier and his other colleagues and his middle command, and try to go further to the top command chain.

When you investigate the individual case, you have try to show the broader picture. This is visibly lacking in this court decision. And this is why we didn't get the answers from this court decision that people demand. I think that when we speak about accountability, we have to mention that this gap has two dimensions. The first dimension is that there is no international court that can prosecute Putin, his senior political leadership, and top military command for the crime of aggression. Unfortunately, even the international criminal court has no jurisdiction over the crime of aggression in the situation of the Russian war against Ukraine. This is why we promote the idea of creating a special tribunal on aggression.

The second dimension is this human

dimension. We have to change our way of thinking. It's normal during wars when we have hundreds of thousands of victims, a lot of them have no chance for justice, because the war turned people into numbers. But once again, we have digital tools that can provide effective investigation. We live in the 21st century, and we proclaim that people are not numbers, that the life of each person matters, that we have to return to people their names and their dignity. We have to find a way to manage this problem, and to provide justice for all victims of this war.

**PAUL W. GRIMM:** Have there been many criminal prosecutions within Ukraine courts of whatever level of command structure may have been involved in these atrocities?

**OLEKSANDRA MATVIICHUK:** It's very difficult for us to provide civil oversight because these court hearings are going on in different regions, and we sometimes obtain information too late and can't send our monitors to the court hearings. Plus, we are in the house of the war. That is why I can't provide numbers. But the process is going on. What makes me worried is I know that Ukrainian people want justice — not revenge — and this means that investigation, justice, and court process have to be done so strictly in line with the law so that nobody has any doubt about the final result.

One last issue I want to emphasize. In order to help Ukraine face this challenge, the international community created a special group of advisors, and a lot of international organizations and governments provide consultations and advice, which is important and essential. But it has not solved the problem, because some things are not being done by Ukrainians —

not because Ukrainians don't know how these things have to be done, but because we are like qualified working hands on the ground. By this, I mean that if you have a car without petrol, you can hire Schumacher, the best driver in the world, but the car without petrol will not move. That is why it's so important to have practical involvement. We need specialists with special status, like judges, prosecutors, and detectives, and for this we have to create a hybrid model inside the national system to effectively investigate war crimes, crimes against humanity, and genocide. This track has to be parallel to the track of a special tribunal on aggression.

**PAUL W. GRIMM:** Harold, can you help us understand what mechanisms international legal institutions can provide in terms of criminal charges against individuals who commit these atrocities?

**HAROLD HONGJU KOH:** Three points, Paul: One, we can't let the best be the enemy of the good. There are many institutions. I sympathize with Oleksandra. But the point with regard to the car analogy she invokes is that you may have a defective car, but if you can drive that mechanism and get to where you want to go, it's worth doing, as opposed to trying to build an entirely new car that may not be available for many years. Second, the key to the whole system is what they call "complementarity." If possible, you do the prosecution domestically. If it has international elements, you add international elements into the domestic prosecution. Only if it's a case where the international violations cannot be addressed through a domestic or hybrid process, you go to an international tribunal. I think that's what

they're trying to do. The Ukrainian prosecutor general's office has developed pretty significant capacity, has a very large number of open cases, and has support from the atrocities crimes advisory group, which was set up by the EU and the United States, and also has access to and is building this database, which Oleksandra described. So that may not be everything, but it's certainly not nothing either. It's an important step forward.

The third point, which I think is the most critical one, is the result of these international criminal activities is isolating and making Putin a pariah. And when you look at where he is now as opposed to February 2022, when he launched the invasion, he's extraordinarily isolated. He made a horrible mistake, and now he can't move his money. His oligarchs have lost their yachts and their football clubs, and I'm sure they want to have nothing more to do with him. He's used up all of his high-tech weapons. He's subject to sanctions and can't get new high-tech weapons. He can't travel. And he's now down to using conscripts, and the Russian people are very much up in arms about how those conscripts are being treated. He's now subject to an international arrest warrant, so his freedom is significantly limited. And right now Ukraine is about to launch a counteroffensive with the use of very high-tech U.S. equipment, as well as German equipment. So the military forces, combined with the sanctions, have allowed the Ukrainians to play the role of a 21st-century David against a 20th-century Goliath. We'll see how far they get during this counteroffensive, which will obviously go into the fall. But a question is how much territory can Ukraine reclaim, and will that be the basis for a ceasefire and ultimate diplomatic negotiations starting in the



fall? I think Putin is increasingly isolated. He has lost by votes of 140-plus at the General Assembly five or six times, and there's no sign that he's gaining diplomatic allies. He has begged for Chinese support, and he hasn't gotten it. I think that he's in a dark situation now, and we're looking at all kinds of possibilities. He could be assassinated or "disappeared" like Yuri Andropov. He could decide it's time to flee; maybe he has money stashed somewhere and has an escape plan. He's a former KGB agent, and they tend to have escape plans.

So I think he's starting to look at a very limited set of options right now and, as discouraging as this has been, the fact that the Ukrainian people and the civil society have not only survived but strengthened and developed a global appeal during this period will serve them well in the long term. I think that their smart power is rising while Putin's hard power is falling.

**PAUL W. GRIMM:** Is it true, Harold, that however long and frustrating the process may be for this to play out, it does have the ability to play out? Can accountability be achieved?

**HAROLD HONGJU KOH:** The tribunals exist, many of them, and others can be created. The critical point is to not take accountability off the table in the diplomatic negotiation. The second part is how to start moving on some of the most urgent humanitarian issues. The Pope is interested in being part of this process. He's expressed his interest on reuniting families and children. It's possible that could be a side discussion that he leads with unusual credibility. Meanwhile, the Secretary General of the UN Antonio Gutierrez has struggled to maintain the grain deal and the flow of grain out of Odesa

and other places. I think that's going to continue. You could have multiple negotiations on a number of issues leading toward some kind of comprehensive Dayton-style peace accord, with many of the accountability tribunals that are in existence and others that can be created as a part of that long tail you're discussing.

**KIM SCHELPELE:** I think Harold's right that the challenge will be creating enough mechanisms to satisfy enough people. As Oleksandra says, every one of these crimes that her group and others have documented is something that needs to be addressed. It seems to me that, in addition to multiplying the tribunals and the various avenues for accountability, we'll also be needing to think down the road about reconstruction and restitution, so to speak, because a lot of people have not only suffered from horrific deaths and injuries, but also people have been displaced, homes have been damaged, and so on. One of the goals of using all the legal mechanisms that we can use is that, first of all, as Harold said, Ukraine's in the right on all these cases.

This would build their resources, but as we start thinking about who's going to pay for the reconstruction and how are we going to leverage that process, then I think a lot of people are also eyeing Russian assets that have been frozen and captured. Another challenge is going to be figuring out whether those assets can be redirected to something like restitution or reconstruction, which is not in the criminal line, but is something that I think will also ultimately help the people who have suffered in this war.

**PAUL W. GRIMM:** Paul, any insight that you have from your many years

**of focusing on these issues during your work at State?**

**PAUL STEPHAN:** I think what Russia has done is an enormity as well as enormous, and one of the problems we have when there are huge crimes is we get overwhelmed. As Harold has said, the way you deal with huge, unmanageable problems is to break them down into their components so that you can deal with the parts you can fix right now. You try not to undermine the challenges that can't be met now, but not make things worse and hope that, step-by-step, you come to a solution that is at least tolerably good — although never perfect. I think this discussion has been identifying those things. Most of my recent work has been on the asset side of things rather than the criminal prosecution side of things. I think the challenge is to be prepared to act, but not to do anything irrevocable. This is where I think we are right now.

**PAUL W. GRIMM:** When you say that the challenge is to be prepared to act but not do anything irrevocable, what does that action look like on the assets? How do you begin to look at resources that might be mobilized at the end of the process to rebuild? So that even if it may be a decade down the line, people can say, "It's not perfect. It has many parts. It's very complicated. But it does provide the ability to move forward when these things have happened in a way that gives some measure of solace to the state that has been subject to that aggression." How do you marshal those resources?

**PAUL STEPHAN:** Well, you start with what we've done, which is the freeze orders. I would've made the scope of

some of our orders broader than they are. I think there's been a tendency on the part of most of the sanctions-imposing countries to spare those assets and transactions that would cost too much for their own stakeholders, their own companies and businesses. I think we could go further than we've gone in that area. But I think first hold those assets ready for the right time, under the right lawful process, to be dedicated to the reparations that are needed. Of course, that involves imagining what that process will look like, of converting frozen assets into assets available for reparations. I don't think we're there yet, but I think we ought to be thinking now about how to do that.

**PAUL W. GRIMM:** Are there some examples of how that might be done that you could share with us, Paul?

**PAUL STEPHAN:** I would hope that this approach would be tied to some kind of armistice, if not peace agreement. The best example, I suppose, was the settlement of the Iranian hostage crisis, where the Algiers Accords did identify assets that were held by the United States. Some were returned to Iran post-haste, but also a large portion was used to fund a dispute resolution process, which, 43 years down the road, is still going strong. The only outstanding claims are state-to-state claims, and they're mostly Iranian claims against the United States. But that process on the whole, I think, has been a great success, and we might hope that we could put something together that would work that would take a lot less than 43 years to bring to a conclusion.

**PAUL W. GRIMM:** We're coming up on the end of our time. I'd like to give each of you just a minute or two to sum up any last thoughts you'd like

to leave our audience with. Should we feel more optimistic or less optimistic about the state of international law dealing with these acts of aggression than we would've felt before the Russian invasion of Ukraine?

**PAUL STEPHAN:** I may have or at least be seen as having less ambitions for international law than perhaps some others. But I still do have ambitions, and the analogy I would use to respond to your question is how do we feel about COVID? It was terrible that we went through this international pandemic, but I think — although it remains to be seen how we've come out of it — a case can be made that new sources of resilience, certainly new technologies, new ways of dealing with global problems have been explored, even though it's not been one victory after another. And that's sort of how I feel about events like these grave and dangerous acts by a superpower. It'll take a while to respond, but one hopes we come out of this stronger than we were before.

**OLEKSANDRA MATVIICHUK:** I believe in law, and that is why when I say that the law is not working, I believe that it's temporary. I have two comments. First, when we speak about all crimes, which we now have documented, this is a crime scene, the result of leadership decision to initiate, to start, and to plan this war of aggression, and that is why we have to create a special tribunal which can prosecute Putin and other top officials of the Russian state for this crime. And there is a debate about this court, in what kind of forum it has to be created, and that is why I would like to raise the voice that we have to create a special court in a way which can provide opportunity to overcome the immunity that Putin has according to the inter-

national law. And second, I work with victims. I work on the ground directly, and I see how investigation is going on, and that is why I so emphasize this. In addition to all these advisors and support, we need qualified working hands on the ground. Last example, when Kyiv region was liberated, France sent [aid] to work on the ground. But when the Kharkiv region was liberated, my colleague, who is an editor of one of the large Ukrainian online media, had to volunteer in the morgue — not because he's a good specialist of DNA, but because nobody was there. And I would like to remind you that all information that we now gather has to be presented in a competitive court process, and we have to prove the truth, not just to show the truth.

**KIM SCHEPPELE:** I second what Oleksandra said — that the process of collecting evidence is a labor-intensive process that needs people who are experts, and Ukraine doesn't have enough of them. So that would be an urgent thing for the international community to think about providing. But I want to also broaden our discussion a little bit here to say that, at the end of this war, Putin should not be leading Russia. Russia will still be there, and one of the things I worry about is what Russia will look like after Putin. He has not designated a successor. There are lots of reasons to believe that his absence would cause a fair amount of chaos at the top of Russian politics, and I hope that we have some people thinking a little bit ahead about what Russia should look like coming out of this conflict — without Putin, without the people responsible for these atrocities at the top. How will Russian domestic law handle this? Because the only thing worse than what's happening in Ukraine is for Russia also to collapse

into chaos and create another catastrophe right next door.

**HAROLD HONGJU KOH:** Obviously, we have to focus on how Putin can be punished and how the Ukrainian people can be compensated and made whole. But I don't think we should overlook how much Putin has already visibly failed. When he started this, he seemed to be a very powerful figure challenging the international system, and now he's really hanging on. Among his many, many miscalculations, he underestimated NATO. He underestimated Ukraine. He underestimated Volodymyr Zelenskyy, and Zelenskyy has been extraordinary in not just being a wartime leader — a Churchill with a cellphone — but also in sketching a vision of Ukraine's future, which is a sustainable future as part of Europe. He's describing a Ukraine

that will have energy based on clean energy, that will be part of a new security architecture, that could be part of the EU, that will have territorial borders, that will be respected, that has food security, environmental security, nuclear security, and that will be an equal in the eyes of the sovereigns of the world to Russia.

And this is something that has been achieved through this extraordinarily painful process. And as Kim has said, Putin has no vision of Russia's future. He gambled on the wrong vision. He focused on the past. He focused on restoring a Soviet Union that's gone, and he doesn't have a Plan B as far as we can tell. Obviously, that creates instability of its own. But this is a battle between Ukraine's future and its bet on international law and world order versus Putin's bad bet on the past:

using tools of atrocity, aggression, and international law violation to try to recapture a world that's gone. And so, I think the history is on the side of the Ukrainians.

**PAUL W. GRIMM:** Thank you. I want to thank you all very much for your time. Oleksandra, particularly you, because it's late for you, and it is not easy always to participate in calls like these given the conditions you must face every day. I think all of us share an admiration for your courage and your tireless work. I wish you success in that, and I want to thank you very much. Your comments today are very much appreciated.

**Thank you all very much.**

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