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Closing the Impunity Gap in U.S. Law

David Scheffer*

The following article is the author's written testimony submitted to the Subcommittee on Human Rights and the Law, Committee on the Judiciary, U.S. Senate, on October 6, 2009, for a hearing entitled, "No Safe Haven: Accountability for Human Rights Violators, Part II." The author had testified on November 14, 2007, in a related hearing to examine why the United States remains a safe haven from prosecution for major human rights violators of foreign citizenship. Following that hearing, Senator Richard Durbin (D-IL), the chairman of the subcommittee, and Senator Tom Coburn (R-OK), its ranking member, co-sponsored legislation, which became law, aimed at closing gaps in federal statutes related to the commission of certain crimes outside the United States. This second submission of testimony focuses particularly on the Crimes Against Humanity Act of 2009, introduced in July 2009 by Senators Durbin, Patrick Leahy (D-VT), and Russ Feingold (D-WI). This legislation would introduce into federal law a broader set of criminal offenses pertaining to both U.S. citizens and aliens who visit or reside in the United States.

¶1 I wish to thank Chairman Richard Durbin, the ranking member, Senator Tom Coburn, and the other members of the Subcommittee on Human Rights and the Law of the Committee on the Judiciary of the U.S. Senate for the opportunity to present written testimony in connection with the Subcommittee's hearing on October 6, 2009, entitled "No Safe Haven: Accountability for Human Rights Violators: Part II." I teach international criminal law and international human rights law at Northwestern University School of Law, where I also direct the Center for International Human Rights. I am a former U.S. Ambassador at Large for War Crimes Issues (1997-2001).

¶2 When I last testified before the subcommittee, in November 2007,¹ there were numerous gaps in U.S. federal law that prevented the prosecution of various types of cases pertaining to three categories of crimes: genocide, crimes against humanity (which include torture and, as a crime of persecution, ethnic cleansing), and war crimes (which also include torture). I have long described these three major categories as "atrocious crimes" for ease of reference and to more accurately convey and emphasize the

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¹ No Safe Haven: Accountability for Human Rights Violations in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the Senate Comm. on the Judiciary, 110th Cong. (2007) (statement of David Scheffer, Mayer Brown/Robert A. Helman Professor of Law, Northwestern University School of Law, Chicago, Ill.), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3028&wit_id=6778.

jurisprudential development of such crimes in the international and hybrid criminal tribunals since 1993.² I am reiterating in this testimony much of what I conveyed two years ago because, while the situation has changed (and I will note progress below), some of the fundamental points I raised remain and require further examination by the subcommittee. There also has been a major development with the introduction of the Crimes Against Humanity Act of 2009,³ which I examine later in this testimony.

I will not address human rights violations that do not rise to the level of magnitude and criminality found in the atrocity crimes or the gaps that may exist under U.S. federal law with respect to other violations of international human rights law. The latter would be a very extensive undertaking beyond the scope of my testimony. There is a rich and continuing line of civil cases under the Alien Tort Statute of 1789 (“ATS”),⁴ a truly unique American law, dealing with various human rights violations and seeking civil damages only, and the Torture Victim Prevention Act of 1991 (“TVPA”),⁵ which again only permits civil damages with respect to acts of torture. I will refrain from examining ATS or TVPA litigation in this testimony; here I focus exclusively on criminal law and military law and how to ensure that U.S. law sufficiently empowers U.S. courts with appropriate jurisdiction to investigate and judge the culpability of alleged perpetrators of atrocity crimes.

I. SUMMARY OF RECOMMENDATIONS

(1) The United States must eliminate any possibility that it would remain a safe haven for war criminals and other perpetrators of atrocities who reach American shores and seek to avoid accountability for atrocity crimes. The United States must further demonstrate its willingness to hold its own citizens accountable for atrocity crimes as a commitment to the rule of law and to America’s rejection of impunity for such crimes regardless of who may be investigated at any level of civilian control or military command.

(2) The passage and enactment of the Genocide Accountability Act,⁶ the Child Soldiers Accountability Act,⁷ and the Trafficking in Persons Accountability Act⁸ demonstrated the will of the Congress within the past two years to shut down the United States as a sanctuary for perpetrators of genocide anywhere in the world, for recruiters and users of child soldiers anywhere in the world, and for traffickers in persons anywhere in the world.

² The international and hybrid criminal tribunals include the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Iraqi High Tribunal, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court. The term “atrocity crimes” is explained in David Scheffer, *Genocide and Atrocity Crimes*, 1.3 *Genocide Stud. & Prevention* 229 (2006); and David Scheffer, *The Merits of Unifying Terms: ‘Atrocity Crimes’ and ‘Atrocity Law,’* 2.1 *Genocide Stud. & Prevention* 91 (2007).

³ Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. (2009).

⁴ 28 U.S.C. § 1350 (2006).

⁵ *Id.*

⁶ Genocide Accountability Act, 18 U.S.C. § 1091 (2007).

⁷ Child Soldiers Accountability Act, 18 U.S.C. §§ 118, 213 (2008).

⁸ Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044 (2008).

There should be consistent application of the rules of jurisdiction in the coverage of atrocity crimes in the federal criminal code, including application to all U.S. citizens, to U.S. government employees and contractors, and to all aliens present in U.S. territory for the commission of atrocity crimes anywhere in the world.

(3) Continue to eliminate from U.S. law all statutes of limitations for atrocity crimes.

(4) Amend the federal criminal code, title 18 of the U.S. Code, so that it enables U.S. courts to prosecute crimes against humanity and war crimes that are already codified in the statutes of the international and hybrid criminal tribunals and are defined as part of customary international law. The Crimes Against Humanity Act of 2009 represents a significant development in advancing this goal.

(5) Amend the Uniform Code of Military Justice, title 10 of the U.S. Code, so that U.S. courts-martial and military commissions can more effectively and unambiguously prosecute crimes against humanity and war crimes that are already codified in the statutes of the international and hybrid criminal tribunals and defined as part of customary international law.

(6) Recognize that until such amendments to titles 10 and 18 of the U.S. Code are enacted, the United States has an antiquated criminal code and military code. Further recognize that the United States stands at a comparative disadvantage with many of its major allies that have modernized their national criminal codes in recent years with incorporation of the atrocity crimes, in part so as to shield their nationals from investigation and prosecution by the International Criminal Court (“ICC”) by demonstrating national ability to prosecute such crimes and thus invoke the ICC’s principle of complementarity, which defers to national investigations and prosecutions. Paradoxically, even as a non-party to the Rome Statute of the ICC (the “Rome Statute”),⁹ the United States today essentially stands more exposed to its jurisdiction than do American allies that have modernized their criminal codes.

II. INTRODUCTION

¶4

In general, U.S. federal criminal law and military law have become comparatively antiquated during the last seventeen years in their respective coverage of atrocity crimes, while international criminal law has evolved significantly during that period. The prospects of U.S. courts exercising jurisdiction (subject matter, territorial, personal, passive, or protective jurisdiction) over atrocity crimes under current law remain relatively poor. U.S. Attorneys, in even the best of jurisdictional circumstances, appear

⁹ 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].

not to have pursued the types of investigations and possible prosecutions one might expect if there were an aggressive commitment to bringing perpetrators of atrocity crimes to justice and if the law provided a clear basis for such prosecutions.¹⁰ Similar problems exist with respect to military courts-martial under the Uniform Code of Military Justice (“UCMJ”).¹¹ 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.¹²

¶5 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. Experiences of recent years with security contractors in Iraq, such as Blackwater USA (now Xe Services LLP) and DynCorp International, are examples of this dilemma.¹³ The hypothetical possibilities, if not realities, arising from this shortcoming in U.S. federal law should be deeply disturbing to any rule of law society.

¶6 Before examining the gaps in U.S. federal law regarding atrocity crimes, the significant progress made by this subcommittee during 2007 and 2008 regarding three new laws should be recognized. The Genocide Accountability Act, which Chairman

¹⁰ 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.

¹¹ 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.

¹² Examples include the United Kingdom (International Criminal Court Act 2001, ch. 17, pt. 5, May 11, 2001); Australia (International Criminal Court Act 2002, consequential amends., June 28, 2002); Canada (Crimes Against Humanity and War Crimes Act 2000, ch. 24, June 29, 2000); Germany (Code of Crimes Against International Law, June 30, 2002); The Netherlands (International Crimes Act 2003, June 19, 2003); New Zealand (International Crimes and International Criminal Court Act 2000, October 1, 2000); Argentina (ICC Implementation Law, Law #26200, Jan. 5, 2007); Spain (The Organic Act 15/2003, Nov. 25, 2003); South Africa (Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, July 18, 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, ch. 16, Mar. 7, 2008]); and Finland (212/2008 Laki rikoslain muuttamisesta [Law Amending the Penal Code] May 1, 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 *available at* <http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database/>. Nations that are state 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, Sweden, and Brazil.

¹³ James Vicini, *Blackwater Guards Charged in Iraq Ahooring*, REUTERS, Dec. 8, 2008, *available at* <http://reuters.com/article/topNews/idUSTRE4B73YS20081208>; Alissa J. Rubin & Paul von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, at A1; *Hearing on Private Security Contracting in Iraq and Afghanistan Before the House of Rep. Comm. on Oversight and Gov’t Reform*, 110th Cong. (2007).

Durbin and Senator Coburn originally 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.¹⁴

¶7 The Child Soldiers Accountability Act, also originally co-sponsored by Chairman Durbin and Senator 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 (less than fifteen years of age) 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 from the United States. Formerly, there was no prohibition under U.S. federal law to the recruitment, enlistment, conscription, or use of child soldiers under fifteen years of age, thus providing 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 in the United Kingdom, Australia, Canada, Germany, the Netherlands, New Zealand, South Africa, Spain, and Argentina (which raised the minimum age to eighteen) and in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

¶8 The Trafficking in Persons Accountability Act of 2008, which was enacted as part of the Trafficking Victims Protection Reauthorization Act at the end 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

¹⁴ 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.

responsible for trafficking of persons outside the United States are subject to investigation and prosecution for such actions.

¶9 Unfortunately, genocide, the recruitment, enlistment, conscription, or use of child soldiers, and trafficking in persons 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 recently-introduced Crimes Against Humanity Act of 2009, which will be examined in detail below, incorporates the trafficking crimes covered by the new law, albeit with the much higher threshold of gravity required for the prosecution of crimes against humanity.

¶10 On a related front, it would be fallacious to assume that the United States necessarily could rely only upon its bilateral extradition treaties to resolve the impunity gap for a wide range of crimes against humanity and war crimes because (1) most extradition treaties require that the crime at issue (and for which the individual would be extradited to stand trial) must be punishable under the laws of *both* Contracting States, and many of the atrocity crimes are not punishable in either of the Contracting States, including the United States, (2) one can safely conclude that many of the jurisdictions that could exercise jurisdiction over an alleged alien perpetrator of an atrocity crime or a common war criminal, and with which the United States has an extradition treaty, cannot be relied upon to seek extradition of the individual from the United States and guarantee credible prosecution of him or her, and (3) the United States has bilateral extradition treaties with just over 100 foreign jurisdictions, meaning that with respect to the almost 100 other nations, there is no option for extradition pursuant to a treaty obligation.

¶11 Beyond the recent developments in legislation described above, there is a broader landscape upon which well-recognized crimes against humanity and war crimes are absent from the federal criminal code (title 18 of the U.S. Code) and from the U.S. military code (title 10 of the U.S. Code). These gaps in U.S. law have become much more pronounced in recent years as other jurisdictions, particularly among America's major allies, have modernized their criminal codes. In this testimony, I will examine both title 18 and title 10 and how the two titles of the U.S. Code should be more coherently inter-related and strengthened. But first the stage should be set with the jurisdictional reach of U.S. law for atrocity crimes.

III. JURISDICTIONAL REACH OF U.S. LAW

¶12 Generally absent from U.S. law is the kind of jurisdictional regime that would provide the most pragmatic sphere of coverage to ensure that perpetrators of atrocity crimes cannot find safe haven in the United States. Current U.S. law on atrocity crimes typically exhibits a narrow range of jurisdiction, covering actions of U.S. citizens (although not necessarily if such action takes place abroad) or crimes which occur in U.S. territory. There is an expansive use of extraterritorial jurisdiction for terrorism, narcotics trafficking, and hostage-taking criminal laws, but similar extraterritorial applications have not yet reached atrocity crimes under U.S. law. This shortfall has begun to be covered by the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Trafficking in Persons Accountability Act, but other massive criminal conduct remains unregulated by federal law.

¶13 The gaps in U.S. law would be filled most pragmatically and effectively if the following jurisdictional criteria were established:

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 described below exists, anywhere else in the world.

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 with respect to any commission of an atrocity crime anywhere in the world.

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. law¹⁵ and/or international law in terms of their magnitude and systematic or planned character.

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.

Protective jurisdiction: Where U.S. interests abroad are directly threatened by an atrocity crime, 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, U.S. diplomatic and military facilities and assets, and U.S. sovereignty interests.

¶14 I have already addressed progress with respect to the crimes of genocide, recruitment, enlistment, conscription, or use of child soldiers, and trafficking in persons, for which laws have been enacted within the last two years. I will concentrate the rest of my testimony on crimes against humanity and war crimes.

IV. CRIMES AGAINST HUMANITY

¶15 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.

¹⁵ In this testimony, I examine continued amendment of U.S. law so that it incorporates the full range of atrocity crimes.

¶16 U.S. law certainly provides the means to prosecute as common crimes such acts as murder, torture, slavery, kidnapping, sexual abuse, or rape under narrowly-defined circumstances set forth in title 18 of the U.S. Code.¹⁶ But none of these codified crimes in title 18 carry the additional requirements distinguishing crimes against humanity from common crimes. Nor does title 18 include some of the well-established crimes against humanity, even as common crimes, which constitute the subject matter jurisdiction of the Nuremberg and Tokyo Military Tribunals and the international and hybrid criminal tribunals of the last seventeen years,¹⁷ as well as the modernized criminal codes of some American allies.¹⁸

¶17 Furthermore, there is generally no extraterritorial application of title 18 common crimes; although there are some exceptions, U.S. courts are typically unable to prosecute an American citizen or an alien who is in the United States for alleged commission of either a title 18 common crime outside the United States or a crime against humanity outside the United States. These are huge gaps in U.S. law which would permit alien atrocity warlords to find safe haven in the United States and which deny U.S. courts the ability to prosecute American citizens who commit crimes against humanity anywhere in the world. This is the case even though prosecution under statutory circumstances of the common crime of murder or rape or torture or slavery or kidnapping or sexual abuse, typically with a single victim or very few victims, may provide a measure of justice. But such common crime prosecutions fall far short of what a successful prosecution of a crime against humanity, with multiple victims (sometimes in the tens of thousands), would entail and what it would signify as America's commitment to the rule of law.

¶18 Federal criminal law also has statutes of limitations that generally confine indictments to a five-year window following commission of the crime unless it is a capital offense.¹⁹ Such statutes of limitations have been abandoned in international and much foreign practice in light of the magnitude and serious character of crimes against humanity. Leaders engaged in such conduct and shielded by their continuing control of the government and law enforcement authorities (particularly in autocratic states) typically will not be exposed to apprehension or be inclined to surrender to the courts for prosecution within such a relatively short period following commission of a crime against humanity.²⁰

¹⁶ *Inter alia*, 18 U.S.C. § 1111 (murder); § 2340 (torture); § 1584 (sale into involuntary servitude); § 1589 (forced labor); § 1201 (kidnapping); § 2242 (sexual abuse); § 2241 (aggravated sexual abuse).

¹⁷ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, art. 6(c), Aug. 8 1945, 59 Stat. 1546, 82 U.N.T.S. 279; Charter for the International Military Tribunal of the Far East, art. 5(c), Jan. 19, 1946, T.I.A.S. 1589, 4 Bevens 20 (1968); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); *See* Statute of the International Criminal Tribunal for Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone, art. 2, Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the Iraqi High Tribunal, art. 12, Oct. 18, 2005, *available at* www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf; Rome Statute, *supra* note 10, art. 7.

¹⁸ *See supra* note 13.

¹⁹ *See* 18 U.S.C. § 3282 (2006).

²⁰ None of the international or hybrid criminal tribunals have any comparable statute of limitations on the prosecution of crimes falling within their jurisdiction. Further, there are no statutes of limitations in the modernized criminal codes covering atrocity crimes of the United Kingdom, Australia, Canada, France (for "serious crimes," defined by the French Constitutional Court as so serious as to be of concern to the international community as a whole), Germany, the Netherlands (except for the least serious war crimes which are limited to 12 years), New Zealand, and South Africa.

¶19 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 following acts, as they are criminalized under Article 7 of the Rome Statute:

- 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;
- enforced disappearance of persons;
- apartheid; or
- other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

¶20 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.²¹ These countries previously had been in similar circumstances as the United States but, because of their participation in the ICC, they modernized their criminal codes so as to enable themselves to prosecute the same crimes as are within the subject matter jurisdiction of the ICC. Under the principle of complementarity found in the Rome Statute,²² 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.²³

²¹ See *supra* note 13.

²² Rome Statute, *supra* note 10, arts. 17-19.

²³ See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (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 (2005).

¶21 It is certainly possible, without amending the law, to cherry pick one's way through Title 18 and cobble together barely plausible examples of common crimes, such as the federal kidnapping statute,²⁴ that could be prosecuted in the spirit of a particular crime against humanity, such as imprisonment or other severe deprivation of physical liberty in violation of the fundamental rules of international law. But U.S. attorneys would have to become exceptionally innovative, and take considerable risks in the courtroom, to prosecute one of the common crimes under Title 18 as a crime against humanity. There has not yet been a single federal criminal prosecution of a crime against humanity as such, despite the presence of many aliens on U.S. territory who may qualify for investigation for such crimes.

¶22 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 UCMJ that explicitly codifies a crime against humanity.²⁵ 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,²⁶ 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 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.

¶23 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. This means that it may prove very difficult to frame relevant charges (thus requiring resort to charges of common crimes) against any suspected perpetrators of crimes against humanity who are U.S. military personnel anywhere in the chain of command, including at the highest levels of military leadership. The prosecutor's alternative would be to charge one of the UCMJ's common crimes, which may fall far short of a crime against humanity charge. While an antiquated notion of military justice—focusing on common crimes and a general jurisdiction over war crimes—may remain useful under the UCMJ, the inability of U.S. military lawyers to bring an explicit *crime against humanity* charge may enable the individual to escape liability under U.S. law while exposing such individual to the scrutiny of a foreign court (with a modernized criminal code and where the crime may have allegedly occurred) or international or hybrid criminal tribunals that are familiar with the prosecution of crimes against humanity regarding military personnel and exercise vigorous jurisdiction over such crimes. Much of the litigation before the international criminal tribunals involves indictments that charge individuals with both crimes against humanity and war crimes against military commanders, and there have been convictions for commission of both types of crimes.²⁷ Ideally, Title 10 of the U.S.

²⁴ 18 U.S.C. § 1201 (2006).

²⁵ Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

²⁶ 10 U.S.C. § 843 (2006).

²⁷ 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. Jelacic, 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

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.

¶24 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.

V. CRIMES AGAINST HUMANITY ACT OF 2009

¶25 Fortunately, help is on the way. Senators Durbin, Patrick Leahy, and Russ Feingold introduced S. 1346, The Crimes Against Humanity Act of 2009 on June 24, 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.²⁸ 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.

¶26 Interestingly, S. 1346 requires in the gravity, or magnitude, requirement for crimes against humanity that the crime be “part of a widespread and systematic attack directed against any civilian population, and with knowledge of the attack. . . .” The only novel part of this definition, for which I do not know the drafters’ rationale, is the conjunctive pairing of “widespread and systematic” in describing the nature of the attack. On its face, this appears to create a high hurdle to leap over to prosecute a suspect, for it requires proof of two factors regarding the attack: that it is pursuant to or in furtherance of a policy of a state or armed group *and* that it results in multiple victims. A random, unplanned slaughter of civilians by a crazed warlord may not qualify because the “policy” for such an attack cannot be established. Alternatively, a highly planned state

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).

²⁸ 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 10, 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.

policy to exterminate an ethnic minority may be within hours of implementation, but may be aborted for any number of reasons, leaving the suspects free to plot again and perhaps succeed the next time. Since no multiple victims resulted (as the policy was not activated), the suspects could not be prosecuted under the Bill's formulation of the crime against humanity of extermination. All of the definitions for crimes against humanity in the statutes of the International Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Iraqi High Tribunal, the Extraordinary Chambers in the Courts of Cambodia, and the ICC employ the disjunctive and require that the attack be "widespread *or* systematic," thus enabling those courts to prosecute individuals who either cause multiple victims to suffer or act pursuant to or in furtherance of a policy to commit such crime.

¶27 The point I am making, however, may be a distinction without a difference. The Rome Statute essentially pairs the two words together even though it uses the formula of "widespread or systematic" in its definition of crimes against humanity. The union occurs in that part of the definition that requires there to be an "attack directed against any civilian population." Article 7(2)(a) of the Rome Statute defines "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts referred to in paragraph 1 [the listing of crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. . . ." It would be difficult to accomplish the required attack against a civilian population and satisfy the definitional requirements of the Rome Statute without both the commission of multiple acts (hence "widespread") and a state or organizational policy driving such an attack.²⁹ The identical formulation is repeated in the Introduction to Crimes Against Humanity in the Elements of Crimes to the Rome Statute.³⁰

¶28 The judgments delivered by the International Criminal Tribunals for the Former Yugoslavia and Rwanda have emphasized the disjunctive nature of the definition, but the facts usually point to the reality that a widespread attack on a civilian population arises from some kind of policy or plan, even if either is inferred, or because the state tolerates the atrocities of non-governmental actors. The policy, plan, or ambivalence or inaction of the State drives the killing machine toward a widespread attack on civilians.³¹ In light of the statutory formulation in the Rome Statute, which points to a closer bond between a "widespread" and a "systematic" attack on a civilian population, S. 1346 should not be read as a radical departure from international law. In fact, the legislation may reflect a

²⁹ See WILLIAM SHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS 101-104 (2006) [hereinafter SCHABAS].

³⁰ Elements of Crimes of the Rome Statute of the International Criminal Court, art. 7, Crimes Against Humanity, Introduction, §3.

³¹ See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Chamber Judgment ¶¶ 543-555 (Jan. 14, 2000) ("National case law tends, in particular, to emphasise that crimes against humanity are usually the manifestation of a criminal governmental policy . . . While crimes against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy.").

more realistic understanding of what constitutes the magnitude requirements for a crime against humanity under international law.

¶29 The Crimes Against Humanity Act of 2009 codifies sixteen separate crimes against humanity. The logic behind twelve of the crimes derives from their current status as common crimes in Title 18 of the U.S. Code. S. 1346 simply attaches the gravity requirement for a crime against humanity (“widespread and systematic attack directed against any civilian population, and with knowledge of the attack”) to the common crime so as to codify it as a crime against humanity. The common crimes are murder,³² peonage,³³ kidnapping or carrying away individuals for involuntary servitude or slavery,³⁴ involuntary servitude,³⁵ forced labor,³⁶ trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,³⁷ sex trafficking of children by force, fraud, or coercion,³⁸ aggravated sexual abuse by force or threat,³⁹ sexual abuse,⁴⁰ kidnapping,⁴¹ hostage taking,⁴² and torture.⁴³ The crime of peonage in the United States is associated with holding workers in servitude, particularly in southeastern states. “Peonage” is not a term that has migrated into the lexicon of crimes against humanity in the modern era.

¶30 Nonetheless, although expressed somewhat differently in several instances, the other federal crimes listed immediately above can be associated with well-known crimes against humanity under international law, as confirmed in the statutes of the international and hybrid criminal tribunals exercising jurisdiction over crimes against humanity. The fact that the Crimes Against Humanity Act of 2009 does not establish a mirror image of all of the crimes against humanity set forth in the Rome Statute and the statutes of other tribunals should not detract from the significant progress represented by the legislation in closing gaps in federal law with respect to atrocity crimes.

¶31 The new crimes introduced by the Crimes Against Humanity Act of 2009, which do not currently appear in the federal criminal code, are extermination, national, ethnic, racial, or religious cleansing, arbitrary detention, and imposed measures intended to prevent births. The crime against humanity of extermination is well established in international law and is found in all of the statutes of the tribunals.⁴⁴ Extermination has been prosecuted successfully in many cases before the tribunals. The legislation provides that the crime of extermination “means subjecting a civilian population to conditions of life that are intended to cause the physical destruction of the group in whole or in part.” The Rome Statute, employing similar terminology, defines the crime of extermination as including “the intentional infliction of conditions of life, *inter alia* the deprivation of

³² 18 U.S.C. § 1111 (2006).

³³ 18 U.S.C. § 1581(a) (2006).

³⁴ 18 U.S.C. § 1583(a)(1) (2006).

³⁵ 18 U.S.C. § 1584(a) (2006).

³⁶ 18 U.S.C. § 1589(a) (2006).

³⁷ 18 U.S.C. § 1590(a) (2006).

³⁸ 18 U.S.C. § 1591(a) (2006).

³⁹ 18 U.S.C. § 2241(a) (2006).

⁴⁰ 18 U.S.C. § 2242 (2006).

⁴¹ 18 U.S.C. § 1201(a) (2006).

⁴² 18 U.S.C. § 1203(a) (2006).

⁴³ 18 U.S.C. § 2340A (2006).

⁴⁴ See ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW 216-17 (2008) [hereinafter ZAHAR & SLUITER]; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 109-110 (2nd ed. 2008) [hereinafter CASSESE]; SCHABAS, *supra* note 30, at 199-201.

access to food and medicine, calculated to bring about the destruction of part of a population.”⁴⁵

¶32 Arbitrary detention falls naturally under the crime against humanity of imprisonment in international law and in the tribunal statutes. The Rome Statute elaborates with a description of “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.”⁴⁶ The jurisprudence of the tribunals focuses essentially on charges of arbitrary detention against defendants that involve prolonged imprisonment without due process of law.⁴⁷ The definition for “arbitrary detention” provided for in the Crimes Against Humanity Act of 2009 establishes a direct connection to international law, as it describes the term as meaning “imprisonment or other severe deprivation of physical liberty except on such grounds and in accordance with such procedure as are established by the law of the jurisdiction where such imprisonment or other severe deprivation of physical liberty took place.” Thus, a crime against humanity of arbitrary detention should serve a comparable purpose in federal law as that found in international law for the crime against humanity of imprisonment.

¶33 The crime against humanity of “imposed measures intended to prevent births” would appear to be most directly aligned with the crime against humanity of “enforced sterilization” in the Rome Statute,⁴⁸ which, however, does not define the term. But the words used in the Rome Statute logically describe imposed measures intended to prevent births, so the correlation exists between the legislation and the Rome Statute. The Elements of Crimes of the Rome Statute require that the crime against humanity of enforced sterilization occurs where the perpetrator deprived one or more persons of biological reproductive capacity, the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent, the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and the perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population.⁴⁹ Although the Crimes Against Humanity Act of 2009 does not import these elements, or use any definition, to describe “imposed measures intended to prevent births,” the Rome Statute offers useful guidance for how this crime is intended to be interpreted under international law and thus how U.S. courts might address the issue.

¶34 The proposed crime against humanity of “national, ethnic, racial, or religious cleansing,” which is more commonly referred to simply as “ethnic cleansing,” is not a crime as such under international law. The term does not appear in any of the tribunal statutes and no tribunal has convicted anyone for the crime of ethnic cleansing. But the term ethnic cleansing has been employed in the judgments of the tribunals to describe the practical result of the well-established crime against humanity of persecution. This understanding of the crime against of humanity of persecution is so significant today that “ethnic cleansing” has become essentially synonymous in meaning with “persecution.”⁵⁰

⁴⁵ Rome Statute, *supra* note 10, art. 7(2)(b).

⁴⁶ *Id.* at art. 7(1)(e).

⁴⁷ See CASSESE, *supra* note 45, at 110-111; SCHABAS, *supra* note 30, at 205.

⁴⁸ Rome Statute, *supra* note 10, at art. 7(1)(g); see SCHABAS, *supra* note 30, at 211, 214.

⁴⁹ Elements of Crimes of the Rome Statute, art. 7(1)(g)-5.

⁵⁰ See ZAHAR & SLUITER, *supra* note 45, at 211-215.

The Crimes Against Humanity Act of 2009 leaps into the self-evident reality of ethnic cleansing as a crime against humanity rather than using the more conventional terminology of persecution as a crime against humanity, the latter term having become a complex definitional formula buried deep within tribunal jurisprudence and by which the tribunals have prosecuted and convicted individuals for what the rest of the world understands to be ethnic cleansing.

¶35 The legislation defines “national, ethnic, racial, or religious cleansing” to mean “the intentional and forced displacement from one country to another or within a country of any national group, ethnic group, racial group, or religious group in whole or in part, by expulsion or other coercive acts from the area in which they are lawfully present, except when the displacement is in accordance with applicable laws of armed conflict that permit involuntary and temporary displacement of a population to ensure its security or when imperative military reasons so demand.” The prohibitive part of this definition comports with what the world witnessed in recent years in the Balkans and in Darfur and during the 1980s and 1990s in Iraq. The International Criminal Tribunal for the Former Yugoslavia, in particular, has determined frequently in its judgments that such expulsion or other coercive acts against an ethnic or religious group occurred frequently, and defendants have been prosecuted and convicted for planning and executing such acts. But the charges and convictions have combined the crime against humanity of persecutions with other crimes against humanity, such as deportation, torture, imprisonment, rape, and extermination, to cover what is more commonly described as ethnic cleansing. The legislation achieves essentially the same aim but does so more frontally by employing the term “cleansing” (paired with “national, ethnic, racial, or religious”) and by describing “expulsion or other coercive acts” as the means by which to achieve ethnic cleansing. The bill does not resort to the formula in the practice of the tribunals and in the Rome Statute itself that links “persecution” with the other crimes against humanity set forth in the relevant statute before obtaining a conviction on the “persecution” charge, even though the task before the tribunal judges is one of finding criminal responsibility for what is popularly called “ethnic cleansing.”

¶36 Another primary issue is found in Section 519(d) of the Crimes Against Humanity Act of 2009, which denies any statute of limitations for the crimes set forth in the proposed law. This conforms to a similar denial of any statute of limitations in the genocide provisions of the federal criminal code.⁵¹ There is no statute of limitations for crimes against humanity under any of the tribunal statutes,⁵² so in that respect the legislation is well positioned to ensure that the United States can investigate and prosecute crimes against humanity as a matter of domestic law and consistent with the principle of complementarity in the event and whenever the ICC seeks to exercise jurisdiction in a matter that falls within U.S. jurisdiction. However, the Child Soldiers Accountability Act imposes a statute of limitations requiring the indictment or information “not later than 10 years after the commission of the offense.”⁵³

¶37 It is entirely possible to categorize the recruitment or use of child soldiers as part of a crime against humanity, particularly where such action relates to murder, kidnapping, involuntary servitude, forced labor, slavery, sexual abuse, or torture. There probably

⁵¹ 18 U.S.C. § 1091(e) (2006).

⁵² See discussion in note 21.

⁵³ 18 U.S.C. § 213 (2006).

would be no insurmountable obstacle to charging child soldier recruitment or use within the parameters of a crime against humanity, which would benefit from unlimited time to file charges. But this is not the cleanest formulation. There would be greater consistency in the context of atrocity crimes and filling gaps in U.S. law if the statute of limitations were eliminated from the Child Soldiers Accountability Act of 2008.

¶38 Under current law, a guerrilla warlord who massively recruits and uses thousands of child soldiers in Africa may, only eleven years later, safely reside in the United States as an alien for the purpose of finding sanctuary from prosecution elsewhere. Passage of the Crimes Against Humanity Act of 2009 at least would expose such person to possible prosecution in U.S. courts for a crime against humanity. But it would be far preferable simply to close the loophole in the Child Soldiers Accountability Act, which has none of the gravity thresholds that would be required to prove a charge of crimes against humanity. If that gap were closed, the result would be a more comprehensive assault on the opportunities for impunity for both citizens and aliens found on U.S. territory.

VI. WAR CRIMES

¶39 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 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.

¶40 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 2006,⁵⁴ 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 in foreign territory or the alien commits such war crimes in U.S. territory, and the only victims are other aliens, there is no basis for prosecuting that individual in a federal criminal court on war crimes charges. (Of course, there may be grounds to bring charges for common crimes against the alien unleashing violence on U.S. territory.) 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.⁵⁵

⁵⁴ 18 U.S.C. § 2441 (2006).

⁵⁵ 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, ch. 17, § 50(1), May 11, 2001) 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, ch. 17, § 68(1)).

¶41 The most commonly-known group of war crimes—the “grave breaches” during international armed conflicts under the 1949 Geneva Conventions⁵⁶—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 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.⁵⁷ 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 Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land (1907).⁵⁸ These war crimes consist of attacking undefended places, killing or wounding a person *hors de combat*, improper use of a flag or truce, improper use of a flag, insignia or uniform of the hostile party, treacherously killing or wounding, denying quarter, destroying or seizing the enemy’s property, depriving the nationals of the hostile power of rights or actions, compelling participation in military operations, pillaging, and employing poison or poisoned weapons. Again, however, no such war crimes have ever been prosecuted under the War Crimes Act of 1996.

¶42 In 1997, the War Crimes Act was amended to include violations of Common Article 3 of the Geneva Conventions.⁵⁹ 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.

⁵⁶ 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. 146-47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 288.

⁵⁷ 18 U.S.C. § 2441(c)(1) (2006).

⁵⁸ 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 631 [hereinafter Hague Convention]; see 18 U.S.C. § 2441(c)(3) (2006).

⁵⁹ 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).

¶43 However, the United States regressed in this field of criminal law with enactment of the Military Commissions Act of 2006 (“MCA”).⁶⁰ The MCA decriminalized 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.⁶¹ 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 passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

¶44 The MCA denies penal sanctions for certain conduct otherwise criminalized by the MCA (murder, mutilation or maiming, and intentionally causing serious bodily injury) in connection with the War Crimes Act of 1996 or with respect to crimes triable by the military commissions, *in the event such conduct occurs in connection with “collateral damage” or “death, damage, or injury incident to a lawful attack.”*⁶² These terms are left undefined and one is left to speculate why the designation of either consequence necessarily extinguishes any criminal liability whatsoever. The long-standing rules of distinction and proportionality in the law of war appear to be tested here.⁶³ Interestingly, in the criminal codes of various foreign jurisdictions and in the Rome Statute, a bright line has been drawn on the issue of collateral damage. It is a war crime to intentionally launch an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment *which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*⁶⁴ The latter caveat, of “clearly excessive” character, would be a difficult one to achieve for purposes of prosecution but it is a standard that has gained widespread acceptance, including among the U.S. armed forces. The MCA’s apparent “collateral damage” gap, one that apparently permits collateral damage even if it is inflicted in a manner that is “clearly excessive in relation to the concrete and direct overall military advantage anticipated,” thus narrows the scope of liability for war crimes under American law.

¶45 Despite what may appear to be an impressive compilation of war crimes that can be prosecuted under the War Crimes Act of 1996, even in its truncated version following the amendments to it under the MCA in 2006, there remain a significant number of war crimes under customary international law, as confirmed in both the practice of the international and hybrid criminal tribunals and the Rome Statute, that have not been codified in U.S. law. In contrast, most, if not all, of these war crimes have been codified in the criminal codes of some of America’s major allies, thus empowering them to prosecute explicit war crimes, particularly with respect to their own nationals. The list includes the following war crimes, stated in abbreviated form:

⁶⁰ Military Commissions Act, 10 U.S.C. § 948(b) (2006).

⁶¹ *Id.* at § 6(b).

⁶² *Id.* at § 6(b)(3).

⁶³ See RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 180-82 (2009).

⁶⁴ Rome Statute, *supra* note 10, art. 8(2)(b)(iv).

(1) Pertaining to international armed conflicts:

- Attacking civilians
- Attacking civilian objects
- Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission
- Improper use of a flag, insignia or uniform of the United Nations
- Improper use of the distinctive emblems of the Geneva Conventions
- Transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory
- Attacking protected objects
- Mutilation
- Medical or scientific experiments
- Employing prohibited gases, liquids, materials or devices
- Employing prohibited bullets
- Outrages upon personal dignity
- Rape
- Sexual slavery
- Forced prostitution
- Forced pregnancy
- Enforced sterilization
- Sexual violence
- Using protected persons as human shields
- Attacking objects or persons using the distinctive emblems of the Geneva Conventions
- Starvation as a method of warfare
- Using, conscripting, or enlisting children

(2) Pertaining to non-international armed conflicts:

- Attacking civilians
- Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission
- Attacking protected objects
- Pillaging
- Rape
- Sexual slavery
- Forced prostitution
- Forced pregnancy
- Forced sterilization
- Sexual violence
- Using, conscripting, and enlisting children
- Displacing civilians
- Treacherously killing or wounding

- Denying quarter
- Mutilation
- Medical or scientific experiments
- Destroying or seizing the enemy's property

¶46 While it remains possible through innovative interpretation of indictable common crimes under the U.S. Code to 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 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 amended, and why no U.S. attorney has sought to portray any prosecution in the federal courts as a war crimes prosecution.

¶47 When one examines the situation with respect to U.S. military courts, there exist many uncertainties and largely a theoretical power to prosecute war crimes rather than any significant precedent of doing so. Much would turn, if the opportunity arose, on the military courts' interpretation of the law of war under international law. Under 10 U.S.C. § 818, general courts-martial "have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal." This general provision is elaborated on in the *Manual for Courts-Martial United States*, which states: "General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime against: (a) The law of war. . . ."65 The *Manual* also provides, "Nothing in this rule limits the power of general courts-martial to try persons under the law of war."66 In addition, jurisdiction resides with military commissions and other military tribunals of "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried" by them.⁶⁷ The reach of U.S. military courts and military commissions over civilians in certain circumstances, enemy belligerents of either military or civilian character, or foreign nationals of countries not at war with the United States remains problematic and may turn on how well-established a particular war crime is under principles of universal jurisdiction in international law.⁶⁸

¶48 Rather than try to parse the myriad of possibilities for military court jurisdiction over the commission of war crimes by U.S. nationals of civilian or military character or by aliens of any number of different characterizations, 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 or caught up in hostilities or on occupied territory. One exception is the MCA. Military Commissions established thereunder are empowered to prosecute "any offense made punishable by [and defined in the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September

⁶⁵ United States, *Manual for Courts-Martial*, R.C.M. 201(f)(a)(B)(i) (2005).

⁶⁶ *Id.* R.C.M. 202(b).

⁶⁷ 10 U.S.C. § 821 (2006).

⁶⁸ Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 *NEW ENG. L. REV.* 421, 430-32 & nn.40-49 (2001).

11, 2001.”⁶⁹ Although a detailed list of triable offenses that cover many explicit war crimes is set forth in the MCA,⁷⁰ that list does not include all established war crimes, and thus the Commissions’ supplemental jurisdiction over the “law of war” may need to trigger the prosecution of additional war crimes in the future.

¶49 The UCMJ Article 32 investigations⁷¹ 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,⁷² few of which constitute a war crime *per se* and are more properly understood as common crimes that may be committed by American soldiers. 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 the United States. Because the UCMJ does not have a clearly identifiable list of war crimes in its 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, discussed above, turns on trials governed by the “law of war,” an option rarely invoked by military courts.

¶50 In 2005, U.S. Air Force Major Mynda L.G. Ohman, Staff Judge Advocate at RAF Croughton, United Kingdom, wrote an excellent article in the *Air Force Law Review* about Titles 10 and 18 of the U.S. Code. She summarized how antiquated the UCMJ has become in the context of war crimes prosecutions:

Violations of a federal criminal statute, such as the War Crimes Act, may be tried before courts-martial. Article 134 of the UCMJ, the “general article,” allows the military to import non-capital federal criminal statutes and charge them in a military court-martial. This broadens the subject matter of criminal offenses available to military courts. Not only are the punitive articles of the UCMJ available to the military prosecutor, any federal criminal statute that applies where the crime was committed could also be charged under the general article. For example, this provision would generally allow military authorities to incorporate the War Crimes Act into military prosecutions and charge U.S. service members with certain war crimes.

While the UCMJ has the flexibility to import federal law into trials by courts-martial, it has its limits. Courts have interpreted the language of the general article to bar importation of federal capital crimes into UCMJ proceedings. Where federal civilian courts have jurisdiction over criminal offenses that authorize the death penalty, these same Title 18 crimes may not be brought

⁶⁹ Military Commissions Act § 948d(a).

⁷⁰ *Id.* at § 950(v).

⁷¹ 10 U.S.C. § 32 (2006).

⁷² 10 U.S.C. §§ 77-134 (2006).

before a court-martial under Article 134. Turning again to the War Crimes Act, for the most serious war crimes—those in which the victim dies as a result of the accused's conduct—the statute authorizes the death penalty. Such crimes cannot be charged as war crimes in a trial by court-martial, and military prosecutors must charge the underlying conduct as a violation of another punitive article.

The reliance on Title 10 to prosecute war crimes creates an anomaly. The Department of Defense (DoD) is normally the agency that prosecutes members of the U.S. armed forces. Federal criminal law allows for punishment of certain war crimes, yet the application of Title 18 war crimes is severely restricted in military courts-martial. The effect of this limitation is that courts-martial must continue to largely rely on the offenses defined by Title 10, instead of Title 18, when charging crimes that occur during an armed conflict. As a result, the most egregious crimes under the laws of war committed by U.S. military members are charged as often less severe common crimes under the UCMJ. For example, the intentional, fatal shooting of a person protected by the Geneva Conventions will likely be charged as murder under Article 118, and torture will likely be charged as an aggravated assault under Article 128. Compared to Title 18 crimes, war-related offenses tried by courts-martial will often carry lower maximum penalties.⁷³

¶51 Among the various options for how to modernize the UCMJ, Major Ohman proposed “adding a new war crimes article to the UCMJ to: 1) align the UCMJ with existing federal criminal law; 2) better insulate U.S. military members from the use of military commissions; and 3) enjoy the preventive benefit of having a separate article that specifically defines and punishes war-related crimes.”⁷⁴ If such a new war crimes article, with particularity, were incorporated in the UCMJ, it would enable the U.S. government to confirm the war crimes which now exist under customary and codified international law. The new UCMJ article also should mirror those war crimes fully listed and incorporated into Title 18 as a matter of federal criminal law. The new UCMJ article should incorporate a comprehensive listing of crimes against humanity in the event Title 18 were to be amended to include such crimes, as the Crimes Against Humanity Act of 2009 seeks to accomplish.

VII. CONCLUSION

¶52 The federal criminal code and military code exhibit significant gaps in their respective coverage of atrocity crimes, particularly crimes against humanity and war crimes—categories of crimes that have evolved rapidly in international criminal law and human rights law during the last seventeen years. Other major nations—America’s allies—have modernized their codes to enable their courts to prosecute the full range of atrocity crimes, thus reflecting their democratic choice to strengthen the rule of law in

⁷³ Mynda L.G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F.L. REV. 1, 3-6 (2005).

⁷⁴ *Id.* at 6.

their own societies. Such modernizing exercises also reflect their pragmatic choice to minimize the exposure of the nationals of such nations to the scrutiny of international criminal tribunals, because national courts will be able to shoulder that responsibility.

¶53 Progress has been made to modernize the federal criminal code through the enactment of the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Trafficking in Persons Accountability Act. There remains a need to 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 of 2009 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.

¶54 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, who also is present on U.S. territory. None of the atrocity crimes should be shielded behind any statute of limitations. It is fortunate that the Genocide Accountability Act honors that principle and that the Crimes Against Humanity Act of 2009 would, if enacted, also be free of any statute of limitations.

¶55 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, as well as foreign nationals over whom U.S. courts should be exercising personal jurisdiction, to account. The United States would no longer be a safe haven in reality for untold numbers of perpetrators of atrocity crimes. The process of amending Title 18 already has begun and should be continued. Title 10 awaits further examination by appropriate committees of the Congress. The United States should achieve equal footing with many of its allies that already have recast their criminal law to reflect the reality of international criminal and humanitarian law in our own time.