

Closing the Impunity Gap at Home and Abroad

Address by

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Thank you, Walter, for your kind introduction. Under your skilled leadership and with the help of ace Director Michael Pates, the Center for Human Rights is excelling in its contributions to the work of the American Bar Association. I want to acknowledge as well, and express my gratitude, for the attendance today of President Carolyn Lamm, who is superbly leading this vast organization and upholding the value of human rights principles in our discipline. I also want to thank President-Elect Steve Zack, Bill Robinson, and all of the former ABA presidents in the room today. I am humbled to be in their presence and that of Lou Duffy, whom I join in congratulating today. I also want to recognize Professor Douglass Cassel's presence here. His path breaking article on this subject in 2001 influenced me and is one I

always footnote.¹ Thanks to all of you for joining in recognition of the Center for Human Rights.

I have 30 minutes of remarks ahead of me, and no more. Then I would be pleased to take some questions. I have spent the last 17 years sharply confronting genocide, crimes against humanity, and war crimes. These are crimes that collectively I refer to as “atrocities” and I describe the part of international criminal law being developed by the war crimes tribunals as “atrocity law,” so I will use those terms throughout these remarks. Ensuring that justice is rendered in the face of atrocities, either before U.S. courts or international tribunals, has been one of the most challenging tasks of our generation. Let us not shirk from it. I want to talk about how atrocities are positioned, so to speak, under U.S. law, and then I will turn my attention to the issue of impunity from such crimes in the international arena. I know some of you may want me to address U.S. policy and the International Criminal Court, and I suggest we cover that area during the questions if you wish.

United States Law

In general, U.S. federal criminal law and military law have become comparatively antiquated during the last seventeen years in their respective coverage of atrocities, while atrocity law evolved significantly since 1993. The prospects of U.S. courts exercising jurisdiction over atrocities under current federal law remain relatively poor. U.S. Attorneys, in even the best of jurisdictional circumstances, appear not to have pursued the types of investigations and possible prosecutions one might expect if there were an aggressive

¹ Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001). This address is drawn in part from my recent article, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT’L RTS 30 (2009) and my forthcoming book on the building of the war crimes tribunals (Princeton University Press).

commitment to bringing perpetrators of atrocity crimes to justice and if the law provided a clear basis for such prosecutions.² Similar problems exist with respect to military courts-martial under the Uniform Code of Military Justice (“UCMJ”).³ A considerable number of nations have leapt far ahead of the United States in terms of their national courts being able to investigate and prosecute the full range of atrocity crimes.⁴

In contrast, the United States remains an available safe haven for war criminals and other perpetrators of atrocity crimes who need not fear prosecution before U.S. courts for the commission of crimes against humanity or war crimes under most circumstances if they reach U.S. territory either legally or illegally. Indeed, the fact remains that U.S. citizens and U.S. government employees and contractors who may commit certain atrocity crimes not covered in federal law or common crimes for which there is no extraterritorial jurisdiction may entirely escape any prosecution in the United States. The hypothetical possibilities, if not realities,

² The notable exception has been the sole case (against Emmanuel “Chuckie” Taylor, the former leader of Liberia’s Anti-Terrorism Unit) prosecuted under the criminal Torture Statute (10 U.S.C. §2340A (2006)) since its enactment in 1994.

³ Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006). While it remains true that atrocity crimes likely could be prosecuted as multiple counts of common crimes under the UCMJ (such as genocide as multiple counts of murder or crimes against humanity as cruelty and maltreatment), the UCMJ does not provide for the specific atrocity crimes. The military prosecutor is left pondering whether to charge an atrocity crime under the general authority of UCMJ Article 18 or Article 134, which in fact are antiquated options rarely if ever employed.

⁴ Examples include the United Kingdom (International Criminal Court Act 2001, Chapter 17, Part 5, 11 May 2001); Australia (International Criminal Court (Consequential Amendments) Act 2002, 28 June 2002); Canada (Crimes Against Humanity and War Crimes Act (2000, c. 24), 29 June 2000); Germany (Code of Crimes against International Law, 30 June 2002); the Netherlands (International Crimes Act (2003)); New Zealand (International Crimes and International Criminal Court Act 2000, 1 October 2000); Argentina (ICC Implementation Law (2007)); Spain (The Organic Act 15/2003); South Africa (Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, 18 July 2002); Norway (Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpene og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet) 7 mars 2008 nr. 4. [The Criminal Code, Chapter 16] 7 March 2008); and Finland (212/2008 Laki rikoslain muuttamisesta [Law Amending the Penal Code] 1 May 2008). Other countries that have enacted amendments to their criminal codes to incorporate crimes within the jurisdiction of the Rome Statute include Armenia, Belgium, Bosnia-Herzegovina, Colombia, Congo-Brazzaville, Costa Rica, Cote D’Ivoire, Croatia, Democratic Republic of the Congo, Estonia, Georgia, Mali, Malta, Poland, Portugal, Slovenia, Spain, Switzerland, and Trinidad and Tobago. Relevant laws are available at <http://www.nottingham.ac.uk/law/hr/c/international-criminal-justice-unit/implementation-database.php>. Nations that are states parties to the Rome Statute and have considered or are in the process of legislating incorporation of atrocity crimes into their respective criminal codes include France, Japan, Mexico, Switzerland, Sweden, and Brazil.

arising from this shortcoming in U.S. federal law should be deeply disturbing to our rule of law society.

There have been some positive developments, however, in recent years. The Genocide Accountability Act of 2007, which Senators Dick Durbin (D-Il.) and Tom Coburn (R-Okla.) co-sponsored, closed a critical gap in U.S. law regarding the crime of genocide. Whereas past law permitted only the prosecution of a U.S. national who commits genocide anywhere in the world or an alien who commits genocide in the United States, the Genocide Accountability Act ensures that U.S. courts can judge any alien who commits genocide anywhere in the world provided that alien is found in the United States. The law closed the gap that used to create a safe haven in the United States for alleged alien perpetrators of genocide who managed to reach U.S. territory.⁵

The Child Soldiers Accountability Act of 2008, also co-sponsored by Senators Durbin and Coburn, closed a glaring gap in U.S. law regarding child soldiers. The law criminalizes (1) recruitment, enlistment, conscription, or use of child soldiers (less than fifteen years of age) in the United States by anyone, and (2) recruitment, enlistment, conscription, or use of child soldiers anywhere in the world by a U.S. national or any alien present in the United States. It also renders any alien engaged in such conduct inadmissible to the United States or deportable

⁵ This dilemma was glaringly apparent in two of my own experiences as Ambassador at Large for War Crimes Issues. The first was the inability to consider charging Elizaphan Ntakirutimana, who was indicted by the International Criminal Tribunal for Rwanda and arrested in Laredo, Texas in December 1996, in federal court with the crime of genocide in the event he successfully blocked his transfer to the ICTR to stand trial in Arusha, Tanzania. Since he was an alien who was charged with committing genocide outside the United States, U.S. law barred prosecuting him for genocide. If we had not prevailed in federal court to uphold our authority to transfer him, he would have lived a free man in the United States. The federal litigation spanned four years: Surrender of Ntakirutimana, 988 F.Supp 1038 (S.D. Tex. 1997); In re Ntakirutimana, 1998 WL 655708 (S.D. Tex. Aug. 6, 1998); Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999); Ntakirutimana v. Reno, 528 U.S. 1135 (2000). The second experience concerned Pol Pot, whom we had wanted to have the option of bringing to the United States to stand trial for crimes against humanity and genocide in Cambodia from 1975 to 1979 in the event he could have been apprehended prior to his death in 1998. The Department of Justice advised that U.S. courts probably would have no jurisdiction over Pol Pot, and thus we had to seek a foreign jurisdiction, which proved very time-consuming, where he could be transported if captured. In the end, time spent trying to overcome U.S. jurisdictional inadequacies enhanced Pol Pot's chances of avoiding imminent capture and eliminated the opportunity to move more decisively against him.

from the United States. Formerly, there was no such prohibition under U.S. federal law. This provided safe haven to any alien in U.S. territory who engaged in such conduct and granted peace of mind to any American who recruited or used children under fifteen years of age anywhere in the world. This type of criminal conduct is prohibited under modernized criminal statutes of major allies and friends and in Article 8 of the Rome Statute of the International Criminal Court.

The Trafficking in Persons Accountability Act of 2008 shuts down the United States as a sanctuary for any citizen or any alien lawfully admitted or otherwise present in the United States who engaged in sex trafficking, slavery, forced labor, involuntary servitude, or peonage anywhere in the world. This new law closed the gap in U.S. law that permitted such prosecutions only of U.S. citizens charged with human trafficking conducted anywhere in the world and of aliens who engaged in human trafficking in the United States. Now aliens who arrive in the United States and who are responsible for trafficking of persons outside the United States are subject to investigation and prosecution for such actions.

Unfortunately, these particular crimes comprise only a fraction of atrocity crimes, and the United States remains an actual or potential safe haven for perpetrators of a great many of the atrocity crimes that can now be prosecuted in a number of foreign jurisdictions and before the international and hybrid criminal tribunals. The gaps in U.S. law would be filled most pragmatically and effectively if the following jurisdictional criteria were established:

(1) *Territorial jurisdiction*: The crime has occurred in the United States or in any foreign territory under the effective control of U.S. authorities (including occupied territory and U.S. military facilities) or, if another jurisdictional prong I will describe exists, anywhere else in the world.

(2) *Personal jurisdiction*: The alleged perpetrator is a U.S. citizen or U.S. Government employee or contractor acting anywhere in the world or an alien who is present in U.S. territory and the atrocity crime has been committed anywhere in the world.

(3) *Subject matter jurisdiction*: The crime is an atrocity crime, namely genocide, a crime against humanity, or a war crime as such crimes are defined under U.S. law and/or international law in terms of their magnitude and systematic or planned character.

(4) *Passive personality jurisdiction*: Federal jurisdiction should be triggered in respect of any American citizen who is a victim of an atrocity crime anywhere in the world and thus reach any perpetrator of an atrocity crime against such American victim.

(5) *Protective jurisdiction*: Where U.S. interests abroad are directly threatened by an atrocity crime, then U.S. courts should have the power to prosecute alleged perpetrators of any such crime. Such U.S. interests include threats to U.S. citizens and U.S. diplomatic and military facilities and assets.

Crimes against humanity, as they are now defined in the statutes of the international and hybrid criminal tribunals and in modernized criminal codes of many foreign jurisdictions, require a particular context: that, with some exceptions, the individual crime is part of a widespread or systematic attack on a civilian population in furtherance of a State or organizational policy. U.S. federal criminal law provides for the prosecution of some underlying substantive crimes found in the now conventional list of crimes against humanity, but federal law does not generally specify distinct criminal liability based on the extent of the planned attack or the link to State policy.

The stark reality is that under U.S. federal law there is no provision for any crime against humanity *per se*, meaning there is no defined and codified crime that must be committed as part of a *widespread or systematic* attack directed against a civilian population, with knowledge of

the attack, pursuant to or in furtherance of a state or organizational policy to commit such attack, and which constitutes the *multiple* commission of any of the designated acts. These particular acts for crimes against humanity have been codified in Article 7 of the Rome Statute of the International Criminal Court, and they include:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of population;
- imprisonment or other severe deprivation of physical liberty;
- torture;
- rape;
- sexual slavery;
- enforced prostitution;
- forced pregnancy;
- enforced sterilization;
- sexual violence;
- persecution (namely ethnic cleansing);
- enforced disappearance of persons;
- apartheid; and
- other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Such crimes against humanity have been defined and incorporated in the criminal codes of Australia, Canada, Germany, the Netherlands, New Zealand, South Africa, Spain, Argentina,

Norway, Finland, and the United Kingdom.⁶ These countries previously had been in similar circumstances as the United States but, because of their participation in the International Criminal Court, they modernized their criminal codes so as to enable themselves to prosecute the same crimes as are within the subject matter jurisdiction of the International Criminal Court. Under the principle of complementarity found in the Rome Statute,⁷ a nation's ability and willingness to prosecute the same crimes as found in ICC jurisdiction essentially shields that nation's nationals from ICC scrutiny. Paradoxically, some of America's allies, as states parties to the Rome Statute of the ICC, now are more insulated from ICC investigation than is the United States, even as a non-party to the Rome Statute, because our allies have modernized their criminal codes to fully incorporate genocide, crimes against humanity, and war crimes for possible investigation and prosecution against alleged civilian and military perpetrators.⁸

A similar predicament arises when examining how a crime against humanity would be prosecuted against military personnel in U.S. military courts. There is no provision in the Uniform Code of Military Justice that explicitly codifies a crime against humanity.⁹ It would be a stretch and entail similar risks for a military prosecutor to seek to refashion the common crimes set forth in the UCMJ, with their narrow definitions and relatively short (typically five year) statutes of limitations,¹⁰ into full-fledged crimes against humanity. Since there is no UCMJ crime that could easily be translated into, for example, the crime against humanity of persecution or of enslavement or of enforced disappearance of persons, U.S. military courts are without the

⁶ See *supra* note 4.

⁷ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002) [hereinafter the Rome Statute], arts. 17-19.

⁸ See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 Mil L. Rev. 20 (Mar. 2001) (This article received the American Bar Association's military writing award); see also Michael P. Hatchell, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, ILSA J. Int'l & Comp. L. 183 (Fall 2005).

⁹ Uniform Code of Military Justice, 10 U.S.C. §§801-946 (2006).

¹⁰ 10 U.S.C. § 843 (2006).

power to prosecute military personnel under any circumstances for some crimes against humanity that do not interface with any of the common crimes set forth in the UCMJ.

In fact, there exists no explicit authority under Title 10 of the U.S. Code to prosecute any crime against humanity as a stand-alone codified crime. Much of the litigation before the international criminal tribunals involves indictments that charge both crimes against humanity and war crimes against military commanders, and there have been convictions for commission of both types of crimes.¹¹ Ideally, Title 10 of the U.S. Code would be amended so as to enable military lawyers to bring full-bodied crimes against humanity charges against U.S. military personnel and thus deflect any foreign or international tribunal scrutiny of any such alleged conduct by an American serviceman.

So under federal criminal law, the United States remains in large measure a free haven for perpetrators of crimes against humanity. This is particularly true of any alien who is found on U.S. territory and who may have perpetrated a crime against humanity outside the United States. It is also largely true of any U.S. citizen who may perpetrate a crime against humanity overseas or, if responsible for one in U.S. territory, may only be charged with a common crime that does not reflect the magnitude or importance of the atrocity crime for which he or she should be held accountable.

¹¹ Prosecutor v. Tadic, Case No. IT-94-1, Trial Chamber Opinion and Judgment, ¶¶ 741-3 (May 7, 1997) (defendant charged with and convicted of crimes against humanity and war crimes); Prosecutor v. Jelusic, Case No. IT-95-10, Trial Chamber Judgment, ¶ 58 (Dec. 14, 1999) (defendant charged with and convicted of crimes against humanity and war crimes); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 638, 645 (Sep. 2, 1998) (defendant charged with crimes against humanity and violations of the Geneva Conventions); Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Chamber Judgment and Sentence, ¶¶ 403-445 (Dec. 6, 1999) (defendant charged with crimes against humanity and violations of the Geneva Conventions).

Fortunately, help is on the way. Last year, Senators Durbin, Patrick Leahy, and Russ Feingold introduced S. 1346, the Crimes Against Humanity Act of 2009. The purpose of the legislation is to penalize crimes against humanity and it thus marks a significant advancement in closing the impunity gap in U.S. law for atrocity crimes. It remains a limited piece of legislation as the bill covers many but not all crimes against humanity.¹² The bill hews closely to established common crimes under the federal criminal code and adds to them the gravity context required for a charge of crimes against humanity. This approach differs from the way in which our major allies have revised their criminal codes to incorporate crimes against humanity, as they have incorporated the more explicitly stated and defined crimes against humanity known to international law. Nonetheless, the bill serves the worthy objective of penalizing a good number of crimes against humanity and ensuring that the United States is no sanctuary for those who commit such crimes anywhere in the world.

War Crimes

It may seem remarkable to some that there are gaps in both U.S. federal law and U.S. military law in the ability of federal courts and courts-martial and even military commissions to prosecute war crimes. After all that has been experienced since the precedents of the Nuremberg and Tokyo Military Tribunals and the scores of cases prosecuted by the international criminal tribunals during the last seventeen years, one would be forgiven to assume that surely in the United States, the law is now well established to enable U.S. courts (criminal and military) to

¹² For example, the bill fails to explicitly incorporate the well established crimes against humanity of deportation or forcible transfer of population (other than in the context of “national, ethnic, racial, or religious cleansing”), enforced prostitution, forced pregnancy, persecution (other than in the context of “national, ethnic, racial, or religious cleansing”), enforced disappearance of persons, apartheid, and “other inhumane acts of a similar character (regarding all crimes against humanity) causing great suffering, or serious injury to body or to mental or physical health.” See Rome Statute, *supra* note 7, art. 7(1)(d),(g)-(k). There may be good reason in the future to address this lingering gap in federal law on crimes against humanity in the event the Crimes Against Humanity Act of 2009 is not amended prior to passage to include such crimes.

investigate and prosecute the full range of war crimes that have been codified in treaty law and defined as a matter of customary international law. That, however, is not the case.

While there certainly are some war crimes that can be fully prosecuted under U.S. law, there are many for which there is no jurisdiction in U.S. criminal law and there is uncertain or vague jurisdiction in U.S. military law. The primary federal law, the War Crimes Act of 1996, as amended in 1997 and again in 2006,¹³ is enforceable only in circumstances where the perpetrator or the victim of the war crime is a U.S. citizen or a member of the U.S. armed forces. An alien can be prosecuted only if the victim is a U.S. citizen or a member of the U.S. armed forces. If an alien arrives in the United States having committed war crimes against victims of a foreign nationality on foreign territory, there is no basis for prosecuting that individual in a federal criminal court on war crimes charges. In contrast, modernized criminal codes of some of America's major allies now empower their criminal courts to prosecute the full range of war crimes and to do so against a far wider range of potential defendants, including aliens found in the prosecuting state's territory.¹⁴

The most commonly-known group of war crimes—the “grave breaches” during international armed conflicts under the 1949 Geneva Conventions¹⁵—could not be prosecuted in federal courts against civilians and members of the U.S. armed forces until enactment of the War Crimes Act of 1996. Thus, the grave breaches of torture, inhuman treatment, biological

¹³ 18 U.S.C. § 2441 (2006).

¹⁴ For example, the United Kingdom criminalized all of the war crimes set forth in Article 8.2 of the Rome Statute of the ICC (International Criminal Court Act 2001 (c. 17), Section 50(1)) and can prosecute any alien who commits war crimes (or genocide or crimes against humanity) outside the United Kingdom provided such person subsequently becomes resident in the United Kingdom (International Criminal Court Act 2001 (c. 17), Section 68(1)).

¹⁵ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49-50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 33; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 50-51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 86; Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 129-30, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 146-7, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 288.

experiments, willfully causing great suffering, destruction and appropriation of property, compelling service in hostile forces, denying a fair trial, unlawful deportation and transfer, unlawful confinement, and hostage-taking can, as of 1996, be prosecuted in U.S. federal courts but, remarkably, in fact never have been.¹⁶ The War Crimes Act of 1996 also empowers federal courts to prosecute civilians and members of the U.S. armed forces for a group of war crimes sourced back to the 1907 Hague Convention IV.¹⁷ Again, however, no such war crimes have ever been prosecuted under the War Crimes Act.

In 1997, the War Crimes Act was amended to include violations of Common Article 3 of the Geneva Conventions.¹⁸ This meant that with respect to conduct during non-international armed conflicts, all of the following violations could be, but never were, prosecuted in U.S. federal courts between 1997 and 2006:

- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- taking of hostages; and
- the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

¹⁶ 18 U.S.C. § 2441(c)(1) (2006).

¹⁷ Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 63; *see* 18 U.S.C. § 2441(c)(3) (2006).

¹⁸ The amended provision read: “(c) DEFINITION – As used in this section the term ‘war crime’ means any conduct... (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflicts....” 18 U.S.C. § 2441(c)(3) (as it was codified from 1997 to 2006).

Unfortunately, the United States regressed in this field of criminal law with enactment of the Military Commissions Act of 2006 following the Supreme Court's judgment in *Hamdan v. Rumsfeld*.¹⁹ The MCA de-criminalized certain war crimes set forth in Common Article 3 of the 1949 Geneva Conventions for purposes of U.S. prosecution and thus created an impunity gap in U.S. law.²⁰ Specifically, the following violations described in Common Article 3 can no longer be prosecuted in U.S. courts following the nine-year period during which they had been criminalized: "violence to life and person," murder "of all kinds" (as opposed to the limited and defined circumstances set forth in the MCA), "outrages upon personal dignity, in particular humiliating and degrading treatment," and the provision requiring fair trials before competent courts.

There remains the possibility that through innovative interpretation of indictable common crimes under the U.S. Code, federal prosecutors could prosecute an American citizen or a narrow range of aliens for one or more common crimes that may overlap with one or more of these unindictable war crimes. The Blackwater guards of the September 2007 attack in Baghdad were charged with felonies under a law enacted in 2000 that criminalizes felonies overseas for individuals employed by or accompanying the Armed Forces of the United States or while a member of the U.S. Armed Forces. And, of course, there are immigration violations and civil denaturalization proceedings that are pursued by the Department of Homeland Security. But the haphazard methodology of any such prosecution in the context of war crimes denies the United States the opportunity to prosecute such war crimes *per se* and hence identifies the country as a virtual safe haven for those who commit such crimes. The complexity of the exercise may explain why there has been no war crimes prosecution under the War Crimes Act of 1996, as

¹⁹ Military Commissions Act, 10 U.S.C. § 948(b) (2006).

²⁰ Military Commissions Act § 6(b).

amended, and why no U.S. Attorney has sought to portray any prosecution in the federal courts as a war crimes prosecution.

I emphasize one point: It is not possible to extract from the UCMJ, Title 10 of the United States Code, or the jurisprudence of U.S. military courts any definitive list of explicit war crimes which such military courts are empowered to prosecute against U.S. military personnel, enemy belligerents, or civilians engaged in hostilities or on occupied territory. One exception is the Military Commissions Act,²¹ but even there the list of war crimes is woefully incomplete²² and, of course, the personal jurisdiction of the military commissions is exceedingly narrow.

The UCMJ Article 32 investigations²³ and, in some cases, courts-martial of U.S. service personnel arising from U.S. military operations in Afghanistan and Iraq have not to date been grounded on charges of war crimes, even though on the surface many of the incidents might invite serious scrutiny as possible war crimes and certainly, to the rest of world, appear to exhibit characteristics of war crimes. Rather, these investigations and courts-martial have relied upon the punitive articles of the UCMJ,²⁴ few of which constitute a war crime *per se* and are more properly understood as common crimes that may be committed by American soldiers and to which penalties are likely to be less severe than one finds in war crimes prosecutions. Typical charges in connection with cases arising from Iraq or Afghanistan are assault, failure to obey an order or regulation, murder, cruelty and maltreatment, dereliction of duty, manslaughter, rape, and conduct unbecoming an officer and a gentleman—all charges that also could be brought as crimes against fellow soldiers or civilians in non-combat situations in the United States or overseas. Because the UCMJ does not have a clearly identifiable list of war crimes in its

²¹ Military Commissions Act § 948d(a).

²² Military Commissions Act § 950(v).

²³ 10 U.S.C. § 32 (2006).

²⁴ 10 U.S.C. §§ 77-134 (2006).

punitive articles (perhaps one that could read “Acts Against the Laws and Customs of War”), it remains difficult to describe the military justice system as one focused on, or even defined by, the prosecution of war crimes. The primary exception in the UCMJ turns on trials governed by the “law of war,” an option rarely invoked by military courts.

In sum, there remains a need to further amend Title 18 of the U.S. Code so that the full range of crimes against humanity and war crimes can be prosecuted in federal courts without any question as to the ability of such courts to exercise complete subject matter jurisdiction over such international crimes. The Crimes Against Humanity Act would advance that objective considerably. Amendments to Title 10 of the U.S. Code would enable military courts to fully prosecute war crimes and crimes against humanity. The jurisdiction of federal criminal courts should extend to all U.S. nationals who perpetrate atrocity crimes anywhere in the world and to any alien who commits an atrocity crime in the United States or anywhere else in the world and, in the latter situation, also is present on U.S. territory. None of the atrocity crimes should be shielded behind any statute of limitations. Fortunately, the Genocide Accountability Act honors that principle and the Crimes Against Humanity Act would, if enacted, also be free of any statute of limitations.

Filling the gaps in American law pertaining to atrocity crimes would demonstrate that the United States has the confidence to reject impunity for such crimes and to hold its own nationals to account as well as foreign nationals over whom U.S. courts should be exercising personal jurisdiction.

Ending Global Impunity

The most significant advancement in confronting impunity—namely, the avoidance of prosecution and punishment—has been a single treaty provision: Article 27 of the Rome Statute

of the International Criminal Court. It reads in part: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute...” The Nuremberg and Tokyo Tribunals and the war crimes tribunals of the 1990s had similar language denying the defense of “official capacity” in their constitutional statutes. The fact that a denial of impunity was reaffirmed in the tribunal statutes of the 1990s and is now accepted as perpetual law by the countries (now numbering 110) that have joined the permanent International Criminal Court, means something quite significant has occurred on the world stage.

Some princes and warlords doubtless will escape justice in the turbulent world of the 21st Century. But the die has been cast. Each and every political and military leader, and even every corporate and media tycoon who joins the killing cartels, is on notice of the actual and potential reach of atrocity law. They are learning that policy-making and military strategizing cannot proceed in a vacuum from legal consequences and that the world is watching more intently every day. Those leaders intimidated by this emerging reality are most likely to seek refuge in manipulative re-interpretations of the law, defensive exceptionalism, territorial isolation, or the sheer clout of their nation’s power on a regional or global stage. But those tactics increasingly will be seen for what they seek to hide and will be judged against the Article 27 standard of accountability.

By saying this, I do not mean to deny the importance of certain amnesties. Well-crafted amnesties can fulfill a function in those societies that cannot possibly bring to justice the thousands, sometimes hundreds of thousands, of low-level perpetrators of the crimes and who

usually determine the fate of each victim. Sometimes, such amnesties are heavily conditioned with confessional and punitive options, as well as with obligations to join with others in what is optimistically called “restorative justice.” They should be distinguished from leadership amnesties which remain so tempting to the peace negotiators, but which have become incompatible with international justice and which cast ominous spells on the future of societies that fail to account for the past.

The fact that governments committed to the Rome Statute have embraced the “no impunity” pledge of Article 27 is a testament to civilization in our time. The American signature on the Rome Statute on December 31, 2000, confirmed the intent of the United States to end leadership impunity. The record of the Bush Administration almost buried that aspiration as high officials appeared to bask in claims of impunity. The entire legal framework of the so-called “war on terror” was premised on ignoring or rejecting the jurisprudence of the war crimes tribunals and the evolution of atrocity law during the 1990s, for they presented inconvenient rules of conduct in the face of an unconventional enemy.²⁵ The result was a uniquely and perversely crafted American interpretation of legal prohibitions on torture and cruel, inhuman and degrading treatment of detainees. The exercise, advanced by politically-appointed Justice Department lawyers, sought to shield U.S. officials and their subordinates in the field from any liability for actions that clearly violated years of standard-setting in the tribunals and in treaties which the United States had ratified.

²⁵ See generally Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008); Jordan J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (New York: Cambridge University Press, 2007); Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton and Company, 2007); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Anchor Books, 2008).

Their attitudes were almost surreal for we carpenters of the war crimes tribunals and in the face of the rapid evolution of atrocity law since 1993. How could it be that in the opening decade of the 21st Century there was serious debate in the United States over whether the government should and in fact did orchestrate policies of torture? Or that there were no legal consequences for senior officials or many of their subordinates involved in the commission of what legal scholars and jurists globally viewed with disgust and bewilderment as blatant disregard for the law? Yet impunity still remains an option many people appear willing to use to protect their leaders from legal accountability. I raise the American experience simply to emphasize how fragile the assault on impunity can be when leaders are determined to reinterpret the law or hide behind a shield of impunity.

Granted, the political and military leaders held responsible under the law for the commission of atrocity crimes remain a fairly exclusive club. Until the 1990s, the numbers were not impressive enough to signal the beginning of the end of impunity. Nuremberg and Tokyo had become aberrations in an otherwise fairly wide-open field for the likes of mass murderers.

Joseph Stalin of the Soviet Union, Idi Amin of Uganda, Mengistu of Ethiopia, Kim Il Sung of North Korea, Suharto of Indonesia, rebel leader Jonas Savimbi of Angola, Robert Mugabe of Zimbabwe, and even Richard Nixon and Henry Kissinger of the United States—none of these men were ever prosecuted. Each one escaped the jaws of justice, partly because the legal doctrine of “head of state immunity” shielded them. That doctrine, one of the oldest in the arsenal of international law, insulated heads of state and high government officials from any prosecution by foreign courts for any crime they may commit while in their elevated office of power. The theory was that prime ministers and presidents and foreign and defense ministers must have the freedom to conduct public and foreign policies without the threat of criminal

prosecution.²⁶ If there was to be responsibility, it must be attached to the government and the nation—not to the leaders.

But head of state immunity flew in the face of atrocity crimes, for how could any leader be excused for planning atrocity crimes while his subordinates followed orders to commit them and then were prosecuted? The result was two contesting principles of law: official immunity (thus, impunity) and liability for atrocity crimes. If they were to co-exist, then the law truly would be an ass.

An opening wedge appeared in the Convention Against Torture²⁷ in the 1980s. Since torture under the convention required, by definition, the guiding hand of a public official, it would be counter-intuitive to grant immunity to a head of state or senior minister who orchestrated a policy of torture. His or her participation is critical to defining the crime that must be punished. Think Pinochet. The same logic applies to atrocity crimes. How could top leaders take a pass under head of state immunity for crimes that largely were planned and executed with the active participation of the highest leaders of the government? Yet international law invited such impunity for leaders by immunizing them from prosecution. The Nuremberg and Tokyo tribunals shattered the shield of impunity temporarily but did not amend international law to end it altogether. The International Court of Justice made this clear as recently as 2002 in a ruling that reconfirmed the head of state immunity doctrine, but left the door ajar for the war crimes tribunals to deny it.²⁸

²⁶ ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 302-314 (2nd ed. 2008); ANTONIO CASSESE (ED.), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW, 368-369 (2009).

²⁷ United Nations General Assembly, “Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,” *United Nations Treaty Series* 1465 (December 10, 1984): 85.

²⁸ International Court of Justice, “Democratic Republic of the Congo v. Belgium (Arrest Warrant Case),” *ICJ Reports* (February 14, 2002).

This is because the tribunals have represented a truly international counterattack on impunity for the worst possible crimes, a mission that gathered strength with each passing year. Top defendants, including Slobodan Milosevic and Radovan Karadzic, Liberia's Charles Taylor, and Sudan's Muhammed Al-Bashir, invoked the immunity defense but their arguments proved futile. Each tribunal's statute rejected head of state immunity.²⁹ In the negotiations creating the war crimes tribunals in the 1990s, no one seriously defended the theory that senior government officials could act with impunity. It just made no sense to preserve head of state immunity in the face of atrocity crimes.

Last week, the Appeals Chamber of the International Criminal Court instructed the Pre-Trial Chamber to review the prosecutor's evidence again to determine if there are reasonable grounds to indict Sudan President Al-Bashir on charges of genocide against three indigenous tribes in Darfur. He already is an indicted fugitive of the Court, charged with crimes against humanity and war crimes. Under the law, Al Bashir enjoys no head of state immunity for atrocity crimes, and that is precisely the correct pathway to justice in the 21st century.

Thank you very much.

²⁹ "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis," *United Nations Treaty Series* 82(August 8, 1945): 279, art. 7; Charter of the International Military Tribunal for the Far East, art. 6; ICTY, art. 7(2); ICTR, art. 6(2); *Statute for the Special Court for Sierra Leone* (January 16, 2002), art. 6(2); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29.