the International Criminal Tribunal for Rwanda, and he practiced law as a litigator before trial courts in both Canada and Nigeria. He received his Ph.D. from the University of Amsterdam in the Netherlands, an LLM degree from McGill University in Canada, and received his Bachelor of Laws degree from the University of Calabar in Nigeria.

Since completing his term at the ICC, Judge Eboe-Osuji now holds appointments as distinguished international jurist at Ryerson University in Canada, Paul Martin Senior Professor of Political Science at the University of Windsor, and as Senior Fellow at the Carr Center at Harvard University.

We are going to start with some remarks from Judge Eboe-Osuji, followed by a conversation with me, and then Q&A from the audience. Please, everybody, join me in both welcoming Judge Eboe-Osuji and congratulating him for the honor of the Butcher Medal.

Remarks by Judge Chile Eboe-Osuji

doi:10.1017/amp.2022.15

Thank you, Michael. When Mark Agrast and I settled on the title of this lecture on February 4, 2022, the idea was to speak generally about the accountability of sovereign power for international crimes. That was to discuss no particular head of state, except perhaps historical figures whose behaviors helped to develop the norm of individual criminal responsibility for even heads of state.

Then three weeks later on February 24, 2022, you know what happened: President Putin invaded Ukraine in what everyone accepts as a blatant war of aggression, which international law says is a crime in international law, and thereby he walked himself straight into my lecture, as if to say, "Eboe-Osuji, why talk about historical figures while I am right here, right now?"

There is no doubt that he got what he asked for. President Biden has now repeatedly called President Putin a "criminal" in international law who must be brought to justice and many other world leaders have agreed. As we will see in a moment, President Biden broke no new ground when he called for the prosecution of another head of state or head of government for international crimes. At the end of the World War I, French Premier Georges Clemenceau and British Prime Minister David Lloyd George, later joined by U.S. President Woodrow Wilson, called for the prosecution of Kaiser Wilhelm II, the emperor of Germany and king of Prussia, and they actually took steps to make that happen.

About twenty-five years later, in the middle of World War II, U.S. President Franklin D. Roosevelt, UK Premier Winston Churchill, and Soviet leader Joseph Stalin called for the prosecution of the leadership of the Third Reich, including Adolf Hitler. These were early developments that charted the course of international law.

I shall return to that discussion in a moment, but first things first. I want to pause here and thank ASIL for awarding me this year's Goler T. Butcher Medal and inviting me to give a second lecture to the Society, the second time we are all getting together in person. These are immense honors for which I am truly grateful. Thank you very much.

I take this opportunity to dedicate that award to an institution that is now dear to all of us and should have been for a long time, and that is the International Criminal Court. And to everyone who worked at the Court before and during my time and those who still do. They have done and are doing amazing work in spite of daunting challenges. The world's gratitude is eternally theirs, and I call on the world to continue to support that institution and double efforts in doing that so that it can do more.

International law touches the special problems of the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. International lawyers who are familiar with the negotiation and drafting of the provisions of the Rome Statute in relation to the crime of aggression are

used to hearing that the crime was described as a "special crime" because they said it was a crime of leadership. I am sure that aggression does not deserve special status because of that, but aggression does deserve to be called a special crime for another reason. That reason was supplied by the judges of the International Military Tribunal for Nuremberg, who in their 1946 judgment described aggression in terms that it is not only an international crime, it is the supreme international crime because "it contains within it the accumulated evil of all the other war crimes." It is for that reason that aggression is a special crime in international law, and it is against that background that we must consider Russia's war of aggression against Ukraine.

It is, of course, a matter of much interest that leaders of the Western nations and much of their citizens now want Mr. Putin prosecuted for the crime of aggression amongst other crimes. The trouble is there is an existing gap in the international accountability framework in relation to the crime of aggression. Notably, the Rome Statute's provisions on the crime of aggression were drafted to ensure that the ICC does not exercise jurisdiction over a citizen or the territory of a non-state party to the Rome Statute without referral from the United Nations Security Council. That is the first limitation in relation to the crime of aggression. There is a second one, and it concerns whether the ICC can even exercise jurisdiction over the crime of aggression in relation to nationals of even states' parties to the Rome Statute who have not specifically opted in to the aggression provisions of the Rome Statute. That is the second limitation, but let that not trouble us for today's discussion. We will limit ourselves to the first limitation.

The result of the first limitation is that the ICC cannot now be the forum to try Mr. Putin and his leadership in Russia for the crime of aggression because Russia is not a state party to the Rome Statute, and Russia will veto any referral from the United Nations Security Council, as that body is the only body at the moment able to trigger the crime of aggression or prosecution of the crime of aggression. So what do we do now? What the international community is doing is engaging in desperate efforts to try and cover that gap. The Right Honorable Gordon Brown, former UK prime minister, is the leading voice in that effort. The effort aims now to create an *ad hoc* special international tribunal to prosecute the crime of aggression.

Of course, any effort to ensure accountability, including this particular effort, must be applauded in principle, but we must recall the story about how that gap in the Rome Statute came to exist in relation to the crime of aggression, and that story needs to stress that this gap was not an oversight. It was brought about specifically by efforts mostly of the United States government at the time, joined by others amongst the five permanent members of the United Nations Security Council at a time all the permanent members of the United Nations Security Council, including Mr. Brown's own country, the UK, were clearly in favor of giving the Security Council the deciding say, the trigger as it were, on whether or not ICC should prosecute at all anyone for the crime of aggression in a given state case.

A 2005 piece in the *American Journal of International Law* by two prominent American scholars says much about the gap that now exists in the Rome Statute in relation to the crime of aggression, and those two scholars put it this way: "The crime of aggression issue has prominently figured" in the "rocky relationship between the ICC and the U.S. government." The quote continues: "The treatment of aggression contributed significantly to the sense of disappointment with which the United States reacted to the ICC treaty adopted at Rome, the Rome Statute."

Now, shortly before the Kampala Conference of June 2010, where the aggression amendment to the Rome Statute was adopted, the Council on Foreign Relations, an influential American think tank, published a report in which it was notably asserted that the ICC's exercise of jurisdiction over the crime of aggression, quote, "would jeopardize U.S. cooperation with the court." In that regard, the author wrote as follows: "Prosecuting aggression risks miring the court in political disputes regarding the causes of international controversies, thereby diminishing its effectiveness and

https://doi.org/10.1017/amp.2022.15 Published online by Cambridge University Press

perceived legitimacy in dispensing justice for atrocity crimes. ICC jurisdiction over aggression also poses unique risks to the United States as a global super power. It places U.S. and allied leaders at risk of prosecution for what they view as necessary and legitimate security actions. Adding aggression to the ICC's mandate would also erode the primacy of the United Nations Security Council in managing threats to international peace." That correctly sums up the understood official position of the United States in relation to giving the ICC unfettered jurisdiction over the crime of aggression—unfettered in the sense of being independent from Security Council control.

It is clear that the sentiment that resulted in limiting the ICC's jurisdiction in relation to the crime of aggression was that the crime of aggression is a non-justiciable political matter, but then that raises the question, if that is the case, would that problem go away when you create an *ad hoc* tribunal to try the crime of aggression on a case-by-case basis or even give that power to the UN Security Council to trigger? There is also the argument that ICC jurisdiction over the crime of aggression poses a unique risk to the United States as a global superpower, but then, again, the question is does that concern preclude any other state that may qualify as a global superpower or see itself as such, and should it?

Next question or proposition, ICC jurisdiction over the crime of aggression will place the United States and allied leaders at the risk of prosecution for what they view as necessary and legitimate security concerns. Now we are living that argument as we speak. Russia believes that what it is doing is a necessary, legitimate security concern.

Again, the argument about giving the ICC jurisdiction over the crime of aggression unfettered from the jurisdiction or powers of the Security Council will limit the primacy of the United Nations Security Council in relation to international peace and security, and here we are. Veto power will be exercised by one country there to forbid the prosecution of the crime of aggression—these are the limitations that we are talking about.

Those familiar with international relations will know how difficult it is to create an international criminal tribunal, permanent or *ad hoc*, in the context of a cold war, and we are in the middle of a second cold war. Leaders of the G7 may want to create such a tribunal, but would the G77 go along with that effort to create a tribunal in the context of the United Nations, which is the most authoritative context to create such a tribunal? Can these be done without the cooperation of the G77 merely by avoiding the UN altogether and reaching back to the Nuremberg Tribunal model that was used in 1945 when much of the world was under colonial rule and the United Nations had not yet been created, and given the power as the clearinghouse for efforts to maintain international peace and security?

These are difficult questions. I merely raise them; I do not have the answers, but we cannot ignore the hard lessons of the short-sighted political expediency that the present circumstances teach us. It was politically expedient to limit the reach of the Rome Statute in relation to the crime of aggression, and now the chickens have come home to roost. It will be foolish to brush aside that hard lesson and carry on as if it did not matter, as if nothing happened, as if the gap in the Rome Statute was an oversight, as if we are to ignore the deliberate policy of self-interest that ignored the central message of Robert H. Jackson in 1945. Everyone now wants the reign of law over Russia and rightly so, but in 1945, at the end of the World War II, Mr. Justice Jackson of the U.S. Supreme Court, then presciently warned as follows: "We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what will be our national advantage." It is important to stress that message, not to rub it into the faces of those who created that gap in the Rome Statute. It is necessary to stress the mistake so we do not keep making it, and that mistake gets made all the time.

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It is against this background that I stress the need to amend the Rome Statute in a corrective way. One minimum amendment that can be made would be to delete Article 15*bis*, paragraph 5 of the Rome Statute, which provides that as regards: "A state that is not the party to this statute, the court shall not exercise this jurisdiction over the crime of aggression when committed by that state's nationals or on its territory." That needs to be deleted.

With that, I come to another matter of the lecture that I had always meant to deliver before Mr. Putin walked himself into it. And that is to say even if it is possible to set up a special tribunal for the crime of aggression, there is one big question that we must all consider. It is the question of immunity. That question asks whether it is even possible to prosecute Mr. Putin for the crime of aggression or indeed for any other international crime, for that matter, given that he is a head of state.

I must recall that the appeals chamber of the ICC, when I sat on it as president, categorically answered that question in the context of the work of the ICC. The appeals chamber decided in 2019 that customary international law never recognized head of state immunity in processes of an international criminal court. More than that, the court said that every important instrument of international criminal law since 1919 had consistently rejected the proposition of immunity for heads of state. But there is a cohort of academics who have made a reputation for themselves arguing for a long time that customary international law recognizes sovereign immunity even before an international court. Some of those academics promptly mounted an insurrection, as it were, by social media against the appeals chamber's judgment that rejected their position as correct.

I must say that at this stage, I make two disclosures. One disclosure is that some of these academics—not the ones who mounted insurrection by the way, but some of them who disagreed—are very close friends of mine for whom I have the fondest regard and highest regard. I need to make that disclosure. And the second disclosure I must make is how I feel about that position, as if you have not guessed. They are wrong.

Now, consider this, the central thesis of these academics' argument proceeds from the premise that customary international law recognizes the immunity of one sovereign before the courts of an equal sovereign based on the doctrine often expressed in the Latin maxim *par in parem non habet imperium*—amongst equals, none has dominion. The logic of that doctrine, these scholars would argue, also prevents an international court from exercising jurisdiction over a head of state, notwithstanding that a *par in parem* doctrine was established in the context of jurisdiction of national courts and not of international courts. Professor Scharf and I will be discussing some of that in more detail later.

I should note that the contention of this school of thought is founded merely on the operation of a certain view of logic presented as law. There is a distinction between a logical argument and the positive legal statement of a rule. And their logic stretches to the international courts a rule of immunity that was developed in the sphere of national courts. Their argument is not based on actual data or experience of international law, but on the purported extension of logic. Even assuming that that logic is flawless—and I am satisfied that it is seriously flawed—one eminent obstacle to their argument of logic has to be Mr. Justice Oliver Wendell Holmes Jr. You will all recall his dictum that the life of the law is experience: it is not logic. As we will see presently, the actual experience or data of international law says something quite different than what these scholars contend with so much confidence.

It is, of course, more than surprising to see the leading proponents of that theory of immunity now turn around and argue that President Putin can be prosecuted before the special tribunal that Mr. Brown wants to help set up. I have actually heard efforts made to explain this turn of the weather vane by the argument that any immunity that a head of state enjoys in international law before the courts of equal sovereigns can be readily overcome by resorting to the jurisdiction of

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Ukraine to prosecute the president of Russia. But I am still trying to unravel the about-face in light of the central premise of their earlier contention that immunity exists before international courts. That central premise being located in the very doctrine of *par in perem non habet imperium.* Do we take it that the *par in perem* doctrine operates as every other time and even by extension to international courts? And the only time it does not apply is when certain powerful states want to prosecute leaders of other states? That is an open question.

Ultimately, what we now see is, in my view, the nakedness of the fallacy so insouciantly propagated by these scholars, insisting that customary international law recognizes head of state immunity before an international court trying international crimes. It was always difficult to see where you demarcate the acceptable limits of a theory of sovereign immunity that would have legally served up impunity on a platter to Adolf Hitler, Pol Pot, Théoneste Bagosora, and Jean Kambanda for the crime of genocide.

The crime of genocide, that is the legacy of Adolf Hitler, Pol Pot, and others, is often described as the supreme crime or crime of crimes. One would think it astonishingly immoral of any legal theory to permit anyone, even a head of state, to escape from accountability for that odious crime. It is encouraging to see that people now also recognize the immorality of allowing President Putin to escape accountability for the invasion of Ukraine, another crime also seen as a supreme international crime.

Let us recall the characterization the Nuremberg Tribunal gave to the crime of aggression: "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Notably, Russian prosecutors and judges were full participants in the judicial process that resulted in that jurisprudence and that pronouncement in 1946.

Where does that leave us? Does it mean that Mr. Putin should enjoy immunity before any tribunal, including the special one being contemplated? The answer is no. But that would be the same answer for any head of state who commits an international crime. The reason that heads of state do not enjoy immunity in customary international law for international crimes when prosecuted before international courts flows not merely from a principle of natural law discoverable through the path of morality, but the norm resulted rather as a deliberate principle of positive law formulated as such by the powerful nations that created that path of international law at the material time.

We may begin the story on November 20, 1918, less than two weeks after the end of World War I. British Prime Minister Lloyd George was chairing the Imperial Cabinet meeting on that date. During the meeting, Lord Curzon briefed his cabinet colleagues on his meeting in France the week before with Premier of France Clemenceau. In the meeting between Clemenceau and Curzon, Clemenceau indicated his inclination to have the Kaiser prosecuted for the crime of aggression and war crimes, but that he had commissioned some of France's top international jurists to study the question and then render opinion on what international law said on the matter.

At that time in Europe and the United States, there was public clamor for the prosecution of the Kaiser, as we now see in relation to Mr. Putin. To that end, when Lloyd George had that briefing from Curzon, he too indicated a willingness to have the case prosecuted. But then he said something important in relation to international law. Remember that Clemenceau said, "I've tasked two of my top jurists to study what international law says on the matter," and to that, Lloyd George said he always wanted to prosecute the case, but as for international law, "with regard to the question of international law, well, we are making international law, and all we claim is that international law should be based on justice." So there he was declaring that they were making international law or remaking or adjusting it.

I will not bore you with the details of the work of the McDonnell Committee in the UK that studied this question and recommended to the British government that, yes, the Kaiser must be prosecuted, nor need I bore you with the acrimonious debate that occurred before the Paris

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Peace Conference Commission on Responsibilities for the authorship of the war and the enforcement of penalties and its subcommission number three.

On the night of November last year, I gave a lecture at Western University where I treated that discussion with slides and historical documents. It is on YouTube; you can get it there. I will not repeat it here. For today's lecture, though, I only need to recall that the American delegation to the commission and subcommission in the persons of U.S. Secretary of State Robert Lansing and his delegation colleague, James Brown Scott, had fought tooth and nail to prevent the prosecution of the Kaiser at all or to set up an international tribunal to try him. The reason for their objection included absence of precedent in international law as well as a view of immunity of heads of state. But the British delegation, led by Solicitor General Sir Ernest Pollock, KC, supported by Dean Ferdinand Larnaude of the University of Paris, fought back and insisted, yes the Kaiser must be tried before an international tribunal.

In the end, the majority of the commission and subcommission put the matter to a vote, and by a vote of eight to two, the vote carried that an international tribunal should be set up to try the Kaiser. The two dissenting voices where the American delegation and the Japanese delegation.

Next came the deliberation of the Council of Four, colloquially called the "Big Four," of the Paris Peace Conference. There were Clemenceau himself, David Lloyd George, Italian Prime Minister Vittorio Orlando, and U.S. President Woodrow Wilson. It was their job to decide what the Peace Conference was to do with the reports of the Subcommission on Responsibilities. Throughout their deliberations, Clemenceau and Lloyd George maintained their relentless determination to prosecute the Kaiser. Orlando was tentatively supportive, although he had doubts. The person that needed convincing was President Wilson.

Their meetings on April 2–8, 1919 were truly instructive. Having been fully briefed by Lansing about the objections of the American delegation to the commission and subcommission, President Wilson indicated initial misgivings against the insistence of Clemenceau and Lloyd George to prosecute the Kaiser, but Clemenceau and Lloyd George stood firm and remained unwavering to that commitment to prosecute the Kaiser. Lloyd George even went so far as intoning that he would find it difficult to accept a peace treaty that did not include the prosecution of the Kaiser.

Eventually, Wilson caved in, but before he did, he graciously invited Orlando to express his views. Orlando had been mostly silent during those deliberations. Orlando tentatively indicated agreement in principle but also tentatively ventured some concerns on grounds of lack of precedent in international law as well as the importance of respecting the national sovereignty of Germany, suggesting that it was up to Germans to prosecute their Kaiser. But that only provoked an emphatic and exasperated pushback from Clemenceau.

Relating to the argument of precedent, for instance, he said: "Was there a precedent when liberty was given to men for the first time?" He continued, "Everyone must assume his own responsibility and I assume mine." Elaborating on that individual criminal responsibility theme, he continued, "For me, one law dominates all others, that of responsibility. Civilization is the organization of human responsibilities." That was classic Rousseau, by the way.

In an apparent demonstration of early understanding that general principles of law recognized by civilized nations can be a source of international law, although he did not formulate his arguments in those terms, Clemenceau continued his mini-master class in the following words, "Monsieur Orlando says yes within each nation. I say in the international field. I say this along with President Wilson who by establishing the foundations of the League of Nations has had the honor of transferring the essential principles of national law into international law." He continued here by pointing to the forward-looking adjustments they were hoping to make in international law. He said what we want to do "today is essential if we want to see international law established." That was the backstory to what became Article 227 of the Paris Peace Treaty.

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I will leave it there for now to save time for some of the conversation that we must have. I thank you very much.

Michael Scharf

Thank you. There is a proposal saying that the UN General Assembly and Ukraine together could create a new international tribunal to prosecute President Putin for the crime of aggression, which, as the Judge described, cannot be prosecuted by the current International Criminal Court. We all know that the Special Court for Sierra Leone, which was created in that way, held that there was no head of state immunity before that court because it was not international enough. The question is, what happens if this resolution passes by a bare majority with significant opposition and significant abstentions, just like the last couple of resolutions that have recently passed at the Human Rights Council and in the General Assembly? Relatedly, how many countries are needed to create a truly international court such that immunity does not apply?

Judge Chile Eboe-Osuji

Thank you very much. Let me take it from the last one. How many countries do you really need to create a truly international court? The question is this. It takes us back to Nuremberg, does it not? It took four countries to create one. If it can take that number to create an international tribunal so what is the difference then between two and four in terms of creating what is an international tribunal?

Some of the confusion that arises, implied in that question, is one that confuses jurisdiction with immunity, presence of jurisdiction versus absence of immunity. These are not the same things. The fact that there is no immunity for a head of state in customary international law does not mean that any particular court has jurisdiction to try any case. Those are two different conceptions. You can bring someone before a court that does not recognize immunity. The court will have to ask you if it has jurisdiction to try this person, regardless of the absence of his immunity. It is important to separate that, but somehow that often gets confused in this debate on immunity.

Michael Scharf

Do you think that the General Assembly can create this tribunal?

Judge Chile Eboe-Osuji

The General Assembly can, I do believe. It depends on how they do it. It may be under the terms of the UN Charter, as it were, worded from Articles 11 to 13, which tend to talk about recommend, recommend, recommend. But we also know that is for the General Assembly. What does recommendation mean? Someone might look at it in terms of the idea that the UN is to be the clearinghouse for international action for the sake of peace in the world. If you want to do anything and give it legitimacy, you must do it within the UN.

If it is within the UN, there is a body—that is the Security Council—that has been given primary responsibility to discharge a function, and that body has become dysfunctional. For one reason or another, it is not working. Is the GA to throw up its arms and say sorry because there is this body that is supposed to do it, yet it is not doing it, and thus we can do nothing? Or can the GA use this recommendation power now and enable UN members to go outside the United Nations and do something that could not be done by that body? That is one way of looking at it.

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Michael Scharf

I do want to ask you some questions about your legacy, since we are here to celebrate that and your award together. You have had long experience with applied international law from your earlier times as a prosecutor in the Rwanda Tribunal and the Special Court for Sierra Leone to your position as legal advisor at the UN High Commissioner for Human Rights and your eventual appointment as an ICC judge. From the vantage point of that career, of those combined experiences, can you tell us one way that international law can or should be improved and why?

Judge Chile Eboe-Osuji

Thank you, Dean. I have already talked about one way, amending the Rome Statute in the way I spoke about it. I will not repeat that. Another crucial issue is the big gap in international law regarding the absence of peace as an actionable, fundamental human right to peace. As we speak, we have the fundamental human rights declared in the Universal Declaration of Human Rights and a slew of international treaties on that. But you do not see included in that bill of fundamental human rights the right to peace, and there is no other human right you can really meaningfully enjoy without the right to peace. It is like the missing front tooth, in my view, and that needs to be closed.

It is important to adopt a covenant on the right to peace—as a covenant, not a mere declaration. Where there is a right, there is a remedy. You violated that right. So, if you have peace as a fundamental human right, a war of aggression would necessarily be a violation of that right, and the victims of that violation would now have the right to bring their own claims, regardless of what agreements that countries agree to in order to end a war, which may actually not account for the rights of reparation for citizens at the individual level. But, if you recognize the right to peace, there are lawyers in this room and in this conference who will be willing to litigate cases on behalf of victims in various national courts around the world and attach the property and assets of the states, individuals, and corporations who have deliberately launched wars of aggression and brought untold horror to human beings. That is one important development I think needs to happen following this naked invasion of Ukraine.

Michael Scharf

Important suggestions. A couple of hours ago, many of us in the audience today got the opportunity to hear Fatou Bensouda, who made a clarion call for women and everybody to take leadership in international criminal law. Looking back at your tenure as ICC president, why did you volunteer yourself for such a difficult position that takes such a thick skin, and what were your primary goals for your tenure there, and how would you say you accomplished that mission?

Judge Chile Eboe-Osuji

Thank you very much. By the way, I must, first of all, say I do strongly back Ms. Fatou Bensouda's call for support of future women leaders and current ones. I sincerely do believe that if we had more women leaders in this world, we might be in a better shape than we are now. I mean it.

As for your question, I did put my hand up for it because there were some things that I felt could have been done from a different perspective, and if you want to have something done, you better get in and do it yourself and not sit by the side and complain that it was not done a certain way. So I did volunteer.

It is all team effort, there is nothing there that I achieved alone. There is a big team, lots of people who helped to make that happen. But the idea was, there was this difficulty with the African Union

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(AU) and the ICC leading to the clamor and almost the resolution of mass withdrawal at the AU. I felt that coming from Nigeria, that could come in handy in trying to rally Nigeria behind the court and say, look, what is going on here? Help us. I thought that was something that could be done, and it worked. That was one thing that I thought should be achieved. We were able to, again, with the cooperation of everyone, do some things that had not been done before. We held town halls. It may look like nothing, but if you have an organization of any size, the ability of everyone to get together and be in the same room, ask questions that trouble them, and have the leadership address those and share sympathy, it is a powerful thing. That is something again, we all did as a team when I was there, and there are other little things that we did.

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