

## TENTH ANNUAL GROTIUS LECTURE RESPONSE

### FOR LOVE OF COUNTRY AND INTERNATIONAL CRIMINAL LAW, FURTHER REFLECTIONS\*

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Esteemed colleagues—Isaiah prophesized, “And the loftiness of man shall be bowed down, and the haughtiness of man shall be made low . . . .”<sup>1</sup> That prophecy has borne truth in our collective experience since the end of the Cold War. If we have learned anything as international lawyers during these turbulent years, it must be that the darkest and most evil elements of the human character can overwhelm all logic and argument to bring each of us—regardless of character or brilliance—to his or her knees. That reality is not difficult to grasp when one witnesses the butchered victims of a massacre on a hillside in Africa. It compels the deepest sense of humility and yet inspires the belief that the law—that sacred trust our predecessors crafted—and the victims of atrocity crimes deserve better from us.

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1. *Isaiah 2:17* (King James).

Prince Zeid delivered that message this afternoon with the eloquence and insight for which he has come to be so highly respected during the last decade. When he spoke of how one individual—Richard Goldstone—acted courageously to indict both Radovan Karadzic and Ratko Mladic in those desperate days of early 1995,<sup>2</sup> and thus helped change the dynamic in the Balkans, he was unwittingly describing the type of person he himself represents. Prince Zeid, with persistent, steady leadership, has acted with a different kind of courage in the service of Jordan, and of international criminal law. He was not obligated to plunge into the muddy waters of our profession or lead the Assembly of States Parties of the International Criminal Court (“ICC”) during its initial three years. He could have been a conventional distinguished diplomat from the Middle East. Instead, he made and continues to make enormous contributions to the pursuit of international justice and peacekeeping and we are privileged to have him on the world stage. Mark my words, sitting before you is a future Secretary-General of the United Nations.

I intend to focus on four issues in Prince Zeid’s lecture: the role of lawyers in the service of their nation within the realm of political expediency; the significance of the victims; amnesties; and the end of impunity for atrocity crimes, namely, genocide, crimes against humanity, war crimes, and aggression.

Prince Zeid posits a central question: whether lawyers are consigned to do the dirty work “for the love of country” or on behalf of political expediency to the detriment of the law, and particularly of international criminal law.<sup>3</sup> The best example of this point is the resurrection of criminal conduct that many of us thought was obliterated by our legal system years ago. Now we are burdened by

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2. See *Prosecutor v. Karadzic & Mladic*, Case No. IT-95-5-1, Initial Indictment, ¶¶ 47-54 (July 24, 1995) (charging Radovan Karadzic and Ratko Mladic with genocide, crimes against humanity, and violations of the laws of war). See also RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 101-03 (2000) (describing the intense political pressures facing Justice Goldstone in moving forward with the Karadzic and Mladic indictments in accordance with his role as an independent prosecutor).

3. See Prince Zeid Ra’ad Zeid al-Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Address, *For Love of Country and International Criminal Law*, 24 AM. U. INT’L L. REV. 647 (2009) (outlining the issues arising when ideas of identity and nationality conflict with responsibilities under international law).

allegations of torture and cruel and degrading treatment of detainees, and by the legal rationales for such practices, inflicted “for the love of country” during the so-called war on terror.<sup>4</sup>

We have exhibits for the ages in Professor John Yoo, formerly of the Department of Justice (“DoJ”), Office of Legal Counsel; federal judge Jay Bybee, who was Yoo’s boss at DoJ; David Addington, former counsel and chief of staff to the Vice President Dick Cheney; former Attorney General and former White House Counsel Alberto Gonzales; former Department of Defense General Counsel William James Haynes; and the Bush Administration’s lingering futile nominee to head the Office of Legal Counsel, Steven Bradbury.<sup>5</sup>

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4. See generally PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 3-5 (2008) (chronicling the development and circulation of the Haynes memo, which provided the legal basis for the use of interrogation techniques contradictory to international law and military practice); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1685 (2005) (noting that the legal basis for using torture as an interrogation technique was recognized by government officials and prominent legal scholars, all of whom implied that either the Geneva Conventions did not apply to those captured during the war on terror or that torture without risk to life or health was an acceptable interrogation technique); JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* 23-24 (2007) (characterizing the actions of government lawyers and officials in recommending and authorizing alternative interrogation techniques as willful violations of the Geneva Conventions and, ultimately, as war crimes); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 189-191 (2007) (recognizing that the potentialities of inaction drive national security officials to act “aggressively and preemptively” when faced with terrorist threats, regardless of the implications of their actions). See also Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 240 (2007) (underscoring CIA concern that interrogation techniques such as water boarding would subject CIA personnel to penalties under 18 U.S.C. §§ 2340-2340A, which implemented the United Nations Convention Against Torture). But see Symposium, *Extraordinary Powers in Ordinary Times: Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror*, 87 B. U. L. REV. 427, 466 (2007) (noting that although physicians, lawyers, and military officers are especially well-suited to prevent torture, thus far those responsible for violations of international humanitarian law in the war on terror have not been stripped of their rights to practice as professionals).

5. Professor John Yoo prepared a legal memorandum urging the Bush Administration to reconsider its “recognition of the rules imposed by the Geneva Convention” with regard to the interrogation of the Al Qaeda and Taliban prisoners. Waldron, *supra* note 4, at 1684. While serving in the Department of Justice, Jay S. Bybee prepared a legal memorandum recommending that the Bush Administration’s definition of torture be limited to “the infliction of the sort of extreme pain that would be associated with death or organ failure.” *Id.* at 1685.

None of these individuals had distinguished backgrounds in international law and yet each one practiced within the complex and rapidly developing fields of international humanitarian and criminal law. The public record appears to show that these lawyers—perhaps with honest but grossly misguided intentions—did exactly what was required of them to fulfill the expedient objectives of their political masters.<sup>6</sup> Political and military leaders and intelligence officials needed legal cover and they got it with memoranda authored by mid-level lawyers whose superiors marveled at the simplicity of the analysis which blithely ignored precedents of established federal and international law. Other government and military lawyers resisted the temptations of political expediency, and they deserve recognition for their efforts to rebut the onslaught of accommodating memoranda.<sup>7</sup>

Re-interpretation—particularly of treaties and of statutes—often opens the gateway to political expediency. The world experienced this during the ABM Treaty re-interpretation debate of the 1980's, where government lawyers with no background in international law re-interpreted a major treaty using rationales that took years to correct.<sup>8</sup> The Iran-Contra scandal also had its share of re-interpreted

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David S. Addington “helped to shape an August 2002 opinion from the Justice Department's Office of Legal Counsel that said torture might be justified in some cases.” Douglas Jehl, *In Cheney's New Chief, a Bureaucratic Master*, N.Y. TIMES, Nov. 2, 2005, at A1. During his time at the White House, former U.S. Attorney and White House Counsel Alberto Gonzales produced a memorandum to President Bush on the use of alternative interrogation techniques and is considered one of the architects of the Bush Administration's policies towards detainees. R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set Course for Detainees*, WASH. POST, Jan. 5, 2005, at A01. William J. Haynes produced the Department of Defense memorandum providing a legal justification for the use of alternative interrogation techniques. SANDS, *supra* note 4, at 3-5. Steven Bradbury wrote a series of classified Department of Justice legal memoranda thought to promote the use of waterboarding and other alternative interrogation techniques. Scott Shane, *Waterboarding Focus of Inquiry by Justice Dept.*, N.Y. TIMES, Feb. 23, 2008, at A1.

6. See, e.g., Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32 (illustrating the close connection between William J. Haynes, the general counsel of the Department of Defense, and Vice President Richard Cheney's chief of staff, David Addington).

7. See, e.g., *id.* (detailing the story of Alberto J. Mora, the former general counsel of the United States Navy, who consistently voiced his opposition to the policies of the Department of Defense and the Bush Administration but was unable to overcome the influence of more powerful political figures).

8. See David J. Scheffer, *Nouveau Law and Foreign Policy*, 76 FOREIGN

federal statutes.<sup>9</sup> More recently—in addition to the torture memoranda—political interpreters manipulated the texts of relevant U.N. Security Council Resolutions on Iraq,<sup>10</sup> the 2002 law on Authorization to Use Military Force,<sup>11</sup> and the Geneva Conventions of 1949<sup>12</sup> in order to legitimize a war of choice, authorize highly intrusive wiretapping of Americans, and create a novel regime to classify and handle combatants with an arrogance towards long-held interpretations of the law that invites disbelief.<sup>13</sup> Even the 2002

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POL'Y 44, 48-54 (1989) (noting that none of the lawyers interpreting the ABM Treaty had specialization in international law and that their subsequent interpretation resulted in weakened confidence on behalf of foreign governments negotiating with the United States).

9. See David J. Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AM. J. INT'L L. 696, 698 (1987) (detailing five statutes reinterpreted during the Iran-Contra Scandal: the Arms Export Control Act, the Export Administration Act of 1979, the Foreign Assistance Act of 1961, the National Security Act of 1947, and the Hostage Act of 1868).

10. Security Council Resolutions 678, 687, and 688, promulgated in 1991 during the first Gulf War, formed the basis of the Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, issued on Oct. 2, 2002, which permitted the U.S. to use military force against Iraq. Press Release, The White House, George W. Bush, Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq (Oct. 2, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021002-2.html>. For the text of the resolutions, see S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991). Security Council Resolution 1373 prohibited U.N. member states from providing material or financial support to terrorists, and Security Council Resolution 1441 found Iraq in violation of its responsibilities to comply with its disarmament obligations and provided for oversight of disarmament by U.N. and IAEA authorities. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

11. See PAUST, *supra* note 4, at 91-92 (arguing that the Authorization for Use of Military Force, contrary to the Bush Administration's interpretation, authorized the use of force only for acts committed prior to the September 11, 2001, attacks). For the text of the Authorization, see Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, 12 U.S.C.A. § 1541 (2002).

12. See THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 239-40 (2006) (noting that even the authors of the memoranda recommending alternative interrogation techniques acknowledged that some countries may argue that they may be in violation of the Geneva Conventions).

13. See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 11-14 (2006) (underscoring that rather than a "carefully reasoned legal judgment," the Bush Administration's position on the rights of detainees was an unprecedented legal position with no base in domestic or international law); GOLDSMITH, *supra* note 4, at 144 (highlighting the conclusion by the Department of Justice, Office of Legal Counsel that a 1994 statute criminalizing torture

Article 98(2) bilateral non-surrender agreements between the United States and nations joining the International Criminal Court suffer from the Bush Administration's re-interpretation of the Rome Statute.<sup>14</sup> The idea that Article 98(2) of the Rome Statute was intended by the negotiators, who included Prince Zeid and me, to cover any and all nationals of a State (such as mercenaries, private contractors, tourists, journalists, and business travelers), rather than only the official personnel of the "sending State," which in treaty law has a very clear meaning, reflects the kind of overreaching that political re-interpreters practice.<sup>15</sup>

Re-interpretation tactics are fodder for much academic discourse. Legal scholars debate the merits of the conventional interpretation against the freshly-minted unconventional interpretation.<sup>16</sup> But it is exceptionally tempting to essentially re-write the law in order to achieve politically expedient ends—and lawyers are the authors of the process from start to finish. While Prince Zeid was stationed in Croatia with U.N. peacekeepers from 1994 to 1996, I spent the first term of the Clinton Administration in the Situation Room of the White House as an official representing the U.S. Mission to the

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violated the President's Commander-in-Chief powers under the Constitution, thereby justifying non-compliance); PAUST, *supra* note 4, at 20-21 (asserting that because the Constitution and the courts require that the president uphold customary international law, the Department of Justice memos justifying such violations were unfounded and unprofessional distortions of the law).

14. See David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 337-46 (2005) (contending that the original intent of the U.S. was to preserve the effect of status of forces agreements (SOFAs) and status of missions agreements (SOMAs), which guide criminal investigations and prosecution of government personnel abroad, rather than provide protection to all U.S. nationals).

15. See *id.* at 347 (explaining that the International Law Commission, in commenting on the Vienna Convention on Consular Relations, defined a "sending State" as the state which a consulate represents in a foreign jurisdiction, implying that those protected by the sending state are government officials and not nationals, as the Bush Administration argued).

16. See, e.g., John Norton Moore, *Treaty Interpretation, the Constitution and the Rule of Law*, 42 VA. J. INT'L L. 163, 188 (2001) (recognizing two primary practices for interpreting treaties in the United States, a unitary approach based solely on the intent of the parties and a dual approach based on intent and foreign relations law); Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 28 (2005) (recognizing the inherent tension between the United States Department of State and the International Court of Justice over treaty interpretations as well as the debate over which interpretation should be followed by U.S. courts).

United Nations on the Deputies Committee of the National Security Council. I emerged from that experience frustrated enough to speculate—perhaps foolishly—about an American foreign policy grounded in the enforcement of international law and the advancement of the nation’s global rather than solely national interests. That would require some fundamental shifts in how our foreign policy is conceived, strategized, implemented, and defended. It would require a real commitment to *assertive* multilateralism, a term I proposed to my boss, Ambassador Madeleine Albright, in 1993, to the unending shock of certain Members of Congress and commentators who kept interchanging “assertive” as “aggressive.”<sup>17</sup> Perhaps a re-born assertive multilateralism, whereby the U.S. Government would more effectively use its influence and power within international institutions and among newly carved coalitions of nations to achieve collective responses to global challenges, would help salvage what is left of our foreign policy after the last seven years.

But such visions are difficult even when political expediency is dictated by leaders whom you, as a lawyer, strongly believe should hold positions of governmental power. During the Clinton Administration, I witnessed many policy decisions that distanced the United States from opportunities to advance noble principles of international law. As with other administrations, the State Department’s regional political bureaus exercised paramount influence in Clinton-era policy discussions, as did the Pentagon and the National Security Council. Political expediency, if we understand it to mean the primacy of political machinations over objective legal reasoning—particularly where the enforcement of law truly matters—disastrously crippled America’s response to the Rwandan genocide,<sup>18</sup> blocked any serious effort to achieve Russian

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17. See Madeleine K. Albright, U.S. Sec’y of State, Myths of Peace-Keeping, Statement before the Subcommittee on International Security, International Organizations, and Human Rights of the House Committee on Foreign Affairs (Jun. 24, 1993), in DEP’T ST. DISPATCH, June 1993 (underscoring that in an era of “multilateral engagement and U.S. leadership within collective bodies” assertive multilateralism through preventive diplomacy and intervention in failing states is necessary to maintain international peace and security).

18. See David J. Scheffer, *A Look Back: Lessons from the Rwandan Genocide*, 5 GEO. J. INT’L AFF. 125, 126 (2004) (acknowledging the multiple domestic and international political issues that prevented the United States and the United Nations from responding effectively to the Rwandan genocide); SAMANTHA

accountability for the atrocity crimes unleashed in Chechnya,<sup>19</sup> and held U.S.-Turkish relations hostage to the historical significance of the atrocities suffered by Armenians during the early Twentieth Century.<sup>20</sup> It thwarted effective measures to apprehend indicted fugitives Ratko Mladic and Radovan Karadzic in the Balkans, prevented the introduction of NATO ground forces to Kosovo when they were desperately needed, and prohibited strong diplomatic pressure on Zimbabwean President Robert Mugabe to extradite former Ethiopian dictator Mengistu Haile Mariam to Addis Ababa to stand trial for his atrocity crimes. Political expediency, often translated as American exceptionalism, was not unknown to American lawyers—myself included—negotiating the Rome Statute of the International Criminal Court and its supplemental documents.<sup>21</sup>

I agree with Prince Zeid that the victims hold the keys to whether a society will restore itself following atrocities. They are the central purpose for why the International Criminal Court exists. As he says,

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POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 329-90 (2002) (describing U.S. response to the early signs of the Rwandan genocide as uninformed and slow because the U.S. did not perceive Rwanda as a national security threat); JOHN SHATTUCK, FREEDOM ON FIRE: HUMAN RIGHTS WARS & AMERICA'S RESPONSE 21-76 (2003) (arguing that the Clinton Administration failed to respond adequately to the crisis in Rwanda because the Administration viewed the conflict through the lens of the Cold War, in which involvement was only necessary to protect strategic interests, and because the Administration misconstrued the lessons learned from the failed intervention in Somalia).

19. See Human Rights Watch, *Who's Afraid of Vladimir Putin?*, Sept. 23, 2003, <http://www.hrw.org/en/news/2003/09/25/whos-afraid-vladimir-putin> (suggesting that U.S. policy toward Russia is guided by its desire to acquire an ally in the war on terror, to maintain good relations with Russian leadership, and to gain support within the international community).

20. See, e.g., Sebnem Arsu & Sabrina Tavernise, *Turkey Authorizes Troops to Enter Iraq to Fight Rebels*, N.Y. TIMES, Oct. 10, 2007, at A10 (underscoring the connection between U.S. non-recognition of the Armenian genocide, U.S.-Turkish relations, and U.S. military strategy in Iraq).

21. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 53-55 (Nov. 2001-Feb. 2002) (recognizing that despite U.S. opposition to the Rome Statute and the International Criminal Court as against U.S. national interests, the United States stands to gain from ratifying the Rome Statute given the protections it would provide to U.S. personnel and the voice it would be granted in shaping the application of the Statute).

“[W]e build a criminal court for the victims. . .”<sup>22</sup> I would temper his points with some further reflections. Representatives of victims may assume significant roles during prosecutions before the ICC and, indeed, the Extraordinary Chambers in the Courts of Cambodia where former senior Khmer Rouge leaders appear destined to face trial soon.<sup>23</sup> But the ICC can offer only the possibility of restorative justice with reparations, if any, paid out of a convicted defendant’s assets or from the court’s trust fund.<sup>24</sup>

No one can say whether retributive justice trumps restorative justice or vice versa in the mind of any particular victim. We do know that the ICC is primarily a court of retribution against individual perpetrators and, despite the unprecedented focus put on the issue, only secondarily is it a court designed to address the interests and needs of the victims.<sup>25</sup> The ICC cannot, indeed must not, be burdened with the overwhelming restorative needs of the victims. As my colleagues from the Criminal Division of the Justice Department repeatedly counseled me during the ICC negotiations,

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22. Zeid, *supra* note 3, at 657.

23. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 323-341 (2007) (outlining the protections provided to victims in international criminal tribunals to make sure that their concerns and claims are adequately enumerated). See generally David Boyle, *The Rights of Victims: Participation, Representation, Protection, Reparation*, 4 J. INT’L CRIM. JUST. 307 (2006) (detailing the protections and opportunities for victim participation in the proceedings of the Cambodian Extraordinary Chambers).

24. See SCHABAS, *supra* note 23, at 337-41 (2007) (recognizing that although the ICC is empowered to make a determination of damages and to order reparations, the reparations ordered may come only from an individual—no order may be issued against a state).

25. See Christine Chung, *Victims’ Participation at the International Criminal Court: Are Concessions of the Bench Fulfilling the Promise?* 6 NW. J. INT’L HUM. RTS. 459, 461 (2008) (discussing an ICC case in which the judge warned of the potential impacts of broadening victims’ participation in light of the “fundamental principles of criminal law,” which “do not link the status of the victim and consequent rights of participation to the charges confirmed against the accused”); Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT’L CRIM. L. REV. 345, 346-47 (2003) (noting that in the first international criminal tribunal statutes, neither the word “victim” nor rights of such a person were mentioned).

the Court cannot become a welfare agency, which is a cynical but perhaps accurate point of view.

However, Prince Zeid's focus on the victims is entirely appropriate. I believe the yawning gap in how the international community has addressed the needs of victims of atrocity crimes arises most prominently amongst governments. Our distinguished colleague and former president of this Society, Professor Tom Franck, eloquently addressed the need to refocus our attention on state responsibility and I lodge a similar plea today.<sup>26</sup>

We begin, though, by recognizing that what has transpired in The Hague, Arusha, and Freetown, defendant by defendant, has created an impressive body of jurisprudence that already has transformed international criminal law and should aid the goals of deterrence during the Twenty-First Century.<sup>27</sup> The ICC's true value is in its capacity, ideally, to help prevent atrocity crimes in order to save millions from experiencing the fate of victims already brought low by the violence and destruction that define such international crimes. But what of the aftermath? Despite the work of the International Law Commission in preparing the draft articles on state responsibility for internationally wrongful acts,<sup>28</sup> no normative basis exists for state responsibility towards victims of atrocity crimes, whereby judgments of guilt arising from the ICC can be translated into the responsibility of the governments that hoisted the perpetrators onto the battlefields or the killing fields.<sup>29</sup>

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26. See generally Thomas Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?* 6 WASH. U. GLOBAL STUD. L. REV. 567 (2007) (positing that state responsibility for acts of genocide must be recognized despite trends towards holding only individuals accountable).

27. See WILLIAM A. SCHABAS, *THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 44 (2006) (underscoring that although the law guiding the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda differs, the decisions of both courts will play a significant role in guiding the International Criminal Court).

28. See generally U.N. GAOR, 56th Sess., U.N. Doc. A/56/10 (Apr. 23-June 1 and Jul. 2-Aug. 10, 2001) [hereinafter Report on the Work of the 53d Session] (enumerating the draft provisions concerning state responsibility for violations of international law as well as the concerns of the drafters).

29. See David Scheffer, *The World Court's Fractured Ruling on Genocide*, 2 GENOCIDE STUD. AND PREVENTION 123 (2007).

Restorative justice for the victims may begin in the courtroom, but it will be achieved within these devastated societies only if the executive and legislative branches of governments are obligated by treaty or compelled by moral suasion to bear the requisite costs associated with the victims. I have no easy formula for achieving this objective. For there can be no return to the punitive reparations that so crippled Germany after World War I and that Adolf Hitler exploited to stoke the misery and pride of his nation for his own aggressive and genocidal aims.<sup>30</sup> One of the next great challenges in our profession will be determining how to transform the remarkable progress in individual criminal responsibility achieved during the last fifteen years by the international criminal tribunals into a more obligatory role by the same governments who ordered these atrocities. How can international criminal law be used to compel governments to comply with international law as well as to accept their own responsibility for the needs of the victims against whom their own leaders are proven to have waged atrocity crimes? More often than not the perpetrator government will have few if any resources to share with the victims in the aftermath of war or a campaign of atrocities.<sup>31</sup> So our challenge is steep and complex in its ramifications, but we must set our sights on it.

As a modest initial step, I would suggest examining the merits of a non-binding General Assembly resolution which would express the common view of the international community that where the political or military leaders of a nation are convicted by the International Criminal Court, that nation should voluntarily shoulder some

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30. See RODERICK STACKELBERG, *HITLER'S GERMANY: ORIGINS, INTERPRETATIONS, LEGACIES* 241 (1999) (recognizing the steep decline in the standard of living in Germany, characterized by malnutrition, starvation, and disease, resulting from policies seeking to demilitarize Germany as well as the expulsion of Germans from other European states); JACKSON J. SPIELVOGEL, *HITLER AND NAZI GERMANY: A HISTORY* 10-28 (1988) (detailing the political, economic, and social issues in Weimar Germany that facilitated Hitler's rise and the popularity of his racist and anti-Semitic policies).

31. Cf. Irene Melup, *The United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND* 59-60 (Yael Danieli et al. eds., 1999) (detailing U.N. recommendations for implementing the United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power and noting that most states lack the resources for implementation).

responsibility, within the limits of its capabilities, towards the needs of the victims of the atrocity crimes.<sup>32</sup>

I conclude with some comments on the fate of amnesties and the denial of impunity represented by Article 27 of the Rome Statute. Prince Zeid correctly signals the demise of amnesties and the unprecedented commitment of Article 27, but I would offer the following clarification.<sup>33</sup> The end of impunity, and hence the end of amnesties fortifying impunity, has arrived for political and military leaders who commit atrocity crimes. I do not mean to suggest that impunity will not be realized by such leaders in the future or that national amnesties will not be negotiated to secure their withdrawal from public life. We can expect many atrocity lords to enjoy impunity for years to come in the real world outside these walls. The ICC is not a court of universal jurisdiction<sup>34</sup> and, as we were reminded by the International Court of Justice in the *Yerodia* case, head of state and diplomatic immunity remain powerful shields to accountability before foreign criminal courts and in the absence of obligations arising from participation in an international criminal tribunal.<sup>35</sup>

But the die has been cast. Each and every political and military leader is on notice of the actual or potential reach of the law, that policy-making and military strategizing cannot proceed in a vacuum from legal consequences, and that the world is watching more intently every day. Those leaders intimidated by this emerging reality are most likely to seek refuge in re-interpretations of the law, in exceptionalism, territorial isolation, or in the sheer clout of their

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32. See Franck, *supra* note 28, at 571 (contending that states should assume their burden of reconstituting victims regardless of whether individuals are held liable for genocide as an essential part of the healing process).

33. See Zeid, *supra* note 3, at 660 (recognizing the importance of the Article 27, which precludes officials from signatory states from avoiding liability based on official status, in moving away from the practice of granting amnesty to those committing atrocity crimes).

34. *But see* SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 27, at 60 (recognizing that “genocide, crimes against humanity, and war crimes, . . . the core crimes of the Rome Statute” are commonly thought to be crimes of universal jurisdiction).

35. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Judgment of Feb. 14, 2002) (holding that Abdulaye Yerodia Ndongbasi, Minister of Foreign Affairs of the Democratic Republic of Congo, was entitled to diplomatic immunity from criminal jurisdiction under international law, despite Belgium’s issuance of an arrest warrant).

nation's power on a regional or global stage.<sup>36</sup> But those tactics increasingly will be seen for what they are and judged against the Article 27 standard of accountability.

We also should recognize that amnesties still fulfill a function in societies that cannot possibly bring to justice the thousands, sometimes hundreds of thousands, of low-level foot soldiers (military and civilian) who are the direct perpetrators of the crimes, who determine the fate of each victim.<sup>37</sup> Sometimes such amnesties are heavily conditioned with confessional and punitive options, as well as with obligations to join with others in restorative justice. They should be distinguished from leadership amnesties which remain so tempting to the peace negotiators but which are incompatible with international justice.

The fact that States Parties to the Rome Statute have embraced Article 27 is a testament to civilization in our time. I am only one voice, but I hope, for the love of country and of international criminal law, that the United States of America has the courage to join at least 106 other nations at the ICC in burying impunity along with the violence, death, and destruction that the shield of impunity has unleashed on countless victims, so many of whom seek to survive and, as Secretary Albright often reflected, simply live normal lives.

Sir Robert Peel, a British prime minister in the Nineteenth Century, once exhorted his opponents to "elevate your vision."<sup>38</sup> Today Prince Zeid elevated our vision to what should be our noblest aspirations, and for that, Mr. Ambassador, we express our most humble gratitude.

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36. See Benjamin G. Davis, *A Citizen Observer's View of the U.S. Approach to the War on Terror*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 465, 477 (2008) (describing the approach of the United States to international law as one based on the "exercise of raw power politics on the international plane").

37. See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 *BERKELEY J. INT'L L.* 283, 285 (2007) (recognizing that state leaders often use amnesties to compensate for a lack of capacity to prosecute the high numbers of perpetrators, as a way to halt ongoing human rights violations, and as a way to move the peace process forward).

38. William Gladstone, *You Cannot Fight Against the Future*, in *THE PENGUIN BOOK OF HISTORIC SPEECHES* 311 (Brian MacArthur ed., 1996).