

Eli M. Rosenbaum Keynote Address, 16th Annual International Humanitarian Law Roundtable, Chautauqua, New York, August 26, 2024 (as prepared for delivery)

Thank you, Jennifer [Trahan (Professor, New York University)].

Good morning. It's wonderful to be back at Chautauqua for the 16th annual International Humanitarian Law Roundtable. I go all the way back to the second and third iterations, held here in 2008 and 2009, organized by the Robert H. Jackson Center. I well remember those two Roundtables, especially because four of the prosecutors who helped create modern international criminal law, at Nuremberg, were participants – the much-missed Whitney Harris, Ben Ferencz, Henry King, and Bill Caming. Just being in their presence was an exhilarating and deeply inspiring experience. Some of you in this room today were there and can no doubt back me up on that – including my friends Steve Rapp, David Crane, just to speak of fellow prosecutors.

Those were heady time indeed. Optimism abounded. The International Criminal Court and the Special Court for Sierra Leone had been established just a few years earlier [both in 2002], following on the heels of the creation about a decade earlier of the International Criminal Tribunal for the Former Yugoslavia [1993] and the International Criminal Tribunal for Rwanda [1994]. After decades of post-Nuremberg dormancy caused largely by the persistence of Cold War tensions, the life-saving promise of international criminal law seemed at last to be on the cusp of comprehensive realization. And these Roundtables, held each year in the very New York State county in which Robert H. Jackson spent his formative years, were on the way to becoming an indispensable vehicle for advancing international criminal law, especially by facilitating interactions between practitioners, scholars, and activists – thanks to the far-sighted leadership of Greg Peterson and other founders of the Jackson Center.

In the 15+ years since those first Roundtables (or “Dialogues” as they were originally called), much important progress has been made in enforcement of humanitarian and human rights criminal law, before both international and national courts. Those developments have been catalogued, so to speak, on something of a rolling annual basis by speakers and discussions at the prior Roundtables.

Last year and this year have seen momentous positive developments, such as the March 2023 ICC issuance of an arrest warrant for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, who bears the Orwellian title in his office of Commissioner for Children's Rights, for the war crimes of abducting and deporting Ukrainian children in the wake of the Russian Federation's 2022 unlawful and unprovoked full-scale invasion of Ukraine. Pursuant to bipartisan legislation that was signed into law by President Biden just three days before the end of 2022, the United States was at last in a position to assist the ICC in its Russia investigations. The process of rebuilding the U.S.-ICC relationship, which had hit its nadir during the previous U.S. administration, made great progress –most prominently exemplified by U.S. Attorney General Merrick Garland's visit to the ICC in June of last year, the first time that a U.S. Cabinet official had ever set foot in the Court's headquarters. I accompanied AG Garland to other meetings he had with Prosecutor Khan in Washington and Europe. Meanwhile, the courageous and remarkably successful work of Ukrainian authorities to document Russian crimes -- crimes

that are ongoing even as we meet here today -- continued apace. Together with Ukrainian investigative authorities and with assistance from European governments and multiple agencies of the United States government, the men and women of the Prosecutor General's Office, led by visionary Prosecutor General Andriy Kostin, are doing what no other law enforcement authorities anywhere have ever even attempted -- namely, pursuing comprehensive justice for the victims of war crimes, crimes against humanity, aggression, and, I believe, genocide while their country is defending a large-scale, indeed existential war. They are the heroes who will continue to bear the heaviest investigative and prosecutorial burdens of these complex and emotionally taxing cases. And on a personal level, I must say that of all the things I miss about working at the U.S. Department of Justice, it is the privilege of working closely with them that I miss the most.

Continuing on the theme of progress during the past year: In December, USDOJ charged four Russia-affiliated military personnel with committing war crimes in Ukraine, making the United States the first national jurisdiction in the world other than Ukraine itself to prosecute alleged perpetrators of war crimes committed by Russian forces in Ukraine. By the way: That case, was the product of an extraordinary investigation directed for the DOJ War Crimes Accountability Team I headed by my brilliant Justice Department colleague Christian Levesque and carried out in partnership with the Federal Bureau of Investigation and ICE's Homeland Security Investigations, and with important support from the Department of State. It also marked the first-ever use by U.S. prosecutors of the federal war crimes statute, which was enacted back in 1994.

This past February, Lithuania became the third country to charge alleged Russian war criminals. Lithuania is one of at least nine European countries to have publicly announced the initiation of investigations under their domestic laws. I am optimistic that prosecutors in at least some of those countries will soon join their Ukrainian, American, and Lithuanian counterparts in commencing prosecutions.

Also last year, on the historic initiative of the European Commission, the International Centre for the Prosecution of Aggression -- the I-C-P-A -- was established. Embedded in Eurojust in the Hague, it facilitates international cooperation to locate and preserve evidence that could be employed before a proposed special tribunal to prosecute cases involving the crime of aggression committed against Ukraine -- a crime that the ICC cannot prosecute in this instance without UN Security Council authorization -- which the Putin regime would surely block with Russia's veto if an ICC referral were ever to be proposed. It was an unforgettable experience to be present at a conference at Catholic University last year [March 2023] at which my friend and personal hero Beth Van Schaack made the historic announcement that the United States "supports the development of an [ad hoc] internationalized tribunal dedicated to prosecuting the crime of aggression against Ukraine."

Also last year, Attorney General Garland named my gifted and tenacious DOJ colleague Jessica Kim to work at the ICPA, to which end he bestowed on her the title "U.S. Special Prosecutor for the Crime of Aggression." She is thus the first U.S. prosecutor to be tasked with helping to build a prosecutable aggression case since the days of Robert Jackson and his U.S., British, Soviet, and

French colleagues at Nuremberg. Jackson fought hard, including in communications with President Truman, to get the then-novel offense of aggression included in the Charter of the Nuremberg International Military Tribunal, and the crime made its world courtroom debut there in 1945. Jessica will join us here this evening – so very fittingly in Chautauqua under the auspices of the Robert H. Jackson Center!

Although it is good to note with approval and some satisfaction the positive developments of the past year, I would be remiss if I did not point out that we have seen developments this past year that are deeply concerning, even demoralizing, from the prospect of our shared goal of ending impunity for, and preventing the commission of, violations of international humanitarian and human rights law.

First of all, deterrence has plainly not been achieved against Russia, and so the Putin regime continues to decimate Ukrainian towns and kill and wound thousands of innocent Ukrainians, both civilians and the brave and outnumbered citizen-soldiers who are struggling to defend their country. According to updated figures distributed on Friday by Ukraine’s embassy in Washington, there have now been 35,265 civilian casualties [including 12,773 deaths], with, alas, no end in sight.

In the wake of this ongoing humanitarian nightmare, the special tribunal for prosecuting the crime of aggression still has not been stood up. It has been well over *two full years* since the Parliamentary Assembly of the Council of Europe (PACE) called on all member and observer States to “urgently” set up an ad hoc international criminal tribunal [April 28, 2022]. Meanwhile, Russia’s aggression continues.

I don’t need to remind this audience – but I will – that the international Nuremberg tribunal declared that aggression is “the supreme international crime,” because it is the one that typically makes possible the commission of other criminal violations of humanitarian and human rights laws. It should be borne in mind that not only has the Vladimir Putin regime committed the crime of aggression in invading neighboring Ukraine, the largest country entirely in Europe, it has committed the worst kind of aggression, namely aggression for the purpose of territorial conquest. And in the course of this conflict, Russia has gained the ignoble and frightful distinction of being the first and only nation in history to threaten the use of nuclear weapons while waging aggressive war. Prosecutor General Kostin frequently points out that aggression is the one crime that has victimized every single citizen and resident of Ukraine and that, accordingly, the only way to achieve justice for *all of them* is to successfully prosecute those principally responsible for launching and waging the war of aggression. Honestly, the long delay in establishing the special tribunal reminds me of that expression “Nero fiddled while Rome burned.” Russia is killing Ukrainians every day and the main mechanism for achieving justice and, one might hope, some measure of deterrence too, hasn’t even been created.

Relatedly, one might also ask where is the ICC Office of the Prosecutor in pursuing comprehensive justice for Ukraine. It is good, to be sure, that arrest warrants have been obtained against President Putin and Commissioner Lvova-Belova for trying to steal Ukraine’s future by

abducting Ukrainian children and, two months ago, that warrants were issued against a former Russian defense minister [Sergei Shoigu] and against the country's highest-ranking military officer [Valery Gerasimov] for the war crime of directing attacks at civilian objects [article 8(2)(b)(ii) of the Rome Statute], the war crime of causing excessive incidental harm to civilians or damage to civilian objects [article 8(2)(b)(iv) of the Rome Statute], and the crime against humanity of inhumane acts [under article 7(1)(k) of the Rome Statute] for "intentionally caus[ing] great suffering or serious injury to body or to mental or physical health" "against a civilian population." The judges evidently determined that these acts were "carried out pursuant to a State policy . . ." and that the conduct "appears to be ongoing." Those conclusions are without doubt correct. Why then has no arrest warrant for these crimes been issued for President Putin? The crimes have been committed almost continuously for more than two years, a fact of which he cannot be unaware. After all, he – uniquely – has the authority and ability to bring a stop to these crimes, but he doesn't stop them. How many more months or even *years* of such lethal criminality must Ukraine suffer before the individual who bears principal responsibility for the commission of those crimes, faces the possibility of arrest for those crimes? As in the case of the proposed aggression tribunal, international criminal law is moving too slowly while large numbers of innocent people are dying.

Nor has international criminal law deterred the commission of atrocity crimes in Sudan. As Secretary of State Blinken observed [on 12/6/23], "In haunting echoes of the genocide that began almost 20 years ago in Darfur, we have seen an explosion of targeted violence against some of the same survivors' communities."

International criminal law has also done nothing, year after year, as Chinese Government continues to commit genocide and crimes against humanity against predominantly Muslim Uyghurs and other ethnic Turkic minority groups.

Finally, and arguably most egregiously in this "parade of horrors" is the similarly undeterred attack commenced on October 7 in Israel by Hamas and its allies – and the aftermath of that attack. On that day, Hamas, then the de facto and previously elected governing authority in Gaza, broke an existing cease-fire with Israel in order to launch a surprise attack in which thousands of armed men crossed the border and raped, tortured, burned, mutilated, and massacred innocent Israelis and others, murdering some 1,200 people and abducting hundreds of terrified people, from babies and older children to elderly persons, to serve as hostages in Gaza. In the process, and in keeping with its oft-stated overtly genocidal ambition to kill all Jews in Israel and throughout the world, Hamas and Palestinian Islamic Jihad committed the largest mass murder of Jews since the Nazi Holocaust on the 1940s. Numerous hostages continue to be held, under unimaginably horrible conditions. Hamas has openly declared its intent to *repeat* the atrocities of October 7, again and again, until Israel, a U.N. member state and the world's only Jewish state, a tiny country the size of New Jersey, is destroyed.

The atrocities perpetrated on October 7 by Hamas were so gruesome that I hesitate to describe them. If any of the college and grad students here wish, they can go outside the room for a few minutes; I won't be offended.

[Read excerpts from the *New York Times December 28* account which detailed what The Times sub-headline termed “a pattern of rape, mutilation and extreme brutality against women” during the Hamas massacre.]

In sum, Hamas did to human beings that day what none of us here in this room would do even to a rat or a tarantula.

The extreme violence of October 7 had a purpose: Hamas not only expected but *intended* that Israel would soon respond with large-scale military force. Israel did so, attempting to destroy Hamas’s ability to repeat such genocidal attacks and to continue governing in Gaza. Israel’s government took that action to discharge its legal and moral obligations to protect its citizens, among them some 7 million Jewish citizens and more than 2 million Arab citizens, and to carry out its treaty obligation under international law, specifically the 1948 Genocide Convention to “punish and prevent” genocide.

Meanwhile, by using Palestinian civilians as human shields – undeniably a war crime – and interfering with civilian access to food and medical supplies, continuing to fire thousands of rockets at Israel despite learning early on that many were going astray and landing in Gaza, killing and maiming civilians there, and in other ways, Hamas ushered into existence a new and perverse kind of warfare, in which an aggressor intentionally seeks to increase the death toll and suffering *among its own civilians*, in order to generate international sympathy that would force the victim state to desist and to yield political benefits, including ending any near-term hope for a two-state solution – which Hamas openly opposes – and derailing the process of rapprochement between Israel and Saudi Arabia, countries that face the common threat of a militant Iran.

In this grotesque strategy, Hamas has largely, even shockingly, succeeded, as is obvious from what we have seen on some major college campuses, in some international fora, and elsewhere. By the way: In July, the U.S. Director of National Intelligence, Avril Haines, In July, Director of National Intelligence Avril Haines said in a public statement that Iran’s government has given covert support to American protests against Israel’s defensive war against Hamas in Gaza. She added that groups linked to the Tehran government masqueraded as online activists, encouraged campus protests, and provided financial support to some protest groups.

In response to all of the blame-Israel-first posturing, it isn’t said often enough that, already *last year*, the Israeli government made the same basic demand of Hamas that the Allies made of Nazi Germany when *that* entity was the aggressor and the perpetrator of genocide, war crimes, and crimes against humanity, in World War II: Namely, surrender, lay down your arms, and give up your prisoners and, in the words of an Israeli spokesperson on December 7, “the war will end tomorrow.” The Hitler regime ignored the Allied demand for unconditional surrender, with the result that the fighting continued for many months after it was clear that the Allies would prevail, and hundreds of thousands of German civilians died unnecessarily, particularly through Allied aerial bombing, along with an enormous number of Allied and German soldiers. Hamas is doing likewise, refusing to accept the eminently reasonable demand of the country that it attacked so savagely.

Although the Hamas-controlled Gaza Health Ministry has been caught not only falsifying civilian death toll figures but also significantly exaggerating the percentage of women and children civilian deaths, there is no doubt that the death toll has been high and that the suffering in Gaza has been great. This is a major tragedy, without doubt, much to be regretted. But each of those deaths and all of that suffering has been caused by Hamas – which, as Secretary Blinken has noted, “could have ended this war on October 8.”

Having failed to deter Hamas, perhaps international criminal law, many of us dared hope, could bring justice to victims in both Israel and Gaza. Tragically, however, that is not what has transpired over the past nearly 11 months since the October 7 attack. What we have instead seen, I submit, is the abuse and even hijacking of international humanitarian and human rights law.

For instance, South Africa went to the International Court of Justice demanding that the Court find that Israel – the victim of a genocidal attack on October 7 – has in fact committed genocide, in Gaza. This allegation is demonstrably false. Israel’s attorneys made a compelling presentation before the Court, which has yet to rule. There isn’t time this morning to outline their refutation of the genocide calumny, but given that Israel has facilitated the entry into Gaza of *over a thousand tons* of food and other humanitarian relief, has risked its own soldier’s lives to warn Palestinians of the locations of impending IDF military operations so that civilians might flee in advance, and has had an offer publicly in place since last year to permanently end the war as soon as Hamas surrenders, the allegation of genocide is absurd, indeed reprehensible.

To compound the matter, it will be recalled that the initial accuser before the ICJ – South Africa – attracted worldwide condemnation in 2015 when it refused to arrest visiting former Sudanese President Omar al-Bashir despite the fact that he was, and is, the subject of an outstanding ICC arrest warrant for, yes, *genocide*. As Amnesty International noted at the time, South Africa, as an ICC State-Party, had a legal obligation to arrest al-Bashir and deliver him to The Hague, and its refusal to do so was, as Amnesty put it, a “shocking” breach of its international legal obligations. And which country is the latest one to join the ranks of Israel’s accusers at the ICJ? Believe it or not, *Turkey*, which, under the leadership of President Recep Erdogan, continues to deny the reality of the Armenian genocide, which took the lives of at least many hundreds of thousands of Ottoman Armenians during World War I.

So hypocrisy is in full bloom, so to speak, in the furor over purported Israeli “genocide,” making a mockery of international human rights law.

Unfortunately, the situation isn’t much better for international humanitarian law in connection with the Gaza war.

The Office of the ICC Prosecutor quickly and justifiably began investigating the facts of October 7 and its aftermath. In May, an OTP team was scheduled to fly to Israel, whose government had agreed to cooperate with the investigation. But ICC Prosecutor Khan abruptly cancelled the trip, depriving his office of an opportunity to examine the facts in person, on the ground, including to assess whether the ICC’s complementarity requirement had been met – that is, whether Israel had demonstrated an ability and willingness to investigate Israeli crimes that might have been

committed and to prosecute or take administrative action where the evidence warranted. OTP knew that Israeli authorities were investigating numerous of allegations against Israeli personnel. And the Prosecutor himself had stated publicly on October 29 that “Israel has a professional and well-trained military. They have, I know, military advocate generals and a system that is intended to ensure their compliance with international humanitarian law. They have lawyers advising on targeting decisions, and they will be under no misapprehension as to their obligations, or that they must be able to account for their actions.”

But Prosecutor Khan nonetheless called off the trip and instead announced publicly on May 20 that he had decided to seek arrest warrants for Israel’s Prime Minister, Benjamin Netanyahu, and Defense Minister, Yoav Gallant, for war crimes and crimes against humanity against Palestinian civilians in Gaza, and for three senior Hamas officials for war crimes and crimes against humanity committed against Israeli victims and victims of other nationalities killed or brutalized in Israel or seized there and harmed or killed in Gaza.

In his announcement, Mr. Khan stated – ironically, in my view – that his Office, in pursuing arrest warrants for both Hamas and Israeli officials, was seeking to “*demonstrate our willingness to apply the law equally,*” for “*if it is seen as being applied selectively, we will be creating the conditions for its collapse.*” On June 26, I requested leave of the judges of ICC Pre-Trial Chamber I to provide written amicus curiae “Observations” regarding the pending arrest warrant applications. Specifically, I notified the judges, I wished to address multiple instances of apparent bias, including employment of double standards and other selective application of the laws, in OTP’s handling of this matter, which, I contended, collectively cast doubt on the reliability, indeed the credibility, of the arrest warrant applications. On July 22, the judges *granted* my request, and those of dozens of other persons, organizations and governments, after, in the words of their publicly posted decision, they had “evaluated the requests received to assess whether the observations proposed are desirable for the proper determination of the case.” I subsequently filed my extensively sourced Observations with the court, urging that the judges obtain satisfactory responses from OTP before deciding whether to issue the arrest warrants.

Time does not permit me to fully summarize the many points made in my brief, though I hope that some of you will download it from the ICC’s website and read it. But I will mention one of the facts I presented, namely that Prosecutor Khan did not accuse the three Hamas officials with having committed even a single crime *against Gazan civilians*, not even using them as human shields, stealing and destroying incoming civilian food shipments, or withholding from Palestinian civilians the vast quantities of food and water that Hamas had stored in underground tunnels before launching the October 7 attack, thereby significantly increasing food insecurity in Gaza despite efforts by Israeli and other authorities, and by international aid organizations, to reduce civilian hunger. Putting OTP’s selective application of the law aside, imagine what progress Prosecutor Khan could have made toward his stated, noble, and no doubt sincerely held goal of ending suffering in Gaza had he “revealed” to Gaza’s beleaguered civilians that, in OTP’s view, Hamas, which presents itself to Palestinians as their savior, was in fact largely responsible for bringing on and extending their suffering.

I would commend to your attention two other *amicus* briefs recently filed with ICC Pre-Trial Chamber I – one brief by the so-called High-Level Military Group and the other by a consortium of organizations led by the U.K. Lawyers for Israel organization. Both briefs address specific factual allegations leveled by Mr. Khan in his May 20 announcement, on the reasonable theory that they are representative of the main allegations in his arrest warrant applications, which are non-public documents.

The High-Level Military Group, or HLMG, is an independent body of former chiefs of staff, senior military officers and cabinet ministers from NATO countries possessing, as their brief puts it, “many decades of expertise at the highest level of land, air and sea conflict and the legality thereof.” The brief was signed by, among others, retired generals and other senior former military officers from France, Italy, Spain, the United Kingdom, and the United States, a former Dutch Foreign Minister, and a former Deputy Prime Minister of Finland. Last month, these experts made, in effect, the trip to Israel and Gaza that Karim Khan called off for his own staff two months earlier. As their brief recounts, they “conducted an in-country assessment of the Gaza conflict in July 2024, visiting IDF military HQs from the top level; humanitarian aid installations and operations; units down to battalion level of command; and a visit inside Gaza.” Again, time does not permit me to fully summarize the brief and I urge you to read it at the ICC’s website. But here is one of their conclusions, regarding the OTP allegation that Israel employed “[s]tarvation as a method of warfare”: “The logistical efforts of the IDF, the infrastructure they have built and maintained, the resources dedicated by the IDF to these efforts, the directives and commands we saw, and the commanders we met all suggest that there is a genuine, ongoing and concerted effort to alleviate the humanitarian situation in Gaza, in direct contradiction to the claims of the Prosecutor.” The brief continues: “It is our assessment that whatever food insecurity exists today among the population of Gaza is not due to Israel impeding entry or distribution of aid into the territory - either deliberately or arbitrarily - but to the unavoidable effects of large-scale urban warfare, compounded by Hamas hijacking aid for their own military purposes, allowing criminal elements to seize aid, and in some cases confiscating aid and selling it to the civilian population.”

Regarding the allegation announced on May 20 by Mr. Khan that Israel “imposed a total siege over Gaza” by, among other things, “completely closing the three border crossing points, Rafah, Kerem Shalom and Erez, from October 8,” and by “cutting off cross-border water pipelines from Israel to Gaza” to deprive Gazans of their “principal source of clean water,” the brief states, “Erez crossing was severely damaged in the 7 October attack by Hamas. Kerem Shalom crossing is still, even to this day, a target for Hamas mortar and rocket attacks. Nonetheless, we observed a constant IDF commitment to maintain that crossing as an access point for aid. Importantly, Israel had no control over the Rafah crossing between Egypt and Gaza until their operation in Rafah in May this year, and therefore did not have the capability to impose a ‘total siege’ as the Prosecutor alleges. Since 21 October, following needs that arose in Gaza, humanitarian aid constantly entered the Gaza Strip, after going through necessary and legally permissible security checks.” As to the water supply, the brief states, “We understand that 90% of the water in Gaza does not come from Israel. We were briefed that on 7 October, Hamas fire damaged 2 out of the 3 pipelines from Israel into Gaza. We saw evidence that Israel has facilitated the

repairs of water infrastructure.” There are additional similar refutations of OTP’s May 20 allegations. Permit me to quote just one more section:

Moreover, the Prosecutor's allegations completely absolve Hamas – who instigated the war – of the responsibility for supplying its own population. As military experts, we can attest that if states engaged in war are forced to adopt full responsibility for the enemy's civilian population, especially in a context where the opposing party deliberately hinders aid efforts, it sets a standard that will be unacceptable for most states.

It is our considered military opinion that the State of Israel and the IDF are and have been since the inception of this operation complying in good faith with all international legal obligations to facilitate the provision of humanitarian aid into Gaza. Based on our experience and knowledge, Israel is facilitating aid to a level we have not seen in our own militaries and we are not aware of our forces’ efforts or even capabilities to conduct similar operations. We do not believe any other armed forces have ever made such efforts, or achieved such success, in facilitating aid delivery to civilians in enemy territory while still engaged in active hostilities in that same operational environment.⁴ It is our professional view that accusations of an intent to starve civilians by the Israeli Prime Minister and Minister of Defence are unsupported by all available evidence, most importantly by the actual conduct of IDF operations in and around Gaza.”

Again, had Prosecutor Khan not cancelled his own team’s assessment visit to Israel and Gaza in May, he might have reached similar conclusions. But we’ll never know, of course, because the trip was irresponsibly called off in favor of Mr. Khan making a media splash with his untested allegations – an unexplained departure, by the way, as I noted in my brief, from his handling of the arrest warrant applications for the Russians Putin and Lvova-Belova, which were not announced until after the judges had assessed them for sufficiency and decided to authorize issuance of the warrants.

The HLMG’s conclusions are consistent, by the way, with those published, especially in multiple Newsweek pieces, by John Spencer, Chair of urban warfare studies at the Modern War Institute (MWI) at the U.S. Military Academy at West Point. His quarter-century of U.S. Army service included two combat deployments to Iraq as both an infantry platoon leader and company commander, and he is perhaps the world’s leading authority on warfare in urban environments. He has pushed back on the accusations being made against Israel. Spencer terms assertions that the Israel Defence Forces intentionally target civilians “a malicious distortion of truth.” On April 4, he wrote: “The IDF has gone to unprecedented lengths, not seen in the history of modern warfare, to abide by the laws of war and avoid harm to civilians, even when doing so puts the IDF's own soldiers at risk. This has included warning of impending attacks and creating safe corridors for civilians to evacuate through. They have done this while continuing to facilitate the provision of humanitarian aid and supplies.” Spencer adds that Israel has exceeded all requirements of the laws of war and humanitarian rights law, despite the fact that Hamas, is “intentional[y] targeting . . . civilians, which is in fact a war crime and gross violation of international humanitarian law. Spencer continues, “Ultimate responsibility, both legal and moral, for every innocent life lost lies at the feet of the Hamas terrorists. If the international

community truly seeks to avoid future tragedies and the loss of civilian life, it would be well advised to call on Hamas to immediately surrender and release all the hostages.” And finally, he notes, “The fact is that for Israel, every innocent death is a tragedy, whereas for Hamas, it is their very strategy. And the West's failure to distinguish this only emboldens Hamas and perpetuates the violence.”

The brief and annex submitted by UK Lawyers for Israel, joined by B’nai B’rith UK, the International Legal Forum, the Jerusalemites’ Initiative, and the Los Angeles-based Simon Wiesenthal Center goes line by line through the Prosecutor’s May 20 announcement and, again with extensive sourcing, make what appears to be a strong case that, to quote the brief, “every phrase of every sentence of the Prosecutor’s Statement summarising the allegations against Netanyahu and Gallant is untrue.” I refer you to the brief and annex for the particulars.

This past Friday, OTP submitted its consolidated response to all of the many amicus briefs that have been filed, including those that were harshly critical of Israel. The brief devotes nearly the entirety of its 43 pages of substantive text to the issue of whether the ICC possesses jurisdiction over the Gaza matter. I will confess that I was disappointed to see that the brief misrepresents the chronology of recent court filings and decisions – at least as to my request and my amicus brief – in order to advance an argument that because the U.K. government had sought and received leave of court to address the jurisdiction question and because the Chamber the Chamber never expressly “expand[ed] the thematic scope of the observations since it did not explain which other topics could also be of potential relevance to its decisions,” the scope of the allowed observations remained limited to legal issue of jurisdiction.” Hence, OTP urged the judges, they should “dismiss *in limine*” all Observations filed on other subjects, including those addressing “the merits of the [arrest warrant] Applications.”

That’s it. No substantive responses were given to *any* of the factual issues, even those raised by persons possessing, it would seem, far greater practical career experience than the persons on the panel of hand-picked outside experts Mr. Khan assembled to review the proposed arrest warrants and, in this instance, actual on-the-ground assessment experience in Israel and Gaza.

Prosecutor Khan had no hesitation about speaking publicly on May 20 about the purported facts that he believes justify the issuance of arrest warrants, and he was happy to sit for a live interview with on CNN the very same day to justify his arrest warrant decision regarding the Israeli officials – a decision, by the way, that President Biden denounced as “outrageous” and Secretary of State Blinken termed “profoundly wrongheaded” and “quite frankly shameful.” So: answer softball answered softball questions from Christiane Amanpour on CNN. But when serious authorities pose serious questions in a serious legal forum about the propriety and accuracy of what he has done, Mr. Khan ducks and hides.

It pains me to say this, not least because I am among those who have placed great hope in the ICC and I worked, most recently, on the successful effort to gain authorization for U.S. authorities to assist OTP in its Russia/Ukraine investigations, but this is prosecutorial cowardice.

If, as appears very likely, OTP’s investigation was deeply flawed, Prosecutor Khan should do what prosecutors the world over are expected to do: Acknowledge error, withdraw the flawed

legal action or filing, and go back to the proverbial drawing board. In my former DOJ office, we did exactly that – in one of our highest profile human rights violator cases, moreover. It’s never easy, to be sure. But it’s especially important to do so when, as here, a misinformed and uninformed public in effect marches to the sheriff’s office with flaming torches and “demands” prosecution. I recall in this connection the case years ago of an alleged World War II Nazi criminal in the United States who was “exposed” by a prominent journalist, whose allegations were picked up by print and television media all over the planet. Joining forces with a renowned NGO that had a “specialty” in the World War II cases, they brought enormous pressure on us to institute legal proceedings. The problem, however, was that, although the individual in question had fought in a wartime German-led unit, there just wasn’t sufficient evidence of participation in Nazi crimes to be found, no matter how hard we dug – and we dug *very* hard, I can assure you. It stung me to have that NGO in effect charge that I was “soft” on Nazi criminals, the very perpetrators I had devoted so much of my life to pursuing. In fact, it *still* stings. But it was the right thing to do.

An even better example that comes to mind is that of Judge [Richard] Goldstone, who received the Joshua Heintz Award for Humanitarian Achievement just last night at the Jackson Center. In 2009, he headed a team appointed by the U.N. Human Rights Council to look into allegations that Israel committed crimes during its 2008-9 war with Hamas. His report, which was soon made public, concluded, inter alia, that Israel had intentionally targeted civilians, as a matter of state policy. That conclusion was, understandably, front page news worldwide and it caused enormous reputational damage to Israel – frankly, damage that persists to this day. But two years later, Judge Goldstone summoned the courage to state publicly – in a Washington Post op-ed, no less [on 4/1/11], that subsequent investigations by others “indicate that civilians were not intentionally targeted as a matter of policy.” He added, “If I had known then [in 2009] what I know now, the Goldstone Report would have been a different document.”

In the instance of the OTP pending arrest warrant applications, it is not only a matter of ensuring fair treatment of the two Israeli officials and avoiding lending the hard-earned prestige of the ICC Prosecutor’s Office to the prevailing false narrative about the Gaza conflict. I submit that what is at stake here is even bigger. The very credibility and future of international criminal law enforcement are imperiled, and particularly the reputation and credibility of the International Criminal Court – an institution in which so many people around the world, myself and our esteemed departed “Nurembergers” among them, have invested so much hope for justice and accountability in the world’s most important criminal enforcement matters. It is not an overstatement to say that lives hang in the balance and will do so for the foreseeable future, as long as war crimes, crimes against humanity, genocide, and aggression continue to plague our planet. I submit that the time is now to act to prevent the discrediting of the ICC by undoing this unseemly rush to judgment that has been based on what appears to have been a rushed, prematurely curtailed, and, frankly, slipshod investigation.

Permit me to conclude with a personal observation based on my 38 years of investigating and prosecuting war criminals and human rights violators at the U.S. Department of Justice. When,

in 1980, during some of the darkest days of the Cold War, I was 25 years old and began in that work – from which I retired earlier this year – the possibility that in my lifetime, international tribunals would again be established to pursue justice in these cases seemed well beyond remote. Happily, however, this is *exactly* what happened. Indeed, important victories in important cases have been won at the ICTY, ICTR, SCSL, ICC, and other tribunals, all acting on the great legacy of Robert Jackson and Nuremberg. And the Jackson Center, Case Western Reserve Law School, and many of their partners have not only chronicled those achievements here at Chautauqua, they have helped make them a reality.

At the same time, however, we must acknowledge that progress has been too slow and that it has come in fits and starts rather than in linear fashion. Unfortunately, events of the past year have brought us to what I believe is an inflection point, where the very credibility of pursuing international justice for the victims of atrocity crimes is in peril, due, in part, to irresponsible conduct on the part of some entities that have engaged important mechanisms of the International Court of Justice and the International Criminal Court. So, it appears that prospects for continued international enforcement of IHL may now depend on how the *judges* of those courts handle these actions. There is, of course, precedent for judges coming to the rescue, so to speak, of IHL. I have in mind in particular the judges of the International Military Tribunal at Nuremberg. They rejected the importunements of Moscow's prosecutors that the Court find that German forces perpetrated the infamous 1940 Katyn massacre in Poland, when, in fact, it was the Soviet NKVD that committed that atrocity.

We can only hope that, as at Nuremberg, common sense and truth will again prevail, for the protection of vulnerable peoples throughout the world.

Thank you.