

## ACCOMPLICE ACCOUNTABILITY FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW

This panel was convened at 1:45 p.m., Wednesday, March 24, 2021 by its moderator, Oona Hathaway of Yale Law School, who introduced the panelists: Ibrahim al-Kasem of the European Center for Constitutional and Human Rights; Radhya al-Mutawakel of Mwatana for Human Rights; Welton Chang of Human Rights First; and Katherine Gallagher of the Center for Constitutional Rights.

### INTRODUCTORY REMARKS BY OONA HATHAWAY\*

Hi, everyone. Welcome to the Annual Meeting for the American Society of International Law. Our panel today is on “Accomplice Accountability for Grave Violations of International Law.” We have an amazing group with us to talk about these issues.

If you are here, I am sure you know that the most egregious examples of international law violations that have threatened peace and security in recent times reveal a common trend; that is, that governments are perpetrating these serious crimes not on their own but acting with and through others. They often do so with the help of other states or with the help of non-state actors. For example, the United States, UK, and France have provided logistical support, weapons, and other kinds of intelligence support to the Saudi-led coalition whose airstrikes have killed numerous civilians in Yemen. There has also been almost a decade of Russian and Iranian air and ground support for the Assad regime’s systemic assault on civilians in Syria. Also in Syria, the United States has partnered with non-state groups, most prominently the Syrian Democratic Forces. Iran is known to partner with non-state actor groups throughout the Middle East. This is an issue with many different dimensions, highly complex, and we are going to try to tackle as many pieces of this as we can.

The panel is going to explore a range of issues raised by indirect participation in conflict. It will ask what accountability is warranted under international law and what legal responsibility potential accomplices should bear for their role and grave violations of international law. We have with us today five amazing speakers who will think through these issues.

I am going to introduce them each individually, and as I do, I am going to ask them each a question or two. First up is Katherine Gallagher. She is a staff attorney at the Center for Constitutional Rights (CCR) where she works on holding U.S. and foreign officials and corporations, including private military contractors, accountable for serious human rights violations through domestic civil actions, criminal cases under universal jurisdiction laws or at the International Criminal Court, and actions using United Nations human rights special procedures mechanisms. Prior to joining CCR, she worked at the International Criminal Tribunal for the former Yugoslavia.

Katie, here is my first question: You have been involved in the long-running case of *Al Shimari v. CACI*, brought by the Iraqi Abu Ghraib torture survivors against a private contractor, CACI Premier Technology. Can you tell us a bit about that case and what it means for the capacity to hold government contractors who aid and assist grave violations of human rights accountable?

\* Yale Law School.

**REMARKS BY KATHERINE GALLAGHER\***

Sure. First thank you for having me. It truly is a privilege to be on this panel with my co-panelists, who I am eager to hear.

As you said, this is a long-running case. I will be speaking briefly about efforts for accountability and a slice of the harm done at Abu Ghraib. Many of you watching remember when you first saw those photos come out back in 2004. We are talking about a long time ago now, and throughout the last sixteen years, victims have been seeking accountability. A short answer to your question is, it is not easy.

*Al Shimari v. CACI* is the third case brought by Iraqis who were tortured and otherwise harmed while held in U.S. detention across Iraq. The *Al Shimari* case focuses only on the hard site, which is the location where those infamous photos were taken, and it is brought now on behalf of three men: Al Shimari, Saleh, and As'ad.

The reason why this case was brought against private military contractors and CACI in particular is when those photos came out, it was followed by the Taguba report, which some may remember. This was an internal report done by General Taguba investigating harms in U.S. detention centers in Iraq, and he found that there were "sadistic, wanton, and blatant crimes committed against Iraqi detainees." He identified two of the private military contractor company's employees as having been complicit in that harm. One of the companies, Titan, which ultimately became L3 and then Engility, was a party to our first two lawsuits. We settled the case against L3 back in 2011. CACI was a defendant in the first case, *Saleh v. Titan* and then now, of course, in *Al Shimari*. CACI provided interrogators at Abu Ghraib in that hard site, and what the Taguba report identified and what we have subsequently found through years of discovery, including relying on court-martial proceedings by the small group of so-called "bad apples" who participated in the torture and other abuse of Abu Ghraib detainees, is that some of the CACI interrogators were, in fact, ringleaders. The contractors came in, oftentimes older than the enlisted U.S. military. They were paid sometimes three or four times as much as a soldier, and they came in with a sense of authority. And, in this command vacuum, which was found to exist at Abu Ghraib, they filled that space, and what they did is they encouraged the military police to "soften up" detainees ahead of interrogations in the hopes of having the detainees broken, such that they would talk.

Now, over the course of these many years, I have represented 338 Iraqis who have been detained. None of them had ever been charged with a crime. This "softening up" and this harm was not only illegal; it was also pointless. Three of the individuals in this case have been trying for the last twelve years to have that company, which profited handsomely from its work in Abu Ghraib, held accountable. As I can say in a follow-up, it has proved quite challenging.

**OONA HATHAWAY**

I want to follow up to ask you to say a little bit more about the legal claims that you have made. What are the elements of the legal claims, and what have you found has been successful, and what kinds of roadblocks have you run into?

**KATHERINE GALLAGHER**

Sure. The plaintiffs first brought a set of common law claims, which we have since dismissed, and also claims under the Alien Tort Statute (ATS). They have brought claims of torture, war crimes, and crimes against humanity.

\* Center for Constitutional Rights.

I should say when this case was filed back in 2008, it was before *Kiobel*, it was before *Jesner*, and it was before whatever the Supreme Court decides to do with the ATS in *Nestlé*. We are hoping that corporate liability for domestic corporations continues.

The claims really come from the severe physical and mental harm, and I would really highlight the mental harm. I think that is relevant to the theories of conspiracy and aiding and abetting that we are advancing.

What we allege is that the private contractors, the interrogators, worked together with the military police and other members of the military intelligence to, again, break the plaintiffs, and one of the things CACI has said over the years is: “We are not the ones who physically beat and harmed or tied up or stripped naked your plaintiffs, so we did not touch them.” In these theories of conspiracy liability, which has an analog in international law of joint criminal enterprise—and we pointed that out—or aiding and abetting, you need substantial assistance that has a significant effect on the outcome of the crime, and there has been some debate as to whether it is knowledge or purpose we have said we meet, whichever that standard is, because when the contractors went to join with the military police, they could not be outside the room. They could be speaking to the military police before or after the abuse was done because they are trying to mentally break down our plaintiffs. The contractors have raised an array of defenses over the last twelve years from government contractor defense essentially saying, “Everything we did, including that torture, the government told us to do,” or a derivative sovereign immunity, which is an issue that came up most recently, and plaintiffs have prevailed on all of these issues, where the contractor has tried to impugn upon itself some of the immunity of the sovereign, if that immunity even exists. There are some questions about the legal standard, what are the facts that support the claim, and then a range of defenses.

But we have made it through all of those stages, including summary judgment, and we had a trial date before this issue of derivative sovereign immunity went up on appeal, and we now have a cert petition pending before the Supreme Court.

## **OONA HATHAWAY**

My last question for you, if you could speak to it, asks you to scope out from this case to government contractor cases more generally. My understanding is that there has been a number of these cases against government contractors, particularly in the United States. Are we seeing common themes being sounded across these cases? Are there similar kinds of defense being made, similar kinds of claims? Do you think these are going to rise or fall together, or are they distinct enough in terms of the kinds of claims that are being made across these different cases such that the hope is that even if one runs into the trouble, the rest of them have a possibility of proceeding?

## **KATHERINE GALLAGHER**

I would not necessarily say we are seeing a rise now but another crest of a wave because we had a series of cases that came out of Iraq and Afghanistan and U.S. military interventions there. Those were the most outsourced wars in U.S. history, and of course, under the Trump administration, we saw even more privatization. We do see an increase in cases domestically as well as internationally, whether it is in private prisons or in detention centers or in building things like the wall or other ventures where human rights are violated, and so I think this is an area that deserves greater study and attention.

A brief answer to your question, which could have a lot of permutations, at least what we saw in the context of Iraq and Afghanistan is, in the case of torture, we are alleging intentional torts, and we are also alleging a violation of U.S. statutory law and core tenets of international law when we are talking about torture and war crimes, so that there really could not be the defense of “The

government made me do it.” This is very different than the original government contractor defense case that people may know of, *Boyle*, where private companies were building things like helicopters or providing other services that on their face are not unlawful or do not sound negligent.

I think it really depends on what the harm is, whether it is a negligence-based claim or an intentional tort, whether you are talking about violations of *jus cogens* norms, such as torture, but that could certainly be the case in things involving things like slavery, where you have forced labor in prisons or family separation. I think this is an area to watch.

## OONA HATHAWAY

Fantastic. Thank you so much. I want to turn next to Ibrahim al-Kasem, a Syrian lawyer who focuses his work on cases to support detainees before the Syrian Terrorism Court. He is the founding member of the Caesar Files Group, and he has worked as legal consultant to the UN and for the Raoul Wallenberg Institute of Human Rights and Humanitarian law. Currently, he is supporting the European Center for Constitutional and Human Rights as a research fellow focusing on war crimes in Syria.

Ibrahim, the Syrian conflict I mentioned at the outset is one that has been fueled by outside state involvement. Russia, in particular, has been involved in propping up Assad’s government and helping it survive. Many believe that Russia has not only committed humanitarian law violations but aided and assisted Syrian violations as well, and there are obligations under the laws of state responsibility not to aid and assist internationally wrongful acts by other states and obligations, of course, under the Geneva Conventions not only to respect the Conventions but to ensure respect under Common Article 1.

It seems that these rules have not been adequate to dissuade states from supporting some of the gravest violations of international law. Can you speak about this problem from your perspective and what in your view can be done to address these really grave problems?

## REMARKS BY IBRAHIM AL-KASEM\*

Hello. Thank you, Oona. It is my pleasure to be with you.

Actually, the Russian intervention takes many forms of intervention in Syria. Last week was the start of the eleventh year for Syrian Liberation and the armed conflict, which witnessed one of the greatest tragedies of this century, actually, because we have hundreds of thousands of victims, many of them children and women, more than twelve million refugees and displaced persons inside Syria, and in addition, hundreds of thousands of detainees still in detention. Nobody knows about their fate. The Syrian regime, along with Russia and Iran, bears responsibility for more than 90 percent of these crimes. The conflict is being fueled by the intervention of several foreign states, but the most engaged intervention is the Russian intervention in propping up the Assad government and helping it survive by direct participation and military operation through aerial bombardment and direct combat. Besides that, Russia has been involved in the appointment for officials in Syria, in both the Syrian government and the Syrian army.

On the other hand, Russian representatives are also directly engaged in these negotiations between the Syrian regime and the opposition in the Astana peace talks. Moreover, in August 2015, because of the regime’s loss of the control over large areas of Syria in favor of armed opposition, it was impossible for the regime to continue without direct military support from Russia.

\* European Center for Constitutional and Human Rights.

Russia signed with the regime an announced pact. This pact says, firstly, Russia could send soldiers to fight next to the Syrian army; secondly it gives diplomatic immunity to Russian soldiers if they committed any crimes in Syria; and thirdly, Russia benefits from a wide range of power and authority in the areas under its control and is exempted from tax obligations in this area in Syria.

Also, Russia, through its representative, negotiated directly with the armed opposition in Syria for hand-over of areas and reconciliation with the Syrian government. These agreements between the opposition and the regime included protecting the civilian people, but civilians were pursued by the Syrian army and security agency. Further, a Russian office and hotline was supposed to be established to receive civilian complaints about violations by Syrian governmental agencies, but in fact it did not happen.

Although Russia has been given all this wide range of power and authority and has been heavily engaged in the Syrian conflict, it has not fulfilled any responsibility to protect civilians from violations in Syria, which were committed mostly, as I mentioned in the beginning, by the Syrian regime.

Besides that, we are now facing crimes from Russian soldiers themselves, and Russia did not do anything to protect civilians from these attacks. Nothing happened from Russia until now. Russia is claiming no responsibility and maintaining that its fights in Syria are against terrorist groups such as ISIS or Jabhat al-Nusra.

On an international level, Russia did more, especially in the UN. Russia, together with China, used its veto power at the Security Council multiple times in the interest of the Syrian regime, primarily by vetoing sending humanitarian aid into Syria.

In my opinion, the reason for the failure of the international community to stop the Syrian tragedy is not just the Russian veto in the Security Council. Further, the international community did not take responsibility, such as by obligating the Syrian regime to implement Security Council resolutions, such as Resolution 2245, which calls for cessation of fighting and establishing a transitional governmental body. Besides that, the international community set a policy that said what is going on in Syria stays in Syria. The policy for the international community is based on what happened in Libya. They justified this by maintaining that the intervention in Libya cured more ills. We look at Bosnia. The intervention in Bosnia was better than not intervening, thus the international community did not take responsibility.

In my opinion, we need to reconsider the concept of sovereignty and to expand the concept of humanitarian intervention and make it more effective in cases like Syria so that the failure of international law does not affect the protection of civilians.

## **OONA HATHAWAY**

That is very helpful and, of course, incredibly depressing, though not a surprise, sadly. The situation in Syria has been such a dire one. You got to this a bit at the end, but just in the brief time that we have, you said that you would like to see reconsideration of absolute protection of sovereignty, and you mentioned more aggressive humanitarian aid and more judicial involvement. I wonder if I could ask you to say if there is one reform that you would like to see actors outside of Syria take to hold to account not just the Assad regime, but also, in particular, those who are supporting the Assad regime. Let us for now just focus on Russia since we have spoken the most about it. What would you like to see the international community do when it comes to Russia? Do you see any accountability for Russia or any possibility of accountability for Russia, and if so, what in your view would that look like?

**IBRAHIM AL-KASEM**

In Europe, we are working on the pursuit of war crimes in Germany, Switzerland, Austria, Norway, and other states. Regarding Russia, we are looking for bringing the Wagner Group to justice, but this is because of the national jurisdiction and extraterritorial jurisdiction. We have these challenges.

In my opinion, we can form a coalition for justice in many European states, with support from the United States, Canada, or other states to establish a tribunal to prosecute all of the criminals in Syria, even Russians or others. We do not need the Security Council. We have examples like the IIIM, which was established for the investigation of Syrian crimes. The Security Council has failed so many times, due to Russian and Chinese vetoes, to bring a Syrian case before the International Criminal Court. The solution was thus to go to the UN General Assembly to establish this mechanism. We have other solutions, but it depends on the willingness of states to find solutions to stop those crimes in Syria.

**OONA HATHAWAY**

Thank you for that, and I hope we can circle back to some of these questions because I think they are relevant to several of the other issues that we have talked about.

Next, I would like to turn to Radhya al-Mutawakel, a Yemeni human rights defender. She is the chairperson and co-founder of Mwatana Organization for Human Rights, a Yemeni human rights NGO that advocates for human rights through the verification and documentation of violations, provision of legal support to victims, lobbying for accountability, and otherwise seeking justice for victims. Radhya has been working in the human rights field since 2004, covering different topics, including war crimes, arbitrary detentions, enforced disappearances, and freedom of the press.

Radhya, you have been working on the ground in Yemen. Like the Syrian conflict that we just spoke about, the conflict in Yemen is marked by significant external involvement. The Saudi-led coalition that is supported by the United States has engaged in a number of well-documented violations of international humanitarian law. Iran has supported the Houthis and has also engaged in human rights and international humanitarian law violations. Can you tell us a bit more about the way violations in Yemen have been fueled by these assisting states and about your efforts at Mwatana to find international mechanisms for accountability? What do you think can be done to strengthen international mechanisms for criminal accountability for accomplices in situations like Yemen?

**REMARKS BY RADHYA AL-MUTAWAKEL\***

Thank you, Oona. I am happy to be with you today. All violations that are committed by all parties to the conflict, both regional and international, are supported by allies. The war in Yemen is not only a civil war; it is also a proxy war. There is an international dimension. This helped the violence to increase and the range and type of violations to be much greater than if it was only local conflict. This is the first war where all of Yemen is affected, and thousands of civilians have been affected by direct violations, such as air strikes, shootings, land mines, and starvation. We keep saying that Yemenis are not starving, they are *being* starved. Every Yemeni is affected by this war in every province.

The problem is that each group thinks that they are hiding behind their allies, and this makes them more careless when it comes to violations. For example, Iran has claimed since the beginning

\* Mwatana for Human Rights.

of the war that they are not supporting the Houthis and that they are not even part of the war. The Saudis keep saying that they are supporting the Yemeni government. The United Emirates say they have withdrawn from Yemen while they are still supporting different armed groups, including the Sovereign Transitional Council. They think that they can hide behind these local groups, and the local groups themselves think that they are empowered by their allies. That makes the level of violence much higher in Yemen, and these three dimensions of the war in Yemen have complicated all the efforts toward accountability. Further, they are engaged in arms trade with states like the United States, UK, and France. This financial and political interest made the war more complicated.

Although the war started in 2014 and it is very clear that all parties to the conflict are committing horrible violations, we needed a lot of time in order to conduct an international investigation. As of 2017, we have an investigation through the Human Rights Council, known as the Group of Eminent Experts (GEE). It is a very difficult battle every year to renew the GEE or even to strengthen that mandate of the GEE. It is because the various interests have their own allies in the council, like the UK, France, and the United States, and they make it very difficult. Why? Maybe it is less difficult when it comes to Syria because they are all against al-Assad, and they want the initiation of an international investigation. But they do not want it in Yemen. So they make it very complicated at this level. The very good work of civil society and the states who pushed for this succeeded at the end of the day to have an international investigation in Yemen, but we still do not have the IIIM.

Also, like Syria, referring the situation of Yemen to the International Criminal Court is very complicated because of the veto problem, and because those who have the right to veto have financial and political interests with regional parties to the conflict.

In the middle of this, we still think that accountability is the main thing that will protect civilians in Yemen and is the main thing that can push for peace in Yemen. We know that Yemen is the worst humanitarian crisis in the world because of the huge lack of accountability.

We are trying to push for accountability, not only through our investigation on the ground, but also by searching for available mechanisms for international criminal accountability.

As Ibrahim knows, the international mechanisms for accountability are limited. We were surprised when we discovered that the whole world is designed in a way that enhanced impunity more than accountability, but we know it is not a destiny. We can work to find ways to achieve criminal accountability.

Mwatana filed a complaint in Italy because in one of the incidents we found an Italian weapon in an air strike where civilians were killed with EECHR and Rete Disarmo. Also with EECHR and other international NGOs, we supported a communication to the International Criminal Court. But all of this is still from the angle of weapons. We want to find a mechanism that can target all parties to the conflict, local, regional, and also international. We are still working on this, and one of the demands we started to do advocate for is to refer the situation in Yemen to the ICC and also to have an IIIM in order to lay the groundwork for having files that can be used in the future for accountability.

## **OONA HATHAWAY**

Great. That is incredibly powerful and also lays the groundwork for what is a common theme that we are hearing here, which is the challenge that faces victims who cannot get justice in the country where they were harmed. Access to the ICC is so restricted given the limited scope of jurisdiction. The ICC only has jurisdiction over states that are party to the ICC, or states that commit crimes on their territory, or if there is a Security Council referral of the situation to the ICC, which is obviously subject to veto by the permanent members. The Syria situation is not likely to be referred, given the Russian veto, and the Yemen situation is challenging to get referred, given the

involvement of the United States as a sponsor for the Saudi-led coalition, not to mention the UK and France.

Then you are left trying to figure out what are the alternative mechanisms for achieving accountability, and you mentioned seeking jurisdiction in Italy against weapons manufacturers in Italy. Have there been other cases like that? In the Syrian conflict there have been some cases that have been able to proceed in European domestic courts where people who were responsible for various grave human rights violations were tried in Germany, Switzerland, or other places. Is that something that is possible in the case of Yemen, or is it so time consuming and difficult to find a few places where you can get jurisdiction over someone or to bring a criminal case against them that the effort is not worth the challenge?

### **RADHYA AL-MUTAWAKEL**

Thank you for this question because with regard to universal jurisdiction, we have discussed with our allies if we can use it in Yemen, not only for weapons but also for other kinds of violations.

The first question that we have been asked, do you have a Yemeni diaspora in Europe? The problem is that there is no Yemeni diaspora in Europe. The victim is in Yemen, and the violator is not in Europe. That made it more complicated than the cases that happened when it comes to Syria. It is not impossible to still build files, but it is very complicated, and we are still discussing this. We are ready to go whenever there is a line that we can go for, but we have been told it is very complicated to do it while you know that the victim is not there and the violator is also not there.

We have also done a lot of work in the UK, and we sent a letter to the secretary of state. We did not bring a case there because CAAT is doing this already, and we have discussed with them. We thought that it is better that they keep doing what they are doing, and we can support in a different way. The problem when it comes to weapons is that if we do not have the remnants of weapons that proves that the weapons of this country have been used in this incident, it becomes more complicated. It was easy in Italy because we could find remnants of Italian weapons. For France, we could not find remnants of weapons. For the United States, we found many remnants of weapons, but the legal story in the United States is very different and more complicated, and we are still also trying to find ways.

That is why I said it is very limited, but as we also said, it is not a destiny. We are still keen to use universal jurisdiction and to use any kind of legal mechanism in the United States. When we say we want criminal accountability, we mean it. We do not do it for advocacy. We do it for justice. We want to be very serious in order not to renew these mechanisms. It is very limited, but we are still thinking.

I think that we will learn from Syria. Any kind of mechanisms that are created, for example, in Syria or Myanmar or any other country facing war crimes, we try to read it, study it, and benefit from it so that it can be used in Yemen. But it is a very long journey, and the international humanitarian law itself, although it is great, sometimes makes accountability very difficult, like the idea of proving intent. It is almost impossible. I do not know why it is there, but it is there in international humanitarian law, and it makes everything more complicated.

When we started to document starvation, it was very difficult for us to prove the link. We are now investigating this, and we are trying to see the pattern from the systematic kinds of violations that led to starvation. It is very easy for parties to the conflict to commit the crime, but very difficult for us to bring it to the courts.

## OONA HATHAWAY

That is sadly an all too common problem, and I think the frustration you are articulating is a frustration that is true, generally speaking, when it comes to human rights. This particular problem that we are focusing on of accomplice liability makes it all the more frustrating when you have actors who are from states that at least formally celebrate these principles of human rights and humanitarian law, but then are assisting states that are committing these violations and sometimes even directly committing these violations themselves.

The hope is that conversations like this can help us find lessons that we can draw from various efforts to try and address these challenges, and one context might be able to learn something from another. I gather we have many people watching this. I am hoping that some of our listeners and viewers have ideas.

I want to turn to Dr. Welton Chang, who is the chief technology officer at Human Rights First. Prior to joining Human Rights First, Welton was a senior researcher at the Johns Hopkins Applied Physics Laboratory where he led teams and developed technical solutions to address disinformation and online propaganda. Before that, Welton served for nearly a decade as an intelligence officer at the Defense Intelligence Agency and in the Army.

Welton, I would like to ask you to speak with us about the role of new technologies in assessing violations of international law. There are dual-use technologies that present challenges when they fall into the hands of governments that do not respect rights. For example, the Israeli company, NSO Group, had its spyware used by the Saudi government to track Jamal Khashoggi, and the company Sandvine's Deep Packet Inspection technology was used to block internet communications during protests in Belarus. Huawei and others who built facial recognition technology have had that technology used to identify Uyghurs who are then subject to persecution by the government. Can you say a bit more about this problem, and can you offer advice for companies, technologists, and governments about steps they can take to address this problem? Since you are not a lawyer, I will not ask you to talk about how to hold them to account, but we have some lawyers here who may be interested in thinking about that problem. Can you fill us in and help us think about this problem and what technology companies should be doing to try and address it?

## WELTON CHANG\*

Thank you for leading this panel, and thank you to my fellow panelists for their insightful commentary thus far. I will try to break my comments into two things worth thinking about: how we got to where we are today and then what should be done about the current situation.

We are pretty far from the world and the spirit of the 1980s and 1990s when there were widely shared beliefs that technology would be a great equalizer, that the internet's ability to connect anyone anywhere to anyone else would enable massive diffusion of knowledge and spread of democratic values. I think part of where we went wrong is that that techno utopianism did not really take into account the incentive structure of capitals.

One thing that the technologists did get right, however, was that the world would be very different as a result of the internet, the data boom, ever more powerful computing resources, energy for storage, and advances in things like machine learning. The ability to build, feel, and abuse technology to commit large-scale human rights abuses has never been greater than it is today.

I think we should state that technology itself has no inherent morality to it and can, thus, be used for good or ill. There are legitimate uses for many of the tools that have been abused by actors like

\* Human Rights First.

the Saudi government, and things like facial recognition and the knowledge of how to produce such technologies have proliferated to the point where just trying to institute an outright ban would be neither useful nor possible.

One of the comments that Radhya made about there being a morass when it comes to U.S. law also applies in this instance, where Section 230 of the Communications Decency Act provides a liability shield for U.S. social media companies. To the extent that these companies have been very successful overseas, essentially, the plaintiffs in those places have to contend with U.S. law in order to hold those organizations accountable here—for example, Facebook’s participation in the genocide in Myanmar and Facebook being a company that essentially is the internet in many different places around the world. Because of Section 230, the people who are the victims of governments using Facebook as a tool do not really have anywhere to turn, and that is a direct result of American citizens not using their ability to vote and influence policy to change that liability shield and to put people in place so that there are carveouts for those rules.

Some possible remedies, that are not necessarily legally based, are that companies should think about adopting ethical use guidelines and should consider setting aside their profit motive and not selling to countries or companies that they reasonably think would abuse that technology for either targeted or wide-scale human rights abuses.

Companies should also consider not investing in technology where they think that the cost to rights would potentially outweigh any potential gains to profit or to security. An example of this would be facial recognition technology, something that large companies such as IBM and Microsoft have opted out of developing because they view the societal harms that could come as a result of this technology being fielded as greater than any potential profit they could themselves make.

For technologists, we really should think about some kind of Hippocratic oath in our field. Do not always start out explorations into developing something with “can I build this,” but really think about “should I build this technology.” Is this something that can be later on abused by someone in a way that we are going to come to regret much later on down the line? And perhaps when it comes to choosing employment, evaluate companies for the work that they are doing right now and consider not joining a company that you know to be abusing human rights or helping actors abroad and governments abusing human rights.

## **OONA HATHAWAY**

Let me ask, when you make this case to technology companies, what is their response? I can imagine one possible response is “Well, if we do not develop it, somebody else will. So it is better for us to be the ones who develop it and maybe get the patent and manage it and control it rather than allow somebody else to.” What do you say to those who come back to you with that kind of response? How do you reply?

## **WELTON CHANGE**

I think the responses are pretty wide ranging and depend on the culture of the company that you are talking to. In many of these cases, it is really the policy system of specific founders, maybe the CEO, somebody who is very powerful in the company who may hold all of the voting share rights in their dual stock structure of their company. There is not one typical response that you get from companies.

My sense is that the more enlightened ones see that we have come to a point where it is probably not worth making an additional dollar if you are doing that in a world where there is no longer democracy. I think that the companies that do see that as a potential world that we could live in,

in the near future, are saying to themselves, “We have got to do better. We have to build tech for good, and we should try to avoid the things that we know are going to lead to wide-scale societal harm.”

### **OONA HATHAWAY**

Is legal reform a part of that? I know you are not a lawyer. I do not want to ask you an unfair question, but it does strike me that part of the problem here is that we want to encourage them to put their profit motives to one side, and so they should think about not just profit but about what are the long-term uses of this technology. But there is an alternative view, which is to say that may be unrealistic to ask of profit-seeking companies if they have shareholders. I can imagine a response of a CEO would be, “My responsibility as a CEO is to pursue the best interest of the shareholders, and I would be ignoring my duty if I do not do that.” One response to that could be “Well, then let us make it costly for these technology companies to be developing these technologies and to be aiding and assisting in these human rights abuses when they know or should know that these technologies could be used in these wrong ways, and then hold them responsible for it.” Is that a piece of the puzzle for addressing the challenge of these technologies being put to bad uses?

### **WELTON CHANG**

I certainly think so, and specifically, thinking about liability shields, things like Section 230 of the CDA is an area where potential reforms could lead to a large impact, especially with social media being so pervasive, it could have a wide-ranging, wide-scale impact on stopping some of these harms from happening.

I think there is more and more appetite, it seems, in Congress and other places for some kind of common-sense legal reforms with Section 230. I think there have been some well-considered, potential carveouts that have been suggested that have been put forth in Congress that would do some of this, and as an American citizen, I have to apologize to the rest of the world for where we have ended up, where perhaps many parts of Section 230 have outlived their usefulness up to this point. Unfortunately, the rest of the world being subject to essentially this liability shield, they are going to have to wait for America to clean up its act to try to push some of these reforms through.

### **OONA HATHAWAY**

I want to turn now to encourage you all to speak to one another or respond to one another. I know we do not have a lot of time left. I wish we had had all afternoon for this conversation, because even if we had all afternoon, we would have had a hard time talking through everything that matters.

It struck me that there are some common themes here, and I would be interested in inviting you all to speak to them. Ibrahim and Radhya, it strikes me that you are speaking about many of the same kinds of challenges that you are both facing in terms of bringing about accountability in a context where all these outside actors are interfering in the conflict, fueling the conflict, or making it worse, and the difficulties of holding those persons responsible. One way of addressing those issues is by gathering and collecting information and doing the investigations yourselves and trying to make sure that this does not get lost or forgotten, even if we do not yet have the tools and ways of holding people accountable now. We have a hope that we will one day, and in the meantime, we need to document and keep records of the abuses so that when we do have a mechanism for achieving some form of accountability, we might be able to do that. I wonder if you could speak a bit to that and also how the International Criminal Court is, on the one hand, a great hope, but on the other hand, sometimes it feels like an empty hope due to the significant limits on jurisdiction.

And then, Katie, I do not know if you want to comment on what you have been hearing here. In a way, obviously, a lot of your work under the Alien Tort Statute is about holding accountable those who have committed their abuses abroad but have a connection in some way, shape, or form to the United States. Our viewers may know there is a Supreme Court case now pending that raises the question as to whether ATS is going to continue to be a viable option when it comes to not just foreign corporations but U.S. corporations.

Mainly, I wanted to invite you all to speak to some of the overlapping questions and whether you see commonalities to the challenges that you face, and any hopes in terms of ways forward for addressing these kind of challenges. What do you see as the next steps, and how do we think we can solve these problems of accomplices or aiding and assisting in violations? What can we do? What can viewers do to try and address these problems?

### **RADHYA AL-MUTAWAKEL**

I will talk about the documentation. It is one of the main things that we are doing in Mwatana. We are on the ground. In Yemen, there is a balance of weakness between all parties to the conflict. That gives you a space to still be on the ground, even if the situation is very bad. We have field researchers all over Yemen, and we are taking the documentation very seriously. We consider ourselves responsible to build this human rights memory.

At the beginning, we started to document for advocacy, but after years of war, we discovered the path of accountability because we have discovered that the war in Yemen is not being forgotten. It is ignored on purpose. We have developed our mechanisms in a way and capacity in order to start to document for accountability, not only advocacy.

Yes, we think this will work eventually, and the people themselves, the survivors, the families of those people who we met, they cooperate with us. They give us all the details because they believe in justice also. Even the very ordinary people, they want to be heard. They want their stories to be told, and they ask for justice. So we are doing this.

Also having international investigation mechanisms help us because building files like what the IIIM is doing is very important, and it cannot be done by local NGOs. That is why part of our energy is going to push for these international investigations besides the work we are doing. We want to document violations by all parties to the conflict all over Yemen, and it will help in the future, I hope.

### **OONA HATHAWAY**

Great. Ibrahim?

### **IBRAHIM AL-KASEM**

I would say there are many changes in our work actually. The main change for me is that most of the recommendations are going on outside of Syria, outside the theater of the crimes. The regime did not allow for any international cooperation or IIIM to go and make any investigation inside Syria, and the difference now is that we can find how effective they are working on the ground in Syria. The Chemical Weapons Committee went there and could collect evidence and identify who is responsible for a crime. But that they are working outside is the main challenge for me. Besides that, how do we protect the victims and witnesses. There is no mechanism to protect them, even if they wanted to take the risk to go ahead in this process. This makes them feel like there is no hope from the international community and they do not feel that this is fair for them.

For me, I am sorry to say this, but I do not like talking about hope. I am talking just about serious work because serious work will bring what we want. Hope is something Syrian people sought for

ten years and nothing happened. For that, I always say we should work hard because we can justify what we want. We can achieve what we want when we are working. By hope is not enough. What we are doing now, it is very important in Europe, but still it is a small step on the long road for justice in Syria. For that, I am saying we are still in the beginning. We need more time. We need more experience as Syrian lawyers, as Syrian NGOs. We need more support. Even the international mechanism is not enough for me because all their work is just to comment and build cases, but the next step for their files or recommendations is not so clear, and until now, there was no open door for them to continue their work. It is still the beginning for me.

### **OONA HATHAWAY**

That is a very honest answer. There are no easy answers to the problems that we face, and while we have seen some modest improvements in international law, with a more robust interpretation of Common Article 1, for instance, and the State Responsibility Doctrine has become more robust, this is a good reminder that the challenges really do remain, that there continue to be significant barriers in the battle to bring states and nonstate actors to account.

Thank you all for your important work throughout the world to try and bring justice to victims of human rights abuses.

Thank you, everyone. Thank you for your great contributions and for the fantastic conversation. Hopefully this is just the beginning.