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## **IBA Conference**

### **The Rule of Law in War**

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- 1.1 On 28 February this year an unnamed and unarmed 62 year old Ukrainian man was riding his bicycle in his home village of Chupakhivka in North Eastern Ukraine, about 200 miles east of Kyiv and some distance from any fighting. He was a few dozen metres from his house and he was talking on his phone so he almost certainly did not notice of the civilian car driving towards him at speed. He couldn't possibly have known that the car was a stolen one and contained five Russian soldiers. He could not have suspected that he would never reach his home, because a 21 year old tank commander called Vadim Shishimarin leaned out of the car window with an AK47 and fired a number of shots at his head at point blank range, killing him instantly.
- 1.2 This is not an unusual story. The United Nations estimate that in armed conflicts on average three times as many civilians are killed as serving soldiers. What is unusual is this: on Friday last week Commander Shishimarin appeared before a Ukrainian court in Kyiv charged with war crimes in respect of the shooting. Yesterday he pleaded guilty to the charges. This is the first war crimes case to come out of the conflict, but the Ukrainian prosecutor promises that it is the first of many.
- 1.3 As we open this, the 24<sup>th</sup> IBA Transnational Crime Conference, there will be many issues that arise from the Russian invasion of Ukraine which affect you in your practices: sanctioned clients, frozen assets, the closure of offices in Moscow, and the future of Russian nationals who are members of your firms. But before you move to those issues I start by asking you to pause and consider matters which are unlikely to be part of your day to day practices, but which are fundamental to the Rule of Law, and that is the prosecution of the perpetrators of war crimes.

- 1.4 There is nothing new about the concept of laws of behaviour in war, and war crimes trials have taken place since ancient Greek times. But while there has been widespread agreement that there are codes of behaviour which govern armed conflict, vanishingly few war criminals have actually been prosecuted. Historically, trials for war crimes, if they happen at all, have largely been conducted by victors against the vanquished.
- 1.5 The most famous of all war crimes trials opened on November 21 1945. Justice Robert H. Jackson, the Chief U.S. Prosecutor began the trial of twenty-three of the most important political and military leaders of the Third Reich before the International Military Tribunal at Nuremberg with these words:

*May it please Your Honors: The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.*

- 1.6 Assembled in the courtroom that day were four teams of prosecutors, an international group of judges representing the Allied nations (United States, Great Britain, France and Russia), the German defendants, their lawyers, and dozens of officials and media representatives from across the globe.
- 1.7 Described as “the greatest trial in history” by Sir Norman Birkett, the senior British judge who presided over it, the trial of the major war criminals at Nuremberg set a precedent for the structure of international criminal law. It gave rise to hopes that there would be an end to impunity for the gravest crimes. But despite its achievements, the Nuremberg trial could not escape the charge that this was victors’ justice: there was never any question of prosecutions of British defendants for the indiscriminate killing of civilians in the bombing of Dresden, or Russians for the horrors of the Katyn massacre.
- 1.8 The Nuremberg trial galvanised activity in the 1940s. A number of treaties were agreed which set the foundation for modern war crimes

trials. The four Geneva Conventions of 1949 establish international standards for humanitarian treatment in war. And while the horrors of the holocaust had been characterised as crimes against humanity at Nuremberg, a 1948 convention codified the newly defined crime of genocide.

- 1.9 Plans began to be put in place for the setting up on a permanent international criminal court. An International Law Commission was formed to codify international law, and a committee was charged with drafting the statute of the court. Draft codes were submitted in 1954. But by then the icy winds of the Cold War were blowing across the globe, and the international consensus which would have made progress possible had receded. It was not until after the fall of the Berlin Wall in 1989 that work on an international criminal court seriously began.
- 1.10 So the road from Nuremberg to trials of other individuals was a long one. It would be over fifty years until there was another international war crimes trial. In the meantime from Cambodia to Argentina, East Timor to Uganda, Iraq to El Salvador, those who committed crimes against humanity and war crimes which led to tens of thousands of deaths remained unprosecuted and often still in power. In 1996 the UN High Commissioner for Human Rights observed that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000."
- 1.11 But since the 1990s there have been vast strides in solving the complex problem of how to try those responsible for the gravest violations of international criminal law. The first great tangible advance was the setting up by United Nations Security Council Resolution of an ad hoc tribunal to address atrocities committed in the former Yugoslavia. In 1995 a low ranking Serbian official from Prijedor called Dusko Tadic whose only distinguishing feature was his inventiveness in devising creative methods of mutilation in the makeshift detainee camps in Bosnia, achieved a notoriety beyond his wildest dreams when he became the first defendant since Nuremberg to face an international criminal court. His was the first trial arising out of the Bosnian conflict, and as it happens it was the trial in which I started my legal career.
- 1.12 Other justice mechanisms followed. There was soon a tribunal for Rwanda. There were initiatives to try international crimes in local courts in East Timor under a UN administration, and a court set up by treaty to try war crimes in Sierra Leone. Soon there were similar

initiatives for Cambodia, Kosovo and Lebanon. All this spoke of a new era in which there was a real drive for an end to impunity.

- 1.13 The greatest advance towards this end was the establishment of an International Criminal Court. In 1998 120 countries voted in favour of its founding Statute at the climax of a lengthy conference in Rome. The Rome Statute entered into force on 1 July 2002 and now has 123 State Parties. The Court began trials in 2006.
- 1.14 So will the International Criminal Court be the appropriate tribunal for trying the most serious crimes committed in the war in Ukraine? It has jurisdiction over crimes which are committed by a national of or on the territory of State Party. Neither Ukraine or Russia are States Parties. Even for countries that have ratified the Rome Statute, it is not the first port of call. It has complementary or secondary jurisdiction. It is there to intervene only if a state is “unable or unwilling” to conduct trials themselves. It is sometimes called a “court of second resort”. Before that, states are expected to make all efforts to try these sort of crimes in their own courts, and as events of the past week show, there is no doubt about Ukraine’s commitment in that respect.
- 1.15 Ukraine’s attitude to the International Criminal Court has to date been cautious. Despite signing the Rome Statute in 2000, it has yet to ratify it. The court therefore does not automatically have jurisdiction in Ukraine. However, despite its hesitancy in ratifying the Statute, Ukraine voluntarily accepted the court’s jurisdiction in 2014. Therefore, as the Russian invasion began, the Prosecutor of the International Criminal Court was able to accept the referral of the situation in Ukraine by an unprecedented 41 countries triggering the immediate initiation of an investigation.
- 1.16 Russia’s position with regard to the International Criminal Court is more clearcut; while it initially signed the Rome Statute in 2000, it never took the further step of ratifying it. In 2015 it purported to withdraw its signature, a day after the court published a report classifying the Russian annexation of Crimea as an occupation. It is, perhaps unsurprisingly, not a supporter of the court.
- 1.17 Russia’s behaviour when the attention of the court was turned towards Russian actions is an illustration of why it has not had more support from some of the world’s most powerful nations: three of the five permanent members of the United Nations Security Council, the US, China and Russia have not ratified the statute. Nor have

Israel, India, or Iraq. What that means is this: the majority of the world's population, the majority of the nuclear powers, and the vast majority of the world's armed forces are not in countries which have accepted the jurisdiction of the International Criminal Court.

- 1.18 The reason, many think, is principally the concern that their own nationals will become subject to its scrutiny, and that it will wrest control over trials from the national courts.
- 1.19 And at the heart of this fear is the long-term commitment by the court to prosecute the crime of aggression.
- 1.20 In the Nuremberg judgment, Lord Birkett wrote:
  - 1.21 *The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.*
- 1.22 The controversy over the inclusion and the definition of the crime of aggression was such that it almost didn't make its way into the Rome Statute at all. It wasn't until the last day of the 1998 Rome Conference that a compromise was reached whereby the crime of aggression would be included as a crime under the jurisdiction of the court. Even so, it was a further 12 years before a definition could be agreed.
- 1.23 The unhappy compromise which has resulted, limits the court's jurisdiction to cases where the Security Council had determined that there had been an act of aggression, a precondition which would effectively mean that any one of the five permanent members – the US, China, the UK, France and Russia - could block prosecutions into any state's actions, including, of course, their own.
- 1.24 If it is not referred by the Security Council, the crime can only be prosecuted if it is committed by a national of a State Party. Unlike all other crimes under the Statute, it cannot be prosecuted simply as a result of being committed on the territory of a State Party. In short, while the court could indict Russian leaders for crimes against humanity and war crimes, in the absence of a Security Council Resolution, it cannot prosecute them for the crime of aggression, even though Ukraine has accepted the jurisdiction of the court. There

is simply no prospect of the International Criminal Court having jurisdiction over Russian leaders for the crime of aggression in respect of their actions in Ukraine.

- 1.25 So what hope for justice? The Ukrainian Prosecutor General's office has said it is looking into more than 10,700 potential war crimes involving more than 600 suspects, including Russian soldiers and government officials. Serious and objective bodies are steadily building portfolios of evidence of war crimes and crimes against humanity having been committed on the territory of Ukraine.
- 1.26 A Report by the highly respected Organisation for Security and Co operation in Europe of 12 April this year found:
- 1.27 *clear patterns of International Humanitarian Law violations by the Russian forces in their conduct of hostilities.*
- 1.28 But it is much more difficult to link political leaders to these crimes committed on the ground than it is to link them to the leadership crime of aggression, that is, the crime of starting the war in the first place. There is rarely a paper trail showing direct orders to commit individual crimes, and successful prosecution of leadership figures is dependent on proving "command responsibility".
- 1.29 Well, you might say, how hard can it be? Everyone knows that the orders came from the top. Louise Arbour, the former Chief Prosecutor of the ICTY memorably said that "general knowledge" was the court's worst enemy:
- 1.30 *I am told all the time "Why didn't you indict this man or that man? Everybody knows he is guilty" It is a long way from what everyone ostensibly knows to an indictment for crimes listed in the Statute of the Tribunal that will withstand the test before the court.*
- 1.31 And even if there were a legal basis for prosecution, in the absence of regime change it is hard to see how Russian leaders will ever in fact come before any sort of court.
- 1.32 So does the Rule of Law, to which we have all committed our careers, simply wither in the face of the harsh political reality? I don't believe so. What the past 30 years have shown is that the belief in some universal laws of war, which was so firmly asserted in the aftermath of the Second World War, have begun to take root. When I listen to daily reports from Ukraine, I am struck by how frequently

the events are described in the language of law: war crimes, breaches of the Geneva conventions, and the need for justice.

- 1.33 While there have been many criticisms of the work and progress of the International Criminal Court in the years since its establishment, it is some mark of its status that the first reaction of numerous member states to the war in Ukraine was to refer the situation to the court. If the International Criminal Court is really to become an institution which can justifiably claim to be helping to “end impunity” it must surely take this opportunity to show that it means business. It may not be able to do all that we would wish. But just because we can’t do everything, doesn’t mean that we should do nothing. Every advance of justice counts, and the trajectory, built up by prosecuting what we can, where we can, moves on upwards. The Yugoslav tribunal started with the only defendant it could lay its hands on - my low ranking village torturer. It ended years later having tried all the big names in the war: Karadzic, Mladic, Milosevic.
- 1.34 And in the meantime it is for all of us as lawyers and as humanitarians to support the International Criminal Court and all other national and international efforts to fulfil the aims of the framers of the Geneva Conventions, to do what we can to continue to pressurise and assist efforts to bring those responsible for the gravest of crimes to account, and to remember as we go about our work that for evil to prevail it requires only that good people do nothing.
- 1.35 This fabulous building we are meeting in today is no stranger to the harsh realities of armed conflict. It is no coincidence that it is filled with pictures of famous battles – Trafalgar – Waterloo – all ones the British won. It was designed by our greatest Regency architect John Nash – Brighton Pavilion – Marble Arch – Buckingham Palace - for the United Services Club for the use of senior officers in the British Army and Navy. It has hosted more men who have seen the horrors of war than you or I will meet in a lifetime. The chandelier you walked under on your way in was given by King George IV to commemorate victory at Waterloo. The Duke of Wellington spent so much time here that his funeral procession was rerouted to pass it so that he could have one last look at his favourite drinking hole.
- 1.36 As lawyers sitting in this historic building at the start of what we hope will be a hugely successful conference, we might think that what we do has little connection with the horrors and the heroism

which are happening in Ukraine. But it is by honouring those principles in what we do day to day that we help create a world in which they are honoured in all situations, however extreme. The Rule of Law cannot assuage the grief of the wife or the children of an unarmed 62 year old Ukrainian civilian who was shot dead while going about his ordinary daily business by members of the invading Russian army; but it can help them to hope for justice.

- 1.37 All of us have made a professional commitment to the Rule of Law, and as you spend the next days discussing how it is applied in your world, keep in mind the fact that it is those same values which underpin our hopes that justice can be brought even to the atrocities of war.
- 1.38 I wish you all an engaging and successful conference.