

[00:00:00] Welcome to Reactions to War. Today we're discussing a complex yet profoundly important realm of law, international criminal law. As background, international criminal law refers to the area of public international law that defines international crimes and provides mechanisms for enforcing them. It's a relatively new era of law, with the first international criminal tribunals established only in the 1990s after the atrocities in the former Yugoslavia and Rwanda.

[00:00:30] The creation of the International Criminal Tribunal for the former Yugoslavia in 1993, in particular, marked a pivotal moment, as explained by Bill Shatcross, a British political writer. When the first Nuremberg trial began in 1945, it also marked the beginning of a turn towards establishing international judicial institutions to judge war crimes, crimes against humanity, and genocide.

[00:00:57] End quote. It took nearly 50 years, but the Yugoslav Tribunal built upon the Nuremberg legacy To further codify international crimes and demonstrate that impunity for human rights violations would not stand. This ad hoc tribunal paved the way for the establishment of the international criminal court in 2002, as 120 countries came together to adopt the Rome statute.

[00:01:21] Thereby, for the first time in the history of the world, providing a permanent institution to prosecute the perpetrators of the worst international crimes. The importance of such accountability mechanisms continues today amid Russia's invasion of Ukraine and the alleged war crimes being committed. To unpack this history and connect international criminal law to current events, we are excited to introduce our distinguished guests.

[00:01:48] First, we have Professor David Tolbert, who holds the Robert F. Durian Chair, International Human Rights at Georgetown Law. Professor Tolbert has extensive hands on experience. Expertise in international justice from his time as a war crimes prosecutor. From 2004 to 2008, he served as Deputy Chief Prosecutor in the International Criminal Tribunal for the former Yugoslavia, helping bring perpetrators of ethnic pleaing to account.

[00:02:18] He later took on an important role dealing with the Khm Rouge. Trials in Cambodia and supporting transitional justice globally. Most recently, he was a registrar of the special tribunal for Lebanon with his background, investigating war crimes internationally and domestically. Professor Tolbert is perfectly positioned to give us an overview of the development of international criminal law.

[00:02:43] Then we'll be joined. By our guests who will help us connect international criminal law to the atrocities atrocities being committed amid Russia's invasion of Ukraine. Professor Mitt Regan from Georgetown Law. Professor Regan is an expert on international law, national security, and ethics. As a MacDevitt Professor of Jurisprudence and Director of the Center on Ethics and the Legal Profession at Georgetown, his research examines the complex ethical issues surrounding the use of force, including asymmetric efforts against non state actors.

[00:03:21] He has participated in major interdisciplinary national security projects on issues like intelligence accountability. The impact of drone strikes and the alternatives to traditional legal frameworks in irregular warfare. Given this background at the intersection of law, ethics, and security, he will help us connect the international criminal law to the atrocities being committed amid Russia's invasion of Ukraine.

[00:03:47] We are grateful to have two such knowledgeable professors lending their insights today. Now, let's delve into our discussion on international criminal law, its historical origins, and why it remains so critical for present day issues like Ukraine and the recent events in Gaza. I am thrilled our listeners have agreed to join us for what will sure be an illuminating discussion on the power and limits of international criminal law to punish those responsible for horrific abuses, both past and sadly present.

[00:04:20] Now, let's get to the podcast. Hello. Good morning. Thank you, Mr. David Tolbert for coming to join us today with, um, our project with the Global Law Scholars. Um, today we're going to be talking a little bit about international criminal law and sort of how it's influenced international law more broadly and its history.

[00:04:36] Um, and you've had really great experience in the, in the field. So I'd like to, uh, just to get started, can you give us a brief overview of your experience in the world of international criminal law and sort of how you got your start? Well, I, um, I was in the United Nations, well, I was a lawyer, uh, first of all, and, uh, I joined the United Nations, um, actually at UNRRA, which is now quite well known in the, uh, in the United States.

[00:05:07] Newspaper and so forth. I worked in Vienna. I was a legal officer and Chief of the general legal division and then they moved us to Gaza and I didn't really want to do that. I did that briefly and I was then recruited by the Yugoslavia tribunal. I was a Senior legal officer to start out with um Doing a lot of different internal things in the organization.

[00:05:38] And then, um, became the chef, the cabinet to the, uh, president of the court, uh, Gabriel McDonald, which is a very interesting experience. Um, she's in, she was in charge of the appeals and the titular head of the organization. And then, um, after I, after I did that, I. Was recruited to the executive director of the Central European, uh, Law Initiative, which was based here in New York, no, sorry, in Washington, but more, but all over Eastern Europe and, uh, Eurasia, really, so a lot of travel and, um, So forth I did that for a few years and then I got a call Back from the uh tribunal and they asked me to come back.

[00:06:36] I started out as the deputy registrar again Well a new job deputy registrar. It's in charge of uh, all the administrative aspects of the tribunal, but also um things like witness protection, um The prison or whether that wasn't actually a prison, but we, uh, the detention center, uh, also negotiated a lot of agreements for prisons and other states because we did not have a prison.

[00:07:14] Um, Get a lot of work on the protection of witnesses and so forth. So I did that and then, uh, uh, the deputy prosecutor left, um, called up Ponte. It was the, uh, the chief prosecutor, uh, asked me to be the deputy chief prosecutor. So I did that for three or four years. Um, Very interesting job, um, dealing with a lot of, a lot of issues.

[00:07:48] Uh, subsequently, I was up for the, uh, chief prosecutor of Del Ponte Lafayette and got the job, uh, the U. N. asked me to, uh, deal with the, uh, situation. Uh, Cambodia, and so I spent time going back and forth between New York and Cambodia. There was a lot of deep corruption in the court. I sorted a lot of that out.

[00:08:19] I would consider that to be a tremendous, uh, You had, uh, book, but, uh, we did get it sort of sorted out and some cases were, uh, finished, um, and then asked me to, uh, go to, uh, Lebanon. It was the registrar of the Lebanon tribunal for a while. Uh, and then I, uh, left the UN. To become president of the International Center for Transitional Justice, which is a non governmental organization working on primarily things like truth commissions uh, reparations, some criminal justice, um, gender and we worked extensively.

[00:09:05] It came out much, came out of the uh,

[00:09:14] So, so all of those things, uh, I did and then, so I worked 80 years I think the President International, and then I, uh.

[00:09:35] Scholarship that Duke University and wrote extensively and then came back and I was a registrar of the Lebanon tribunal for a little while. Um, then since then I've been teaching primarily. So that's in a nutshell. Yeah, great. Thank you so much and sort of. because of your extensive background and especially your academic background recently, I'm sure you've studied sort of the development of international criminal law.

[00:10:02] And so I'm interested in sort of your thoughts on that, because from, so I guess we can start from the beginning. Um, my understanding, I think most people's understanding is that international criminal law, or at least the modern concept of it, started with the Nuremberg trials after World War II. Can you talk a little bit about sort of the development of these tribunals, their sources of law, and sort of what were the successes and shortcomings of these?

[00:10:24] Um, these trials? Well, Nuremberg is the first and broke the ground. Um, but not anything much happened after Nuremberg. Uh, we had met a number of, uh, years that passed before the ICTY was established. Nuremberg obviously bears kind of the touchstone of, uh, International law, international criminal law, and a lot of great people worked on that.

[00:10:54] Ben Ferencz, who died recently at a hundred and twos. Um, a lot of, obviously it broke the ground. This is the first time. People were really held accountable for these kind of terrible crimes. But there's very little between, uh, Nuremberg and Yugoslavia. Frankly, I can't really think of anything. Uh, there might have been some domestic, uh, convictions that came out of, uh, National tribes, but you saw the tribunal was the kind of the breakthrough breakthrough group of

[00:11:36] national justice. So it's really a relatively young field. I mean, in a way, um, and there are a lot of ups and downs and obviously the Yugoslavia tribunal major ones. And then we've a number of other, uh, Or it's called hybrid court. Sometimes it's kind of a mixture of international as a national state court extensively.

[00:12:07] I wish I think I've done some other like these team or a few others as well after that, of course, the international court was created some ways. The focus was on the international criminal court. They took most of those kind of cases. There, there's still some, uh, cases going on in these other tribunals, but the ICC is primarily an organ for addressing Those kind of crimes, these serious crimes, crimes against humanity, genocide, so forth.

[00:12:54] Um, I will say the, there hasn't been too many convictions or cases at the ICC. Relatively limited. It's a complicated, very complicated case.

[00:13:11] So you want to go and find a huge amount of cases coming out of the ICT. One can hope that, uh, that will change over time. So that's it. In a nutshell, 30 years or something. Yeah, thank you so much. And sort of going back on one thing that you mentioned about how there was this huge gap between Nuremberg and then the ICTY.

[00:13:33] Can you talk a little bit about why maybe international criminal law was slow getting off the ground and sort of why there maybe wasn't a will to sort of build out this legal field following Nuremberg, what I think a lot of people feel was successful in Nuremberg. Well, I think the, um, for, you know, for generations, uh, justice has been local, you know, it's just either, uh, at the national level or the local level or, um, Each country had their own system and systems are very different than particularly between the civil and common law.

[00:14:09] Um, so some, some, some, some countries had very developed, uh, like the UK or the United States, uh, some Western Europe, but. There was no, uh, uh, imperative, I guess, to deal with these massive crimes. Um, um, and Nuremberg or Holocaust really puts the brake and that's, I think that's what happened, but not a lot happened after, after Nuremberg.

[00:14:45] It took a, took a long time before you had international tribunals established. So I think it's, uh, Now, as part political, as part, we have to realize there's, there's a different kind of, uh, approach by a lot of different countries and some division between civil and common law. Um, and, uh, the, I think the, the, the, uh, origin, uh, Television, uh, the recordings and of what happened in Yugoslavia, the rape camps, the massacre, and uh, uh, this really began to, uh, for, for normal people to realize some of these terrible things.

[00:15:35] So there are a lot of factors there, um, but. Television, media, so forth. And then the human rights movement more generally, which became stronger. Um, I was, uh, my, my, uh, professor years ago said, you know, before, before this got started, you could do whatever you wanted to go governments wanted to do, boil them and boil their citizens and now and water or oil and, uh, and so forth, but thanks.

[00:16:09] Nuremberg kind of broke the ground, but not a lot happened until, uh, 30 years later. Mm hmm. And sort of going off sort of this, this sort of emergence of international criminal law, the uh, ICTY and the ICTR, I think

I've talked with you before, you mentioned that you felt like the ICTY to a large degree was a great success.

[00:16:26] Can you maybe describe how it was such a great success, especially considering it was coming from, you know, decades of, of no activity in the field of international criminal law? Let's say so it's just a success. Uh, first of all, we were able to put together a court. There was a lot of skepticism. And in fact, early days are not a lot of activity.

[00:16:51] And there were voices that says the tribunal should be closed. Um, but the fact that we, uh, Addressed or arrested and put on trials or, or some of them, we formed out to other courts. Um, we, we accounted for every, uh, every, every perpetrator who we indicted. And we, uh, Elisavitch and other very senior generals and political leaders.

[00:17:29] Now, that would have been unheard of, you know, before that, uh, there was this giant gap between Nuremberg and the ICTY. So, there are a lot of, you know, there are a lot of reasons that I think that happened, uh, you know, the huge change politically. It's all the Berlin wall, things like that were elements of, uh, you know, creating the space for, uh, the ICT bar and other courts.

[00:18:01] Um, so it's kind of like a, an accountability, uh, wave, uh, in that time period. It's been rougher time now, of course, um, with Russia, China, and others who are not, not participating at all and trying to undermine, uh, uh, national justice. So there's, um, uh, Sorry, getting some substance here. Um, yeah, so, you know, the, the, the change, of course, and the United Nations had been created, uh, and you have a lot of international organizations and so a lot, uh, The human rights movement, I think, has a lot to do with it.

[00:18:55] There's a human rights watch, lots of different NGOs and so forth. So it's not one thing, it's a lot of things. And then sort of going off a couple of things that you said, um, in terms of sort of the establishment of the ICC and the Rome Statute, can you talk a little bit about how this This movement for the Rome statue was influenced both by the tribunals and the sort of human rights movement you mentioned, maybe the political will, um, sort of, you know, I guess, crystallizing after, you know, the fall of, uh, the Soviet, uh, republics and the other communist governments and sort of how this all came together in the end of the nineties and how to sort of create a movement for the Rome statue and especially considering, um, what, what is interesting to me at least is that there's a lot of countries that, um, signed the, the Rome, um, um, Statute, but ended up not joining the ICC or ICC.

[00:19:43] So I'm interested in sort of how that sort of energy coalesced in that moment, and maybe how it sort of started to lose momentum after. Yeah, you had a moment, uh, I think on the back of the ICTY and ICTR and the whole never again, um, kind of mindset. Um, you know, the ICC. Is really obviously a very important institution, um, but I think if we probably don't have enough time to discuss the world of ICC, but it's a very complex and, um.

[00:20:23] Uh, lots of different safeguards and things like that. Um, they've had very limited number of people who've been arrested and at least have been on trial. Um, so I think, uh, you'd never had the ICC without the ICTY. Some of the other stuff. Um, but it has, it's not having a big resonance to be honest. It's, it's very limited number of cases that have been taken up, a number of acquittals.

[00:20:56] Um, part of it is the complexity of the court itself because there's a, I sat through many of those discussions, um, that we had to, we had to get. So many different countries, uh, and these discussions and so forth. Uh, it's, it's kind of a, it's really something that, uh, they put it together, but in a way, uh, there's so many checks and balances, you know, it makes it difficult to have a successful prosecution.

[00:21:32] Um, whereas I think that the ICTY, ICTR, and some of the, the other, uh, Hybrid courts, they've been able to be much more agile and handle more cases and maybe have a larger impact. Yeah, and sort of going off of that, um, sort of what, what she mentioned, um, there's been a lot of criticism of the ICC because of its, um, I guess almost exclusive concentration sort of African leaders.

[00:22:01] And, um, I think today, uh, we're seeing sort of this, this, this, increasing split with international law between sort of the global south and the west, um, through the Ukraine war, Gaza response to COVID and all these things, um, are happening that are sort of maybe putting a lot of stress on the international legal system.

[00:22:17] Can you talk about how maybe this increased tension during this period might, um, influence the international criminal law stage, um, for better, for worse? Well, I think, um, on one side, given the limited number of cases and the limited impact by the ICC, uh, has raised a number of concerns and, uh, it has not, it's just not impacting like we would, uh, expect to, or what we would hope to when we were in Rome.

[00:22:49] That's part of it. Uh, Parnell is the chairman of the The world changes and, uh, uh, a number of other things are happening that, well, way outside of former Yugoslavia. We're dealing now, uh, with what's going on in the Middle East and, uh, Very few, if any, uh, Tunisia and maybe a few others, they joined the ICC.

[00:23:17] So the ICC doesn't really have any jurisdiction over most of that. Um, so the limitations of, uh, jurisdiction and Complexity that, uh, is built in to the ICC statute, I think makes it diff, makes it difficult for the IC have a big, uh, impact. Uh, I mean they have had some that had a few convictions and so forth, but, uh, we did not face all of that at the ICT YA different time period.

[00:23:57] Uh, and the world is very fraud right now, so. Hmm. There are a lot of different factors, but I would like to see the ICC to be more robust and hopefully over time that will happen. You can't be too optimistic right now. Yeah, definitely. It's definitely a difficult period, but one thing that was interesting to me when I was sort of During the research for this interviews, I noticed that, um, while Baruni in the Philippines withdrew in the last decade from the ICC, um, the Gambia and South Africa both declared their intentions, um, to leave the ICC before, uh, ultimately sort of nixing that, which can you maybe talk a little bit about, um, maybe how this reversal might sort of indicate some sort of hope or some sort of belief in the ICC that maybe Ed lost, um, during the 2010s.

[00:24:52] I do think that some states are beginning to see the importance of these institutions, and so one, this is not quite on the right, on the same line, but you see the, the decision by the international court regarding Palestine. Um. Obviously, that's doesn't have a lot. It has moral, uh, impact. It doesn't have much judicial impact.

[00:25:22] Um, the fact that that's, that's happening and countries like South Africa feel they can take the cases to the court. I think it has opened it up to, to some extent. And some of those who are critics actually see that these institutions can be useful. Uh, Unfortunately, I think at this point in history, um, The difficulties are so between Ukraine, between Trump, between all these different things that are going on, um, it's, it's not the, not the atmosphere that we had when we put the, uh, I together, much less the ir.

[00:26:12] So I think the, the atmosphere and the political situation makes it much more difficult. For all of these institutions, and particularly on the IC, uh, they have a lot more pressures than, than we did because we dealt with we,



yeah. , et cetera. Uh, I think we're in a very different situation. Uh. I think it's important, you know, really important, uh, institution.

[00:26:45] Um, I'd like them to do perhaps a bit better job. And sort of going off sort of, I guess, the theme of the last couple of questions and some things you just mentioned, it seems like international criminal law to a large degree is influenced by politics and sort of getting the political will to pursue prosecution and things like that.

[00:27:02] Can you talk a little about a little bit about, in your experience, how you've sort of been able to toe the line between pursuing justice and also maintaining sort of the peace politically, whether it be with the ICTY the other tribunals you worked on? Well, the job of those courts is to, uh, investigate.

[00:27:20] Et cetera. Um, in theory, they're not political, uh, institutions. Uh, the politics is involved in everything. Of course, uh, key States have more power than other States. And one has to take that into account. I think that's what's, what's really important that people like the chief prosecutor or, um, Other or not leaders and and then particularly civil society leaders have a obligation to allow the court to have that space without too much intervention by powerful states.

[00:28:07] Because they will, of course, take advantage, or they want to see certain certain things happen. Sometimes it's the right thing, of course. So, um, you know, there's a, there's a strong political, uh, uh, aspect. So, the leadership of the ICC or any other board needs to be very strong and stick to the line. And.

[00:28:33] It's a tough job. I don't know if I'm addressing your question, but yeah, no, that's, that's, that's pretty much what I, what I was getting after in terms of being able to sort of weigh the sort of the pursuit of, you know, legal means and justice, but also make sure that, you know, politics doesn't overrun sort of in this sort of pursuit of justice, um, and sort of going, I guess, shifting gears slightly, literally.

[00:28:54] One thing that I was interested in about that you mentioned was, um, your work with the International Center for Transitional Justice and sort of these truth commissions, reparations, things like that. Um, it seems like to a large degree, international criminal law is viewed as a means to, you know, solve conflicts or, you know, pursue justice in the aftermath.

[00:29:12] But because of your work with the International Center for Transitional Justice, it seems like there are other means to do this same work. Um, can you maybe talk about maybe what in your view or maybe other

effective means for pursuing justice in these post conflict situations that maybe don't involve these traditional forms of international criminal law with these tribunals or these courts?

[00:29:33] No, I think it's, it's really important and they're, it's, it's obviously a different, uh, process that sometimes it's going to work better and what it, what it works on begins with the idea that, uh, we look at, uh, Civil society to talk to people. We usually have a deep. Dialogue, what, you know, what does that, what does that, who are the people, what are the victims, justice should be in this particular situation?

[00:30:07] So, in that sense, it's, it has a value that probably goes beyond. Yeah, the courtroom. Um, so, and then there are a number of, uh, uh, other processes that, that get at things that are a little bit, that are a little bit different than a trial does. A trial is very limited. Uh, truth commissions allow a much more rich and, uh, participation by victims and by the countries as a whole.

[00:30:40] So there've been some 40, 40 plus, um, truth, uh, truth commissions, um, some very successful and very well known, others less so, um, but they generally start with this kind of, uh, discussion, um, with, with the victims particularly, but civil society more generally. So, it's, it's not nearly as rigid as a, as a board.

[00:31:10] So, it, it deals with the situation in the, in that country. And then they have, there are a number of other elements that I think are important, reparations that are, Pretty successfully in a number of countries that gives, uh, help to the victims and makes, helps the, uh, the rebuilding of the country. Uh, there a lot of in innovative, um, ways to address things.

[00:31:43] Uh, um, Columbia is a really good example of the, uh, special, uh, jurisdiction for peace. Um. Which you, uh, commit, you testify truthfully, and then you, uh, work to help society through a lot of emotional forms and things like that. Um, if that's done properly and not misused, uh, that can have a, you know, it's, it's not nearly as divisive and, uh, Because if you've had a war, you know, two conflicts or more, um, at each other's throat, then you become sort of, Just doing it by criminal justice, you're probably not going to have a society that's going to make a lot of progress.

[00:32:40] So I think, uh, reparations, uh, focus on gender, uh, what you see in transitional justice. Uh, it's not for every place, you know, I wouldn't, uh, you know, maybe Yugoslavia would not have been the right place. Although there had been some discussion about it in a place like Colombia and some other

places. Um, I think transitional justice can be a very, very valuable, uh, I saw that a lot when I was president of the ICTJ.

[00:33:09] Yeah. And sort of based on sort of your, your answers about sort of the gridlock currently in the field of international criminal law, do you think maybe these more, these traditional transitional justice measures or maybe other non traditional, more localized. sort of approaches to this field might be a way to respond to this gridlock?

[00:33:26] Maybe something that, you know, could be looked more or further sort of approached, um, with these sort of international criminal, uh, legal actors? I think yes and no. I think it depends on the country, on the context, what's going on, What do the victims, what does civil society have to say? What does the government like?

[00:33:51] Totalitarian or they're more open. I think those factors all, uh, I don't, I don't think once, you know, one, uh, it's all, it's important to have those discussions, uh, input from not simply from the government, from the populace as well, uh, And I don't, I would not say that you should do X or Y. I think it's for the country to figure that out.

[00:34:22] And it's really useful to look at what was done at the Yugoslavia, or what's done in Colombia, or what was done in South Africa. Uh, draw, draw the, draw the lessons that are useful for that country and let, let victims speak, uh, uh, and have a, Um, you know, really robust, uh, back and forth. I think that's where it's going to be better than when it's simply top down.

[00:34:51] This is what we're going to do. Thank you. I think we're almost at time, but I think I had one last question, um, more of a perspective question. Um, despite sort of maybe some of the struggles we've talked about so far with international criminal law, what would you say are some of the rooms for optimism going forward in the field and sort of how it can develop in the future?

[00:35:10] Well, I think, uh, there have been some very important, uh, cases going from Nuremberg forward. I think the Yugoslavia Tribunal and the Rwanda Tribunal, uh, their impact, uh, and they were, they were run pretty well, unlike Lebanon or, or Cambodia, maybe, um, much more difficult. And I think this goes to the understanding of the country.

[00:35:39] And one size doesn't fit all. Um, but I think overall, uh, we're much better off having accountability processes, whether they're international courts

or good national courts or good truth commissions or reparations, uh, important to focus on gender and so forth. I think we're in a better place. Sometimes I get a little bit concerned about kind of a competition between how you do it.

[00:36:14] I don't think it's really important. It's, it's important to have justice, but how you deal with justice as really has to be part of that society. And it's not for, you know, people myself or others who work in this field, we can be really helpful. It's ultimately, you know, it's their life. Um, And, uh, we can, we can, we can help them get to that point, but, uh, uh, we have to be very flexible in multiple ways.

[00:36:47] It's their lives. Okay. Thank you so much. I think that's all the questions I have for today, but I really appreciate you, uh, coming on and talking with us about international criminal law. So I appreciate it a lot. Okay. Cheers. Now that we've gotten an understanding for the basics, let's turn toward what international criminal law looks like in the present day conflict that's at the top of many minds.

[00:37:09] The Russia Ukraine War. In case you missed it, Russia's most recent invasion of Ukraine began in February 2022. Most of us know the rest of the story. Ukrainian President Zelensky finally refused to flee Kiev. White collar professionals picked up weapons and fought for the sake of their country and Despite expectations, Ukraine held on.

[00:37:33] Now, more than two years into the conflict, a still independent Ukraine continues to fight for their freedom and their lives. But in the realm of international criminal law, the invasion of Ukraine raises more questions than answers. Is it actually legal for Russia to just pick up and invade their neighbor?

[00:37:55] Are Russians, or Ukrainians for that matter, fighting fair? And if not, does the international criminal legal system provide any hope for justice given national legal systems that are hopelessly broken? In the context of conflicts like this, International criminal law kicks in to regulate war crimes.

[00:38:16] Unfortunately, this is more of an incomplete patchwork than a coherent framework. For example, there's not even an agreed upon definition of war crimes. Perhaps the best we have is from the Rome Statute, which created the International Criminal Court. It defines war crimes as, among other things, Quote, serious violations of the laws and customs applicable in the international armed conflict.

[00:38:44] End quote. Internationally directing acts against the civilian population and grave breaches of the Geneva Conventions, which regulate treatment of prisoners during war. Unfortunately for civilians, experts on international humanitarian law have determined that Russia at least, and Ukrainians too, in some circumstances.

[00:39:07] Are not fighting fair. Human Rights Watch, an international criminal rights watchdog, has documented potential war crimes in Ukraine, like quote, widespread and repeated targeting of. Energy infrastructure in the middle of winter, attacks on civilian evacuation hubs, and a missile strike on a shopping center filled with civilians.

[00:39:32] The jury is still out on what, if any, effect that international criminal law can have on the lives of Ukrainians wrecked by Russia's war. Perhaps most notably, The International Criminal Court recently issued an arrest warrant for Russian President Putin as a result of alleged war crimes in Ukraine. As a result, countries that have agreed to be bound by the Rome Statute have a legal obligation to arrest Putin if he comes into their territory.

[00:40:02] Some report that fear of arrest has already influenced Putin's behavior, for example, by deterring him from attending a summit in Johannesburg. However, critics point out that Putin remains free, with no actual prospects of arrest. And to make matters worse, he has apparently been unaffected from his problematic conduct in Ukraine and has merely continued on with the war.

[00:40:29] Again, to help us understand whether international criminal law can make a difference in Ukraine, We're lucky to be joined today by Georgetown Law's Professor Mitt Regan. All right, I'm here with Professor Mitt Regan to talk more about international criminal law and its evolution in light of Russia's full scale invasion of Ukraine, which happened just over two years ago, February 24th, 2022.

[00:40:54] Professor Regan is the McDavid Professor of Jurisprudence, Director of the Center on Ethics and the Legal Profession, and Co Director on the Center on National Security at Georgetown University Law Center. His work focuses on international law, national security, international human rights, legal and military ethics, and to get ethical issues relating to artificial intelligence.

[00:41:15] Professor Regan is also senior fellow at the Stockdale Center for Ethical Leadership at the U. S. Naval Academy, and has been a participant in major interdisciplinary projects on national security. Professor Regan, thank

you so much for being with us today. Thank you for inviting me. I wanted you to. Talk first just briefly about how your work in recent years has intersected with this conflict in Ukraine and as you do that to maybe talk a little bit about what makes this conflict feel unique.

[00:41:44] I mean, I know the news media covers war and conflict all around the world, but when I read news coverage about the war in Ukraine, I can't help but feel like this conflict is just somehow different. But the stakes are higher. Is that just a figment of media sensationalization? Or is it because we care more about violence when it happens to white Europeans?

[00:42:03] Is it because Russia is a major world power? What's going on here? Yes. Well, first of all, let me just describe briefly my connection to work related to the war in Ukraine. I began in the fall of 2022, uh, to work with the Atrocity Crimes Advisory Group. Um, an organization put together by the us, the uk, and the EU to help the prosecutor General's office in Ukraine investigate and prosecute crimes, uh, arising during a conflict with Russia.

[00:42:41] And I did that, um, uh, through that fall into for most of last year, uh, and I'm just finishing up the final work on that. Now, um, we have reorganized the assistance to Ukraine. So that the, the project I mentioned, the ACA, um, is now focusing exclusively on investigation, prosecution, building cases. where I am focusing on some sort of broader forms of justice, uh, engaging with the Ukrainian community and civil, civil society organizations there to get a better sense of a victim's needs and their desires, how they conceptualize justice and how, um, we might respond to that.

[00:43:30] Um, the, the war has certainly captured the world's attention for a considerable period of time. And I think that's for several reasons. One is that it's interesting that when the UN Charter was established after World War II, the Geneva Conventions were adopted. Not surprisingly, the shadow of World War I and World War II loomed very large in the drafters minds and and that of the international community.

[00:44:06] And so the Various measures put in place to try to regulate violence, to treat war no longer as simply an acceptable extension of political ambitions. The idea was that the most significant threats to international peace and security were going to be conflicts between states, right? That hasn't turned out to be the case, uh, during this period, and the vast majority have actually been between states and non state groups, whether it's insurgent groups within a country or transnational groups, terrorist groups, what have you.

[00:44:48] Um, and instances of State invasion of another state have been relatively rare, right? And so some sort of had believed, or at least hoped, that, that Would be a phenomenon that we didn't witness again anytime, um, you know, in our lifetimes. Uh, there is a book called The Internationalists by Ona Hathaway and Scott Shapiro at Yale Law School, who argue that beginning with the Kellogg Briand Pact and then continuing on through the U.

[00:45:25] N. Charter, that the system that was put in place after World War II effectively did serve to restrain instances of state aggression. Right against another state. So this came as quite a shock, I think, to the international system. Um, I think the fact that it Notwithstanding President Putin's explanation, uh, it is something that is unjustified under international law.

[00:45:53] It's a classic case of unlawful aggression, and it's interesting if you speak to people in Ukraine, they, they refer to it as the full scale invasion. distinguishing it from hostilities that they see began in 2014 with the annexation of Crimea, right? So this is just the latest, you know, more expansive stage.

[00:46:15] So I think that with respect to the international community in general, this perhaps has dispelled the hope that we had in place a system to constrain state aggression against another state. So I think that's one reason it's gotten a lot of attention. I do, I have heard criticism as well from those in the global south that there is a considerable amount of violence going on in the global south, has gone on for some time.

[00:46:43] Some of it does involve, uh, states, um, acting aggressively toward other states, um, but that the reason that this has gotten such attention is because It's an activity happening in Europe, uh, in which, um, at least two of the great powers have a significant interest, um, and there's been criticism that this, while there is sympathy for what has happened to Ukraine, that, um, it's unfortunate that this type of Or conflict seems to get a disproportionate amount of attention, uh, uh, from some people's perspectives.

[00:47:23] Um, uh, it's, it's hard for me to comment on that. Uh, I can't really say, um, I mean, to me, sort of suffering and suffering, but, um, at the same time, uh, I could appreciate that the international community has not always been, been completely sensitive to, and, and listened to the global south. And, you know, there's been that complaint is, as I think you probably know, with respect to the, uh, work of the International Criminal Court, reclaimed that it's focused disproportionately on atrocities in Africa, as opposed to other locations, uh, even though African states have, for the most part, although not completely, Supported those efforts, so I think the combination of those things, and I think,

frankly, the particularly intense interest of the United States for a considerable period of time meant that this really did occupy the front pages for a long time as a follow up to that.

[00:48:20] I know in 2008, there was an incident that wasn't too dissimilar from this, where Russia fought a active war with Georgia, uh, its neighbor to the south, and ended up annexing two parts of Georgian territory, South Ossetia and Abkhazia. It sounds like maybe you're suggesting one of the reasons why international reaction has been different between, uh, a lot of attention coming to the full scale invasion of Ukraine and relatively little attention being given to the annexation of Abkhazia might have to do with the U.

[00:48:55] S. 's outsized interest in Ukraine. Is that what's going on or is there a some legal distinction or factual major distinction between what happened in Georgia and what's happened in Ukraine? Um, I think there that probably does account for some of the difference in, in, in attention. It's also simply the scale of this operation is massive.

[00:49:21] Um, but what happened in Georgia in 2008, you know, has happened. Um, the, the, actually the, there was, as you say, the annexation to areas. There was the invasion into the rest of Georgia for five days conflict that occurred there. But the Kremlin has been involved, certainly since Putin has come to power, in a number of different, um, activities that have involved attempting to mobilize Russian ethnic groups.

[00:49:51] There was the creation of Transnistria, you know, carved out of Moldova, for instance, um, obviously Crimea, um, and, and, and then After Crimea, the action in the Donbas in the eastern portion of Ukraine, right? I think, um, those are all sort of part of this strategy. Uh, there is, I think, something of a qualitative difference between just the scale magnitude of those and what's happened in Ukraine.

[00:50:22] Absolutely. I wanted to pick up now on another thing you mentioned, which is the criticisms from the Global South of the International Criminal Court and its predominant focus on Africa. We've heard from Professor Tolbert and throughout our discussions and research on international criminal law, this criticism as kind of a refrain.

[00:50:45] However, On March 17th, 2023, the ICC did issue an arrest warrant for both President Vladimir Putin and his so called Commissioner for Children's Rights, Maria Lvova Bjelovna. And I was interested to see what you think this



means from a legal perspective, and what might it mean for the ICC as an institution?

[00:51:06] Does it signify some sort of speed change, or is it not really a departure from their formal practices? Yeah, I don't see it as a dramatic sea change. I think that, you know, the, uh, the, the ICC will say, well, we focused on atrocities in Africa because they were sort of egregious and obvious. Um, I think they would probably say what's happening with children, uh, in this war is, is equally, uh, uh, uh, uh, you know, atrocious and egregious.

[00:51:37] Um, I mean, the number of deaths and, uh, and injuries, you know, is dwarfed by what happens in some areas in the global south, but. But still, um, I think that the sense is that, um, this is the nature of, this is the kind of an activity that is fairly clear cut and that is criminal. Um, what will be interesting, I think, is to see whether this.

[00:52:05] Activity by the ICC and its broader relationship with the Ukrainian Prosecutor General's Office will provide a kind of a template going forward for future kind of efforts for atrocity accountability. Um, we had special tribunals in Yugoslavia and Rwanda, Sierra Leone, Cambodia, among others, that responded to atrocities in each of those Locations they were, in a sense, 1 off jurisdictions, specially created in some cases with you and security council in some cases with an agreement between the UN and the, uh, and the particular country.

[00:52:49] The creation of the ICC was meant to obviate the need. To do that each time to have a permanent sort of body in place. Um, that said, the ICC still has significant resource constraints, significant restraints in terms of capacity, and Um, we won't be seeing, I think, any special tribunals in the future, except possibly one for the crime of aggression, um, with respect to Russia's invasion of Ukraine, since the ICC doesn't have jurisdiction, uh, over that.

[00:53:27] So if you look, look ahead, the future may well lie with prosecutions on the national level, domestic level, such as in occur, is occurring in Ukraine. I mean, I think, you know, we expected that. upwards of 95 percent of the prosecutions would occur within the Ukrainian criminal justice system, right? And so then the question is, well, what sort of role can the ICC play, um, in concert with that?

[00:53:54] Um, and to some extent there has been a division of labor in this conflict, whereas the ICC took the initiative with respect to children. There may be some other crimes, in the future, with respect to which it does that as well.

And, you know, another question is the extent to which. What's going to be the form of cooperation?

[00:54:17] Will there be, um, some sharing of staff? What sort of international, you know, uh, capacity building will there be within the Ukrainian system? As you probably know, the ACA has undertaken the task of trying to provide guidance on international criminal law, you know, to investigators and prosecutors who are very experienced and very capable, but are accustomed to operating within a domestic criminal system.

[00:54:46] And therefore, uh, you know, are not necessarily clear, at least at the beginning, about how do you go about investigating these? What kind of evidence do you need? Uh, what does it mean to establish genocidal intent, for instance? Um, those kinds of things. And that's what the ACA has been trying to provide, that sort of capacity building.

[00:55:09] So, um, all of that is to say I think that the arrest warrants, you know, Just maybe one indication of a, of an evolution in which there is cooperation between the ICC, uh, and, um, domestic legal systems. than maybe, um, the main forum in which many of these atrocities are adjudicated. I think it's so interesting that so many of the prosecutions are set to happen in Ukraine, presumably under Ukrainian domestic law.

[00:55:44] Could you speak a little bit more about how that came to be, sort of the settled state of things? Yes. Well, first of all, I think it was just a, uh, a case of necessity. Right. Again, there was not going to be a special tribunal established in all likelihood that would take tremendous amount of time. It would be extraordinarily expensive, hundreds of millions of dollars, if not more.

[00:56:09] The ICC had limited jurisdiction. And so if these atrocities were to be prosecuted anytime in the near future, it really fell to the Ukrainian system. And I think that's what the. The U. S., the E. U., and the U. K. understood in establishing, um, the ACA, and Ukraine had incorporated, uh, much of international criminal law into its domestic criminal system, right, and so there are, uh, sections within the Ukrainian criminal code that deal with it.

[00:56:44] Crimes such as war crimes, genocide, the crime of aggression. There is not a section on crimes against humanity. There is an argument that that is part of customary international law and therefore there is jurisdiction by Ukraine to try those. Um, I think that matter is, is unsettled, at least in the minds of the Ukrainians, who may believe that it's necessary to have positive legislation amending the criminal code for this.

[00:57:17] Um, and there is certainly an argument, uh, you know, in many circles that with respect to the core international crimes, war crimes, uh, crimes against humanity, genocide and aggression, That any sort of limitation to prosecution. Um, to those after positive law has been enacted doesn't apply because the whole idea, uh, of, uh, having some sort of positive law is that people are on notice of what's criminal.

[00:57:50] But with that kind of behavior being so egregious, so heinous, the idea is that no one could plausibly claim, for instance, that the kinds of things that constitute crimes against humanity are not criminal. So, um, and in the future, um, and any state that. Would seek to prosecute atrocities would need to have provisions in it or to add provisions in its domestic criminal code.

[00:58:14] In order for its legal system to have jurisdiction over those following on that theme of the cooperation between the domestic court system in Ukraine and international organizations and the international legal community more broadly. I know the ACA atrocity crimes advisory group, as you mentioned, has shifted focus recently to be primarily.

[00:58:37] About facilitating these domestic investigations and prosecutions. Is the ACA envisioned as a permanent sort of standing organization that will provide advice and assistance throughout this entire justice seeking process? Or what, what is that going to look like to the extent that you know? Um, that will depend on congressional funding.

[00:58:59] Um, And I think, um, there is certainly the prospect that as time goes on, and as there is more training and capacity building, and that prosecutors and investigators become more familiar with international standards, there, there would be less of a need. The work of the a CA or it could be, um, uh, perhaps, uh, refocused in a sense, uh, with respect to focusing on those particular cases that are going be brought.

[00:59:32] That is, that is the litigation of the cases themselves as opposed to building them? Um, it, it's hard to say. Uh, it's difficult to know. Um, so at least, uh, for the near term, however, I think the, the, the sense is that, that the a CA will be an important part of this. Of course, this war appears to be far from over, but it's been going on now for over two years, and the world has had at least some time to react.

[01:00:02] Have we seen any major developments in international criminal legal doctrine already in response to this war? If not, what areas do you expect might become the most susceptible to growth or evolution going forward? Um, we

haven't seen anything yet, simply because there haven't been cases that have raised novel questions, but I could anticipate that some may arise in the future.

[01:00:34] the prosecutor general's office is planning to bring the first prosecutions for environmental war crimes that have been brought. And that there really is no jurisprudence to speak of on that. We have some guidance from some compensation commissions and things like that. So that is going to break new ground.

[01:00:54] Related to that, Ukraine is one of the few states that has the crime of ecocide in its domestic code. And exactly what the contours of that are, but that is actually a separate crime. There are environmental war crimes, uh, but then ecocide is a separate crime. And there have been some that, who have argued that on the international level, we should add ecocide to those four core international crimes that I mentioned, uh, earlier.

[01:01:25] War crimes, genocide, uh, aggression, crimes against humanity. That hasn't happened yet. Uh, but the experience of Ukraine in prosecuting an ecocide case will provide significant, um, uh, information, guidance, perhaps precedent, on, on what that might, what that might entail. Um, there has been, as, as you know, significant Russian shelling of infrastructure.

[01:01:53] That is used, uh, by civilians, particularly during the winter months, you know, for heat, power, sanitation, and the like. Uh, one question there is going to be, to what extent are those facilities dual use, that is, to what extent does both the military and civilians use them? Um, if you could establish that civilians use them, Um, it's interesting that international humanitarian law, the law of armed conflict, law of war, looks at impacts and whether civilian harm is excessive on an attack by attack basis, right?

[01:02:34] So any single attack may not be excessive in the harm that it imposes compared to the anticipated military advantage. But if you look at the cumulative effects across the system as a whole. You know, the aggregation of attacks, they could leave a civilian population in, in dire straits. That hasn't happened yet.

[01:02:57] Right. Um, and so a question, you know, could arise is, is there a basis under international criminal law, specifically IHL, to take a look at the cumulative, the aggregate? the impacts of attacks like that. Similarly, with respect to ecocide, an attack on a particular oil port, right, or infrastructure facility, um, in itself, you know, might not constitute massive harm.

[01:03:29] But of course, an ecosystem is one in which a number of different things are related to one another, and simply focusing on what happens with particular Respect to a particular point of attack doesn't really capture the destructive impact, right? And so that's another area in which, um, we'll have to see whether courts are willing to take, uh, to use a broader aperture, broader lens.

[01:03:56] We actually, in our center on national security now are working on a project where we're looking at international law and the possibility of that civilian casualties over the course of a conflict. Um, as opposed to attack by attack might be taken into account. This has come to the fore pretty vividly recently in Gaza, for instance, which is one of the areas we had planned to do interviews even before, uh, you know, the, the Israeli operations there.

[01:04:26] Um, finally, uh, to the extent we get an adjudication of aggression. There are those who say that there is a doctrine under international law, head of state immunity. It says that those who are head of state or the troika will be the foreign ministry, for instance, and the president, the prime minister. are immune from prosecution while they're in office, um, and there's also immunity for the acts that they take while in office, even when they leave.

[01:05:03] Um, and conventional thinking has been that that applies with respect to Prosecutions by individual states and their own domestic systems, because there's the risk that states will use prosecutions against head of other states as a political weapon on the international level. The thinking has been that that risk is less significant.

[01:05:30] And the head of state immunity should not apply there. Um, professor Luban is working on a piece that suggests that it's actually antithetical to the notion. Um, of liability for aggression because that's limited to leaders to have any sort of head of state immunity. That's not an argument that has gained a lot of traction, but there's a, there's a certainly a, there's certainly a logic to it, right?

[01:05:56] And if ultimately we don't have an international tribunal to try the case of aggression and it's tried within the Ukrainian courts, the question of head of state immunity would arise then, and perhaps an opportunity to revisit that issue. Thank you for that super fascinating and thorough overview. I really enjoyed that.

[01:06:14] And I think, um, That was so helpful that I want to sort of leave our conversation there. Um, Professor Regan, were there any final thoughts you

wanted to add just before we wrap up our conversation for today? Uh, no, I think your questions have been really excellent. I think they've really, really probed, I think, the significant questions relating to international criminal law.

[01:06:35] So, I think, you know, there will be a lot of developments. I think arising out of Ukraine that will, uh, you know, continue the, uh, the growth in this area of the law. Absolutely. Well, Professor Regan, we'll keep our eyes out on all of these important topics and we'll see how they change. And, um, thank you so much for joining us today and having this discussion.

[01:06:57] We really appreciate you taking the time and have a wonderful day. Great. Thank you. I've enjoyed it. Today, we started by learning about the origin and history of international criminal law and how countries have reacted to conflict over time. We specifically discuss the development of criminal law over the past few decades and, in evaluating its strengths and weaknesses, have taken an inside look into the International Criminal Tribunal.

[01:07:25] Next, we examined international criminal law in the context of the Russia Ukraine conflict. We focused on the ways that the war has affected the most vulnerable amongst us and what international criminal law means for them. We also discussed the possibilities for and challenges of accountability for war crimes at the highest levels of government.

[01:07:47] As we look toward the future, it's worth taking these lessons to consider what international criminal law should become. Thank you for listening.