United States Senate Committee on the Judiciary
Subcommittee on Human Rights and the Law

From Nuremberg to Darfur: Accountability for Crimes against Humanity

June 24, 2008

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Mr. Chairman, Ranking Member Coburn and distinguished members of this subcommittee, it is an honor to provide testimony before this body. Since its creation one and a half years ago, this subcommittee has provided extraordinary leadership and has already achieved important results. With many others, I was heartened in particular by this subcommittee's leadership in introducing the Genocide Accountability Act of 2007 and ensuring its enactment into law. When it became part of our law last December, the Genocide Accountability Act went a long way toward enabling the United States to play its full part in ensuring that those who consider committing genocidal violence think again before they act, knowing that the space for impunity is shrinking.

As important as this landmark achievement is, the Genocide Accountability Act of 2007 does not by itself fully discharge our nation's historic commitment to ensure that there is no safe haven for those who commit crimes of such surpassing gravity and scale as to engage the conscience of humanity: It is not yet explicitly a crime under United States law to commit crimes against humanity. I believe that if Americans understood what this means, they would be surprised and concerned. I say this for two principal reasons: First, some of the most atrocious crimes committed in recent history constitute crimes against humanity but *not*, as many believe, genocide—the crime that is widely but inaccurately thought to be synonymous with episodes of mass extermination and which already is a federal crime. Second, the history of global efforts to punish crimes against humanity is inseparable from American leadership. The challenge today is to catch up with our own legacy in this area.

And so I urge this subcommittee to provide the same leadership in making crimes against humanity a federal crime that it has provided in addressing other key gaps in U.S. protection when it introduced the Genocide Accountability Act of 2007 and, more recently, the Child Soldiers Accountability Act and the Trafficking in Persons Accountability Act.

Crimes against Humanity

Before I elaborate, it may be helpful briefly to describe what crimes against humanity are. Along with genocide and war crimes, crimes against humanity are among the most

serious crimes under international law. In brief, crimes against humanity consist of certain inhumane acts, such as enslavement, extermination, rape and other forms of torture, *when committed as part of a widespread or systematic attack against a civilian population.* Usually this last requirement is met when there has been a protracted attack against civilians, such as the three and one-half year campaign of ethnic violence in Bosnia-Herzegovina during the 1990s. But those who perished in the World Trade Center on a single day in September 2001 were also victims of a crime against humanity.

Although they were linked to a context of interstate war in the charter of the Nuremberg tribunal, crimes against humanity can be committed in peacetime as well as during armed conflict. When the Nuremberg tribunal rendered judgment against major Nazi war criminals, the offenses we most associate with the Holocaust were judged to constitute crimes against humanity.

While a genocide such as that which occurred in Rwanda in 1994 would also entail the commission of crimes against humanity, the reverse is not necessarily true. Under the authoritative definition set forth in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, *genocide* is narrowly defined as certain acts, such as killing members of a protected group, when committed with the specific intent of destroying, in whole or in substantial part,[1] a national, ethnic, racial or religious group as such. Atrocities committed without this intent do not qualify as genocide, no matter how brutal or extensive.

The specific intent requirement of group destruction is dauntingly difficult to establish. As the International Court of Justice noted in a judgment issued last year, "It is not enough to establish, for instance . . ., that deliberate unlawful killings of members of [a protected] group have occurred"—even, I would add, when they have occurred on a heart-stopping scale. It is not even enough, the Court continued, "that the members of the group are targeted because they belong to that group . . . ." Instead, the acts that potentially qualify as acts of genocide "must be done with intent to destroy the group as such in whole or in part"[2] to constitute genocide. Thus mass atrocities that target members of, say, a religious group and claim even thousands of victims do not qualify as genocide unless committed with the specific aim of destroying at least a substantial part of the group "as such."

Crimes against Humanity and American Leadership

The United States played a leading role in ensuring that crimes against humanity committed by the Nazis could be punished. The phrase had been used before Nuremberg but the crime was not prosecuted until the Allies used this charge against Nazi war criminals.[3] How this crime entered the lexicon of postwar justice is instructive, for it demonstrates that if crimes against humanity did not already exist as a punishable offense, we would find when faced with extraordinary depravity that we have no choice but to establish and enforce this crime.

In 1944 Henry Stimson, then United States Secretary of War, asked Colonel Murray Bernays to prepare a memorandum on how to punish Nazi criminals after the Second World War ended. In his memorandum, Colonel Bernays wrote that many of the worst atrocities committed by Nazi Germany could not be classified as war crimes—and yet, he wrote, it would be intolerable "to let these brutalities go unpunished."[4] That same year, the United States representative to the Legal Committee of the United Nations War Crimes Commission—a body constituted by the Allied nations in 1943—raised the atrocities then underway. He argued that Nazi crimes against German Jews and Catholics demanded application of the "laws of humanity" and urged that "crimes committed against stateless persons or against any persons because of their race or religion" represented "crimes against humanity" that were "justiciable by the United Nations or their agencies as war crimes."[5]

In June 1945, Justice Jackson, the chief U.S. prosecutor at Nuremberg, proposed in a report to the President that the Nuremberg Charter include a charge of "Atrocities and offences, including atrocities and persecutions on racial or religious grounds ...."[6] The final text of this crime evolved somewhat, so that the Nuremberg Charter defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."[7]

Crimes against *Humanity*

The name of this crime is richly evocative of its meaning—and of the moral responsibility that crimes against humanity engage everywhere when they occur anywhere.[8] A postwar judgment by a U.S. military tribunal in Nuremberg made the point eloquently. In a case concerning the *Einsatzgruppen*—the Nazis' mobile extermination units—the American tribunal noted that the defendants before it were charged with crimes against humanity: "Not crimes against any specified country, but against humanity." The tribunal continued: "Those who are indicted . . . are answering to humanity itself," and, it warned, "the court of humanity . . . will never adjourn."[9]

The Jerusalem District Court sounded a similar theme when it explained in its 1961 judgment why it possessed legal authority to try Adolf Eichmann for his role in organizing the transport of Jews to death camps during World War II. Eichmann had been charged with, among other offenses, crimes against humanity, which were made punishable by an Israeli law enacted in 1950. The Israeli Court noted that "[t]he abhorrent crimes defined in this Law ..., which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself ...."[10]

It is also important to emphasize that crimes against humanity are *crimes*. The United States and other Allied nations who convened the Nuremberg tribunal recognized that our only hope of preventing future atrocities of staggering scope was to ensure that those who

violate the basic code of humanity face the bar of justice. Perhaps Sir Hartley Shawcross said it best in his closing argument at Nuremberg: "The Charter of this Tribunal," Sir Hartley told the judges, "gives warning for the future—I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind."[11]

Contemporary Crimes against Humanity

Crimes against humanity have in recent years once again figured prominently in efforts to bring to justice those responsible for crimes of exceptional savagery and scale. This crime was included in the statutes of two tribunals created in the early 1990s with strong United States leadership, the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), respectively. More recently, it has been included in the jurisdiction of other international or hybrid courts established to respond to atrocities so barbaric and extensive as to warrant the creation of a special tribunal, such as the court created to try those who bear major responsibility for atrocities committed in Sierra Leone's infamously savage civil war. Indeed, the highest charge leveled by the Special Court for Sierra Leone against Liberia's former leader—Charles Taylor—for notorious atrocities committed in Sierra Leone is crimes against humanity.

Some infamous episodes of violence prosecuted before these tribunals either were not charged as, or were not judged to be, genocide; instead, the charge that best fit the nature of the crimes was that of crimes against humanity. For example, Stanislav Galić, who received the highest sentence possible for his leadership role in the three and one-half years-long siege of Sarajevo in the 1990s,[12] was convicted by the ICTY of crimes against humanity and war crimes. Despite the extreme nature of his crimes, Galić was not even charged with genocide. When an ICTY Trial Chamber convicted Bosnian Serb leader Momčilo Krajišnik—one of the most senior defendants convicted by the ICTY—for his leading role in the campaign of ethnic cleansing that raged across and ravaged Bosnia-Herzegovina during the same period, it found him guilty of crimes against humanity but not genocide (although in his case the prosecutors charged genocide).

These cases remind us how challenging it can be to prove a charge of genocide even when members of an ethnic or religious group are targeted for atrocious crimes on a massive scale. For example in the *Krajišnik* case an ICTY Trial Chamber found the defendant responsible for "the killing, through murder or extermination, of approximately 3,000 Bosnian Muslims and Bosnian Croats" in 30 Bosnian municipalities during the period of the indictment.[13] It even found that "the perpetrators of the killings chose their victims on the basis of their Muslim and Croat identity."[14] Yet it did not find that the prosecutor had met the heavy burden of proving beyond a reasonable doubt that "any of these acts were committed with the intent to destroy, in part, the Bosnian-Muslim or Bosnian-Croat ethnic group, as such."[15] These crimes were, however, judged to be among the most serious crimes known to humankind: crimes against humanity.

Some of the signal achievements of the ICTY in rendering justice for victims of sexual violence have centered on the charge of crimes against humanity. As my colleague Kelly Askin testified before this subcommittee in April 2008, a landmark judgment rendered by an ICTY Trial Chamber in February 2001 found two of the defendants guilty of the crime against humanity of enslavement because they had held young women captive for several months, repeatedly raped the victims during this period and in other ways exercised powers of ownership over the captive women. Tragically underscoring the victims' debasing treatment as human chattel, one of the defendants sold two women who had already been held captive as sexual slaves to Montenegrin soldiers for 500 Deutschmarks each (and, according to one witness, for a truckload of washing powder).

These examples reflect a broader point: When we look back on the trials that have taken place in contemporary war crimes tribunals, the charge that has been central to most of these cases with the exception of those prosecuted before the ICTR has been that of crimes against humanity.[16] This pattern reminds us that when we confront radical evil, the offense that best captures the depravity of the criminal conduct may be that of crimes against humanity.

Crimes against Humanity and U.S. law

Today, crimes against humanity can be prosecuted in many countries, not just before international courts. Yet despite the United States' leading role in ensuring that this crime could be prosecuted at Nuremberg and in other tribunals, United States law does not yet proscribe crimes against humanity as such in its criminal code.

At the outset of my testimony I said that I thought many Americans would be astonished if they knew this and understood what it means. What it means is that some of the most horrific atrocities we have witnessed in recent decades—crimes that cry out for justice—could not be prosecuted properly if at all in the United States if the perpetrators were found in our midst.

If asked to identify the worst atrocities committed in the second half of the twentieth century, most if not everyone would include in their short list the crimes committed under the murderous regime of the Khmer Rouge. During its reign, perhaps a fifth of Cambodia's population—one and a half million people—are thought to have been executed outright or to have died as a result of Khmer Rouge policies that made survival impossible. In the popular imagination, the only word capable of capturing this violence is genocide. Yet the prosecutors of a special court created to bring surviving leaders of the Khmer Rouge to justice—the Extraordinary Chambers in the Courts of Cambodia—have not yet filed genocide charges against the five suspects they have already charged, even though those charged include some of the most notorious Khmer Rouge leaders other than the late Pol Pot. Instead, the most serious charge laid against the five suspects is crimes against humanity. This might change as the prosecutors in Cambodia continue their investigations and add further charges. Even so, the fact that they did not believe they could support genocide charges in their historic first indictments indicates how

rarely the charge of genocide fits crimes even as surpassing in cruelty and scale as those committed by the Khmer Rouge.

Today, individuals of conscience are rightly focused on ending atrocities still underway in the Darfur region of Sudan. While the United States government has declared those crimes a genocide, it is not clear whether the international court charged with prosecuting those responsible for the Darfur atrocities will bring this charge, much less make it stick. In his first indictments for Darfur atrocities, the Prosecutor of the International Criminal Court did not include genocide charges. The charge that best captured the criminality the Prosecutor believed that he could prove in court (at least at the time he brought his first set of charges) was crimes against humanity. This could change—new indictments will be announced next month—but the basic point will not: When we think about the most extreme episodes of inhumanity our minds can conjure, the offense that captures their criminality best has often been that of crimes against humanity.

Conclusion

Particularly in view of its historic role in ensuring that crimes against the basic code of humanity can be punished appropriately, the United States should be in a position to institute criminal proceedings if someone responsible for a crime of such exceptional magnitude and cruelty were in United States territory and could not be prosecuted in a more appropriate jurisdiction. And so I urge this subcommittee to produce legislation making crimes against humanity a federal crime and establishing jurisdiction to prosecute such crimes not only when they occur in our territory, as happened on 9/11, but also when crimes against humanity occur abroad and the perpetrators seek haven in the United States.

In this way the United States would, to paraphrase Sir Hartley Shawcross, give warning for the future to those who would debase the sanctity of humanity that they act at their peril. And for victims of surpassing evil, the United States would be in a position to secure some measure of justice for the suffering they endured—and which we can hardly begin to fathom.

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[1] Although the Convention uses the phrase "in whole or in part," the words "in part" have been interpreted to mean "in substantial part." See, for example, Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeal Judgment, ¶ 8, April 19, 2004.

[2] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, ¶187, Feb. 26, 2007.

[3] In May 1915, the French, British and Russian governments made a declaration denouncing Turkey's massacres of Armenians at the beginning of the First World War as "crimes against humanity and civilization" for which members of the Turkish government would be held responsible, together with its agents implicated in the massacres. *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 35 (1948). But while the first peace treaty with Turkey included a provision contemplating such prosecutions, it was not ratified and was replaced by a treaty that made no provision for punishment; to the contrary, it was accompanied by a Declaration of Amnesty. Id., p. 45.

[4] Antonio Cassese, *Violence and Law in the Modern Age*, pp. 108-09 (1988).

[5] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 175 (1948).

[6] Quoted in Egon Schwelb, "Crimes Against Humanity," 23 *Brit. Y.B. Int'l L.* 178, p. 207 (1946).
[7] Charter of the International Military Tribunal, art. 6(c), concluded at London, Aug. 8, 1945; entered into force, Aug. 8, 1945; 8 UNTS 279
[8] Beyond this, *crimes against humanity* captures the assault on basic principles of humane behavior that the crime entails by its very nature. An important source of inspiration for the term *crimes against humanity* was the Martens clause, which was included in the preambles to both the 1899 and 1907 Hague Conventions. The version appearing in the 1907 convention provides:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[8]

(Hague) Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex Regulations, Oct. 18, 1907; 36 Stat. 2277; TS 539; 1 Bevans 631. As a leading scholar (and current U.S. judge on the ICTY) has noted, the aim of this clause "is to substitute principles of humanity for the unlimited discretion of the military commander" in situations not yet covered by the codified laws of war. Theodor Meron, "Francis Lieber's Code and Principles of Humanity," *Colum. J. Transnat'l L.* 269, p. 281 (1977).
[9] United States v. Otto Ohlendorf et al., IV Trials of War Criminals before Nuernberg Military Tribunals under Control Council Law No. 10, 411, pp. 497-499 (1950).
[10] Attorney Gen. of Israel v. Eichmann, reprinted in 36 I.L.R. 18, ¶ 12 (at p. 26) (Isr. Dist. Ct.—Jerusalem 1961), aff'd, 36 I.L.R. 277 (Isr. Sup. Ct. 1962).
[11] Speeches of the Chief Prosecutors at the close of the case against the individual defendants, published under the authority of H.M. Attorney-General by H.M. Stationery Office (CMD. 6964), p. 63.
[12] Galić commanded the Bosnian Serb army unit responsible for the Sarajevo siege for two of the three and one-half years of the siege.
[13] Prosecutor v. Momčilo Krajišnik, Case IT-00-39-T, Trial Judgment, ¶¶1143, 717 & 792; Sept. 27, 2006.
[14] Id., ¶ 793.
[15] Id., ¶ 867.
[16] The central charge before the ICTR, which was created in response to the 1994 genocide in Rwanda, has been that of genocide.