D'Alemberte & Palmer Lecture in International Human Rights

Ukraine, International Law, and the ICC:
A Watershed Moment for the U.S.
and the Rule of Law

Alberto Mora

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Introduction

Mark Ellis

The inaugural D'Alemberte & Palmer Lecture in International Human Rights and the subsequent lectures aim to promote greater awareness of and adherence to international human rights principles. Thus, it is fitting that this lecture series has begun on the 75th anniversary of the Universal Declaration of Human Rights. The declaration is the fundamental document of human rights protection worldwide.

It is also fitting that the lecture series honors Sandy D'Alemberte and Patsy Palmer, two extraordinary human beings widely recognized for their unwavering support of human rights here and abroad.

As our law school continues to expand its focus on international law under the leadership of Dean O'Connor, the D'Alemberte & Palmer Lecture in International Human Rights series provides a unique opportunity for students to debate, examine, and learn about the critical issues facing the international community in adequately protecting human rights. The students gain insight into practical ways to uphold these rights, and some may perhaps even be inspired to pursue international law careers.

But even if they do not enter this field, I hope the students will embrace their broader responsibility as lawyers to speak out against injustice and protect people whose rights come under attack.

This sense of responsibility to "speak out" is the principle at the core of the inaugural lecturer, Alberto Mora. Alberto is one of his generation's most talented international lawyers and one of Sandy's greatest admirers. His career has been almost too impressive. However, without question, his most inspiring act was to oppose the use of torture at Guantanamo Bay after 9/11 when no one else in the U.S. government dared to do the same. Alberto's courageous stance in the face of overwhelming hostility personifies the spirit that animates the D'Alemberte & Palmer Lecture in International Human Rights series.

Alberto Mora's lecture has set a standard that will undoubtedly attract an array of future lecturers to inspire our students and all who work to protect human rights.

Introduction of Alberto Mora

Homer Moyer

Thank you, Dean O'Connor, for that gracious introduction. It is a great pleasure for me to be here today and to be a part of this impressive event.

Let me first congratulate Florida State University, the FSU College of Law, and Dean Erin O'Connor for hosting this event. And special thanks to Patsy Palmer and other friends of the law school for initiating this lecture series.

Given Sandy and Patsy's long-standing commitment to human rights and the rule of law, it is entirely appropriate that this series is named in their honor. It is also consistent with the extraordinary vision and leadership that Sandy exhibited throughout his career.

I had the privilege of experiencing that vision first-hand through both CEELI (the Central and East European Law Initiative) and the CEELI Institute in Prague. And I know that you have seen its many manifestations as well. My personal favorite is Sandy's having brought to the law school the four buildings that created the law school's quadrangle. Likewise, Sandy's leadership in establishing here the first new medical school in more than 20 years. And you know of the success of the human rights course that Sandy and Mark Ellis taught here for years.

As all of you know, today's topic is, for multiple reasons, both timely and of great importance to countries around the world, our own included. It is entirely fitting that this inaugural lecture be delivered by Alberto Mora. Like many of us, Alberto was a friend and admirer of Sandy, and was inspired by him. And it is my pleasure to say a word or two about Alberto and why he is our speaker today.

I begin by noting that Alberto was born to a Hungarian mother and a Cuban father. Through them, he understood the practical consequences of living in an authoritarian, communist society—in contrast to a democratic country committed to the rule of law. That understanding is today increasingly scarce in our country. Far too often we find ourselves engaged in polarizing fighting among ourselves rather than appreciating and defending our common interests and our shared national values.

From the foundation of his family, Alberto has come to be a human rights hero in his own right, with a distinguished career in government, the private sector, and academia.

- Between Swarthmore and the University of Miami School of Law, Alberto was a foreign service officer serving in Portugal.
- As a private lawyer, he practiced in Miami, where he met Sandy and saw him as an inspiring role model.
- In 1989, Alberto became general counsel of the U.S. Information Agency. While there, he consulted with Mark Ellis on an improbable project that Sandy and I were promoting—to provide technical legal assistance to newly independent countries that were emerging from the Soviet Bloc. It was an idea Alberto supported.
- From 2001 to 2006, Alberto served as general counsel of the Navy—to which I will return in a few moments.
- In 2006, Alberto became the chief counsel of Walmart's International Division.
- And in 2008, Alberto became general counsel of Mars.

(You know, it's hard to keep this introduction short.)

- After Mars, Alberto became a fellow at the Harvard Kennedy School's Center for Human Rights Policy, teaching and doing further research on human rights.
- And in 2018, Alberto was recruited by the American Bar Association to lead its global programs, including the ABA's Rule of Law Initiative (ROLI), a global rule of law program that had evolved from the original CEELI project.
- Alberto guided and expanded ROLI, which has provided legal assistance to more than 100 countries, until his retirement late last year.

Finally, let's return for a moment to Alberto's years as general counsel of the Navy, in some respects the most celebrated years of his career.

- On September 11, 2001, Alberto was in his office at the Pentagon when a Boeing 757 hijacked by terrorists flew into an adjacent section of the Pentagon. My most vivid recollection from 9/11 was watching the smoke rising from the Pentagon from my office across the river in Washington.
- In the months that followed, many terrorists involved in the 9/11

attacks were apprehended and incarcerated at Guantanamo, Cuba.

- Twelve months after the attacks, the director of the Naval Criminal Investigative Service reported to Alberto rumors that detainees at Guantanamo were being subjected to "physical abuse and degrading treatment" and that it had been authorized by high-level officials in Washington.
- Observing that there is "no moral or practical distinction between cruel treatment and torture," Alberto investigated those rumors. Eventually he learned that the senior legal advisor to the Joint Task Force at Guantanamo had advised in writing that, with advance permission, "cruel, inhuman, or degrading treatment could be inflicted on the Guantanamo detainees with near impunity."
- In the weeks and months that followed, Alberto continued to challenge that advice and speak out against the interrogation techniques being used at Guantanamo. Arguing that they were "unlawful and unworthy of the military services," he brought his concerns to the secretary of the Navy, the general counsel of the Defense Department, the chief of naval operations, the commandant of the Marine Corps, all of the service judge advocate generals, and the Justice Department lawyer who had authored what came to be known as the "Torture Memo."

Let me pause here on something that everyone who has served in the military already understands. The military is an organization that is managed and operates through a "command and control" structure. Whether you treat the words "command" and "control" as nouns or verbs—they convey that the military is not an environment in which it is easy to swim against the tide.

- Alberto continued to argue that the interrogation techniques used were unlawful, contrary to the Geneva Conventions, provided detainees with legal arguments that might prevent their being convicted, and might create liability for those officials who authorized them. Nonetheless, some of the abusive "counter-resistance" interrogation techniques continued.
- An irony is that of the senior lawyers with whom he spoke, it was the judge advocate generals of all three services—the military's senior lawyers—who agreed that these interrogation techniques were in violation of the Geneva Conventions.

Looking back, Alberto later said, "If I hadn't spoken out, my mother would have killed me." What ultimately happened?

- Two years after 9/11, in 2003, the Justice Department's Office of Legal Counsel withdrew the so-called "Torture Memo," which had argued that the president has legal authority to authorize torture.
- The following year, 2004, Alberto documented his continuing criticisms of the "novel legal theories" supporting a president's legal right to authorize detainee abuse as "unlawful," "dangerous," and "erroneous."
- In 2005, Senator John McCain sponsored, and a bipartisan Congress enacted, the Detainee Treatment Act, which prohibits "cruel, inhuman, or degrading treatment or punishment of U.S. prisoners, including prisoners at Guantanamo Bay."
- And in 2009, as one of his first actions, President Obama issued an executive order banning the use of torture by the United States.

In 2006, Alberto ended his service as general counsel of the Navy. At his farewell, there were many toasts. One was by the former head of the Naval Criminal Investigative Service, who said, "Never has there been a counsel with more intellectual courage or personal integrity." Alberto, your mother should be very proud.

Ukraine, International Law, and the ICC: A Watershed Moment for the U.S. and the Rule of Law

Alberto Mora

In Tribute to Sandy D'Alemberte

My profound thanks, Homer—my friend—for that gracious introduction. My thanks, too, on behalf of my wife, Susan, and our son, Alex, to you, Dean Erin O'Connor, for your warm hospitality on our visit to the College of Law. And I wish to acknowledge Patsy Palmer, Sandy's wife and partner in law as in all things, and Mark Ellis, my long-time friend and colleague in the advancement of the rule of law and Sandy's disciple and right hand on so many projects over more than forty years.

Patsy, Mark, and Erin, I'm very grateful to you for my invitation to deliver the inaugural D'Alemberte & Palmer Lecture in International Human Rights. It is an honor to be selected to deliver this address, and not a better way to spend one's time than by celebrating the life and achievements of our friend Sandy. And it is particularly gratifying to do so in the presence of the three of you, Homer, and so many other of his friends and colleagues.

I propose to address two topics in my presentation today. First, I want to touch on certain legal and policy ramifications of Russia's horrific invasion of Ukraine. This represents a watershed moment for international law and the international rule of law. To help restore the peace, to punish criminality, and to deter other states who may be tempted to follow Putin's example, new accountability mechanisms need to be implemented and strengthened. Second, I'll touch upon the need for the United States to reexamine its policy of isolation from international law and, specifically, from the International Criminal Court, which we have treated with a mixture of tepid support and open hostility. We can't expect to hold Russia fully accountable for its aggression and war crimes—or other countries at some time in the future—if we continue hold ourselves immune from international accountability, as Russia and China do. We can start by recognizing that our misguided use of torture following the attack on 9/11 and our equally misguided efforts to evade accountability continue to damage our country. We can start correcting them by ratifying the Rome Statute and joining the International Criminal Court.

I.

But first, let me say a few words in appreciation of Sandy.

I've known Sandy since I first entered the legal profession in 1982. As all of us who knew him recognize, he was an exceptional person. He was a distinguished lawyer and advocate and was devoted to the law. He was a brilliant student, scholar, and teacher. He was a leader, including most notably of this university, its college of law, and the American Bar Association. He built and strengthened institutions, and here I'm thinking about his work in creating—along with Homer and Mark—the ABA's Rule of Law Initiative, or ABA ROLI. He was a public servant and legislator; he served in the Florida House of Representative and later chaired with the state's Constitution Revision Commission. He was a human rights champion at home and abroad.

But a list of Sandy's glittering achievements doesn't fully capture the man because they do little to describe his splendid human qualities. His resume simply doesn't describe the full person. The year I met Sandy was the year I entered the legal profession. This led to a friendship that would last until his death. When Sandy passed in 2019, Mark Ellis—who was in the process of writing his fine and affectionate essay on Sandy—asked me for my thoughts. As I reflected on his life and the sweep of his career, I felt impelled to focus on the impact Sandy had had on me as a newbie lawyer. This is part of what I wrote to Mark:

In my first year of practice, it became very clear to me that Sandy D'Alemberte was the beau ideal, the lawyer one aspired to be if you were good enough and worked hard enough and had the right values, and if you lived a life devoted to the law, to public service, to citizenship, to human dignity, and to excellence, as he had.

Mind you, this is how I felt about Sandy 38 years before he died. Many of his most impressive achievements were still in the future. And I had not yet worked with him directly but relied in part on the opinion of those who had. They revered him, just as I would quickly come to and as I think that most people who got to know him did so as well.

How was it that Sandy accumulated such respect, affection, friendship, and loyalty from others? Here is my calculus:

Better than anyone else I can think of, Sandy modeled a life of virtue, integrity, and excellence in an almost Aristotelian sense of those terms. He consistently pursued the public good through public service. He relentlessly defended and advanced human dignity and human rights. He believed passionately in our country, our founding values, and our laws without ever being oblivious to our many flaws and failings. He understood

the responsibilities of citizenship and lived up to them. He was a man of action and lived most of his life in the public arena. Throughout his life he demonstrated courage, passion, creativity, eloquence, and a restless and precise intelligence. All who knew Sandy could not help but admire him.

Sandy was an innate leader whose leadership qualities were enhanced by his gift for friendship. In my experience, the distance between meeting Sandy and considering him a friend was a short one. Sandy was open, generous, and interested in others. He was gregarious, humble, accessible, communicative, and curious. He seemed to live in accordance with the maxim that a stranger was a friend whom he had not yet met.

Part of Sandy's immense appeal stemmed from his innate cheerfulness, his ready smile and easy laugh, his sense of humor, and his perpetual state of excitement. He saw life as a rolling adventure. He viewed challenges both as intellectual puzzles and a source of enjoyment. He found satisfaction in starting projects and bringing them to completion. In the classroom, he always imparted a sense of excitement in the examination of ideas, in the cut and thrust of student debate, and in the process of learning. He brought to everything he did or said a sense of enthusiasm and a lightness of touch.

Take his habit of wearing bow ties. Thanks to a gracious gift from Patsy, I am the proud owner of one of those ties—this one—which I cherish and thought I would bring along today to remind us of him. In his dress, as well in his actions and speech, Sandy was nothing if not elegant and stylish. But as we all know, bow ties are not now in fashion, and the wearer risks as being mistaken for someone frivolous and somewhat foppish. They harken back to an earlier, fustier era, the era of Archibald Cox of Watergate fame, or perhaps earlier. So why did he wear them? What can we learn of him from this tie?

Patsy would know the answer, but here's what I think. I think that part of the answer of course is simply that Sandy knew he looked good in them; he had a style and was going to stick with it—a touch of forgivable vanity. But I also think that he wore this purposefully as symbol not of fustiness, but mild frivolity. It signaled that he did not take himself too seriously, and that he sought to lower the barrier to friendship that his massive professional eminence might otherwise pose. It signaled that he wore his many achievements lightly, that he was not above poking a bit of fun at himself, and that he saw the fun in life.

Citizen, lawyer, advocate, scholar, teacher, leader, patriot, man of the world, public figure, builder, colleague, friend. Sandy excelled in all these roles. Everything and everyone he touched, he made better. Looking back at the arc of his life, we now can see, perhaps we always knew, that Sandy lived life at a gallop. How fortunate we were that he invited us to ride along

with him on his exhilarating dash. And how fortunate we are—because his spirit and leadership resonate—that we have him still as an example and guide.

II.

We honor Sandy today by sharing ideas about two matters that were of deep interest and concern to him: human rights and the rule of law. These two constructs, as does democracy, have the purpose of protecting and fostering human dignity, which is the ultimate value. These are issues that have touched me personally since the day I was born, the son of Cuban and Hungarian parents, and which have been a professional focus since my graduation from college almost fifty years ago.

Both domestically and internationally, human rights and the rule of law are synergistically linked: human rights are a component of the rule of law, which is a system of systems. Operationally, the observance of human rights is in large measure dependent on the quality and effectiveness of the rule of law system in the applicable jurisdiction. Of the many human rights issues I worked on at the ABA—and invariably they were human rights violations—almost all were ascribable to a failure of the rule of law. To strengthen human rights, thus, we should seek to ensure that the rule of law is strong at both the national and international levels.

Domestically, the protection of human rights is generally a matter for the legal and legislative systems to handle. Internationally, the issue is much more complex. When local legal systems fail to protect human rights, for the affected international community, the management of the crisis becomes a matter largely of foreign policy, diplomacy, and military and national security strategy. This is the situation we are facing now in Ukraine. There is no country that is not affected by Russia's predatory actions.

III.

Russia may not be Nazi Germany, but it belongs to the same club and is indisputably playing from Hitler's playbook. In many ways identical to Nazi Germany's invasion of Poland in 1938, Russia's brutal and unlawful invasion of Ukraine has shattered European peace, produced hundreds of thousands of deaths and injuries, and triggered a vast humanitarian crisis and human rights crisis. It is a war of colonial conquest and subjugation with the declared genocidal objective of erasing the Ukrainian nation and identity. Emulating Germany's Wehrmacht and Luftwaffe, Russia's armed forces—which have been fittingly augmented by convicts press-ganged from Russia's gulag into frontline service—routinely violate the laws of war by

the indiscriminate use of munitions and by targeting civilians and civilian infrastructure, including housing, medical facilities, schools, and museums and other cultural sites. An example of this is Russia's focused aerial assault on Ukraine's energy infrastructure which was designed to deprive the civilian population of heat during winter and help collapse Ukraine's economy. And, as documented by Anne Applebaum and others, Russia's occupation practices across all of occupied Ukraine reveal the systematic use of murder, torture and other cruelties, looting, sexual assault, abduction and forced disappearances, and the use of "filtration" camps designed to coerce Ukrainian citizens into serving Russia's colonial objectives. According to Ukrainian authorities and the ICC, more than 16,000 Ukrainian children have been stolen from their families and been delivered to Russian families or orphanages. The scale of the violence and destruction is shocking. Russian combat casualties, both dead and wounded, are estimated to be between 200,000 and 250,000. Ukrainian combat casualties are estimated to be perhaps in the vicinity of 150,000, and Ukrainian civilian deaths are in the tens of thousands. According to UNHCR, there are about 5.9 million internally displaced people in Ukraine, nearly 8 million refugees scattered around Europe, and about 17.6 million people in need of humanitarian assistance. The suffering is immense.

It is important to keep reminding ourselves that there is as yet no sense of when this war will end. While there are reasons to hope that Ukraine will secure a victory, Russia, unlike Germany in 1945, is not yet defeated. The opposite forces fighting a war of attrition over Bakhmut are evenly matched. Ukraine's courage and grit and its military effectiveness have won the admiration of all, but the war is not yet won. We can be thankful that Russia has failed to achieve its initial strategic objectives to decapitate the Ukrainian government and subjugate the entire country, but the Russian military is still in the field, still busy at the task of killing and destruction, still dangerous. Soldiers will win this fight, not lawyers and judges. The ability to hold Russia accountable for its aggression and its crimes will differ markedly whether Russia is decisively defeated and expelled from Ukraine's territory or whether it remains in control of some territory and is still acting belligerently. Time is not necessarily on Ukraine's side. Thus, we are reminded of the urgency of increasing Ukraine's combat power rapidly so as to help secure the earliest possible victory.

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IV.

Let's turn to a discussion of legalities.

From an international legal perspective, Russia's invasion of Ukraine —which began not in 2022, but in 2014 with Russia's occupation of the Crimea—constitutes a criminal war of aggression in violation of the United Nations Charter. In addition, Russia has committed and is committing crimes of war, crimes against humanity, and acts of genocide in violation of customary international law and multiple binding international treaties, such as the Geneva Conventions and the Convention Against Torture. There is ample evidence that Russia wholly chooses to ignore the just war principles of necessity, distinction, and proportionality that guide the law of war. It is reported that Ukrainian authorities have opened investigative files on more than 74,500 specific war crimes committed on Ukrainian territory, a number that will continue to rise. So far, approximately 30 cases have been tried; Ukraine has pledged to try them all.

Russia's invasion is not only an assault on Ukraine, it also represents a direct assault on the structure of the post-World War II international legal order, which was designed to help deter the recurrence of such wars and hold those responsible for any breaches. Despite the failure of deterrence in this instance, this structure has served us well. It has helped develop norms of state behavior that outlaw aggression and define and protect human rights, norms which in many instances developed into treaties and the binding municipal law of sovereign states. It led to the development of the United Nations and the U.N. system, including the U.N.'s affiliated agencies. It led to the enactment of the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and other Cruel, Inhuman, or other Degrading Treatment, among many other treaties. All these developments helped create new norms for state behavior and establish institutions to help mediate and resolve disputes.

The 35 to 60 million deaths produced by the Second World War also conveyed the hard lesson that those responsible for wars of aggression and the commission of war crimes could no longer be allowed to evade justice.

In 1943, the United States supported the creation of and participated in the work of the U.N. War Crimes Commission, which handled approximately 36,000 international atrocity crime cases. This led to the creation of the International Military Tribunal at Nuremberg, the Control Council of

Germany, and the International Military Tribunal for the Far East, all of which conducted war crimes trials.

Let's recall how this architecture of international criminal law came into being. The foundation stones of this architecture were the Nuremberg Trials, which established the fundamental principles of state and personal responsibility for wars of aggression and crimes against humanity. In the prosecution's opening statement, the U.S. chief prosecutor, Supreme Court Justice Robert Jackson, said the following:

> *[T]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors.*

There are two key ideas here worth reiterating. The first was "to make statesmen responsible to law," to "apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors." This would convert the "system of international lawlessness" into a system subject to law. The second was that the law should be applied not only to Germany, but to "any other nations" who violate the law. This would include, of course, the United States. What Justice Jackson was articulating is a familiar doctrine of American law: equal justice under law, applied internationally to the age-old dilemmas of international relations, and particularly to the core problem war and peace and how to apply law to the exercise of state power.

Following in the footsteps of Nuremberg, in 1993 the International Criminal Tribunal for the former Yugoslavia was created and began operations, followed by the International Criminal Tribunal for Rwanda in 1994. The preparatory work for the creation of the ICC began in 1995 and culminated in the adoption of the Rome Statute in 1998 by 120 states. It entered into force in 2002.

The U.S. signed the Rome Statute on the last day of 2000, but indicated that we would not be submitting the treaty for ratification until we had observed the ICC in operation for some time. By then, significant legal and policy concerns had been raised about the U.S. entering into the Rome Treaty, particularly on sovereignty grounds and concerns about the potential of the ICC improperly interfering with U.S. military operations abroad, an issue I'll discuss in greater detail.

V.

Let's now turn to sanctions and accountability.

The contribution of international law to the world's response to Russian aggression has been of fundamental importance. The legal characterization of Russia's actions as "aggression," rather than anything less, is the foundation for the coalescence of international public and political opinion against Russia. This is demonstrated by the United Nations General Assembly votes on the invasion, including: the declaration on March 2, 2022, calling on Russia to end its military occupation of Ukraine; the October 13, 2022, declaration condemning the illegal attempted annexation of Ukrainian territory; the November 14, 2022, resolution calling on Russia to pay reparations to Ukraine; and the February 23, 2023, resolution again calling for Russia to end hostilities and withdraw its forces. The number of countries voting against Russia on these resolutions has been overwhelming. For example, the resolution against annexation was adopted by a vote of 143 to 5, with 35 abstentions.

This massive support for Ukraine has facilitated one of the most significant elements of the international defense against Russia's aggression: the imposition of coordinated financial, banking, transportation, military, and energy sanctions against Russia, Russian nationals, and Russian-controlled entities. On the banking side alone, it is reported that more than $330 billion have been seized or frozen. The potential application of these funds to sustain Ukraine economically or to serve as the basis for repartitions is under debate.

In addition to these sanctions, the accountability measures that have been enacted or are still in the design stage will also pressure Russia to withdraw from Ukraine and serve to expand and stiffen international sanctions against Russia, continue to strengthen international public and governmental political opposition to Russia's actions, and further isolate Russia and constrain its ability to exercise its political, military, and economic discretion. The principal accountability measures include:

(a) The continuing collection of detailed evidence on Russian war crimes. Russia's aggression against Ukraine will be the most documented war in history. Thanks to the prevalence of smart phones and information technology, Russia's war crimes are being documented in real time or almost so. This data is being collected, organized, and analyzed by the Ukrainian government with the assistance of foreign governments and hundreds of international NGOs. When the war crimes trials are held, this will permit the identification of the perpetrators from the top of Russia's civilian and military leadership down the chain of command to the responsible units and, in some cases, down to individual soldiers.

(b) The creation of a specialized international court to try Russia for the crime of aggression. Although the ICC Statute has been amended to include the crime of aggression and the ICC's chief prosecutor believes that the court is the right place to bring such charges, many legal experts believe that the creation of a separate specialized court, perhaps formed under the sponsorship of the UN General Assembly, is required. This is the path endorsed by the European Parliament. A group of 32 nations has formed an ad hoc organization called the Core Group on the Special Tribunal for the Russian Crime of Aggression, which is expected to issue recommendations soon on the creation of the tribunal.

(c) The ICC's issuance of arrest warrants on March 17 against Putin and a subordinate for the unlawful transfer and deportation of children from occupied Ukraine. These warrants declare that there are reasonable grounds to believe that Putin and his subordinate bear "individual criminal responsibility" for these war crimes. Not only do these warrants contain important symbolic value, but they impose an obligation on all 123 nations who are state parties to the Rome Statute to apprehend Putin and take him into custody for delivery to the ICC should he come into their jurisdictions. In addition to these arrest warrants, it is reported that the ICC is also considering issuance of arrest warrants for the war crime of targeting civilian populations.

The ICC indictment of Putin represents a startling and major initiative to interpose the rule of law against Russian aggression. It will vastly complicate Russia's ability to manage its diplomatic relations with the rest of the world and further shreds Russia's already tattered attempts to justify its invasion in a benign light. It signals to all other Russians involved in

the Ukrainian children abduction program that they, too, may be facing international arrest warrants, and constitutes the same signal to all Russians engaged in the commission of the multiplicity of other war crimes being committed on a daily basis.

VI.

The Nuremberg trials and the Nuremberg principles that emerged were triumphs in large measure of American law, statesmanship, leadership, and power. Many other countries contributed, of course, and notably the United Kingdom, to the subsequent development of the Nuremberg principles and the United Nations system.

As the global response to Russian barbarism demonstrates in part, international law has grown and its supporting structures have grown vastly more powerful and become immensely more relevant, integrated, and important to global affairs since Justice Jackson articulated his idealistic vision of international law almost 78 years ago. Justice Jackson would, I think, be generally pleased by how international law has developed in consonance with his vision. But he would be less pleased—indeed, I think he would be appalled—by how the United States has come to turn its back on his vision that the use of power by all states—including the United States—should be bound by law. Despite having been arguably the principal architect and exponent of the post-World War II international legal order, the United States has now largely parted company with Europe and most other democratic countries and gravitated to the position that our exercise of power should *not* be subject to international law.

Is Justice Jackson's vision of a world under law still the right vision for our country? I think it is, a view shared by many. More importantly, does our government believe this? This is less clear. While the United States has been a leader—arguably the leader in marshalling global opposition against Russian barbarism and we have acted in concert with other nations, for more than two decades we have vehemently articulated as U.S. policy the view that non-parties to the Rome Statue—as the U.S., Russia, China, Israel, and other nations are—are wholly outside the reach of the ICC under all circumstances. The tell-tale clue to the possibility that this position might still reflect the U.S. position was provided by a March 8 news item in The New York Times, which reported that according to several sources, the Pentagon was blocking the Biden administration from sharing evidence with the International Criminal Court gathered by American intelligence agencies about Russian atrocities in Ukraine. The reason for this, according to the Times, was because American military leaders oppose helping the

court investigate Russians because they fear setting a precedent that might help pave the way for the court to prosecute Americans. When asked whether he thought the issuance of the Putin arrest warrant was justified, President Biden said, "Well, I think it's justified. But the question is, [now referring to whether the ICC has jurisdiction over Russia] it's not recognized internationally by us, either. But I think it makes a very strong point." Note the hedge here with respect to the ICC. Were the U.S. to continue to hold to the position that the ICC is without authority or jurisdiction to arrest war criminals who are citizens of non-parties to the Statute, this would severely damage the effort to bring Putin and other war criminals to justice and damage allied unity of purpose in the war.

VII.

We need to put U.S. policy towards the ICC in context. This policy does not exist in isolation from other factors that impede our nation's appreciation of the benefits of international law and contributed to our drift away from it. I see three factors, which I'll address in turn: (1) America's drift from multilateralism and growing tendency to go-it-alone; (2) The misguided but growing belief that international law is not law and that observance of it is contrary to American sovereignty and the national interest; and (3) The distorting our use of torture has had in our attitude towards international law.

A. America's drift from multilateralism and growing tendency to go-it-alone.

Sometimes it seems that the U.S. has lost over the years the understanding of the importance of international cooperation as a necessity when it comes to solving the world's problems.

Some of this stems from the disparity in military capability between the U.S. and other countries. While at the Pentagon at the height of the wars in Afghanistan and Iraq, I heard more than once from military leaders that it would have been easier to fight the wars without allies than with. The U.S. toppled Saddam Hussein without UN approval and with little foreign military support. In the process, we lost much of the international good will that we had enjoyed after the 9/11 attacks. But the ability to act alone masks the disadvantages of being a solo actor and the legitimacy that working with others confers. The truth is, addressing the major international challenges such as international pandemics, ensuring the stability of global economies, countering global warming, fighting international corruption, alleviating

poverty, addressing international migration and refugee flows and, as with Russia and possibly China in the future, countering predatory military aggression by near-peer competitors will always require that nations act in concert. These are challenges beyond the capacity of the U.S. to solve alone.

After World War II, the U.S. helped lead a burst of international creativity that led to the establishment of multiple international or regional bodies—such as the UN, the World Bank, the IMF, NATO, and many others—that have made the world a better place because they brought nations together. After 9/11, there was no such effort. The Trump administration's withdrawal from the Trans-Pacific Partnership, the Paris Agreement on climate change, and the World Health Organization, along with its threats to leave NATO and our longstanding unwillingness to sign the Law of the Sea Treaty, are five recent examples of our current isolationist impulse.

B. The misguided belief that international law is not law and that observance of it is contrary to American sovereignty and the national interest.

The U.S. desire to relieve ourselves of the constraints and burdens of international law, particularly on the use of force internationally, has a pedigree that stretches back more than 40 years. Although long gestating in academic discourse, the first significant move to shield the nation from international legal accountability came in 1984 when the United States withdrew its consent from jurisdiction before the International Court of Justice for matters of general international law. This came, it should be noted, as the ICJ was considering Nicaragua's ultimately successful claim that the U.S. had breached international law by supporting the Contras in their rebellion against the Sandinistas and by mining Nicaraguan harbors. In 2005, we withdrew from the ICJ with regards to cases dealing with consular relations.

In the past twenty years, the effort to distance the United States from the requirements and systems of international law has gained enormous influence in academia and government through the persuasive work of a relatively small group of conservative legal scholars—such as Jack Goldsmith, Eric Posner, Adrian Vermeule, John Yoo, and a few others—who questioned whether international law was law at all and whether it has any binding legal effect in the United States given its allegedly antithetical nature to constitutional sovereignty. This is how the dean of the Cornell Law School, Jens David Ohlin, explains the arguments of these scholars in his seminal 2015 book, The Assault on International Law:

> *International law is under attack in the United States. Although most lawyers – and certainly most law school professors – consider international law to be a central and profoundly important element of our legal system, many conservative lawyers are deeply suspicious of international law and the infringement of American sovereignty that it represents. They want U.S. affairs to be dictated by the American political system and the laws that it produces, not the international legal norms that flow from faraway European cities like Brussels, Geneva, and the Hague.*
>
> ...
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> *What unites this group is a shared hostility toward international law, a preference for presidential power in the face of global crisis, and a recommendation that the United States withdraw and remain isolated from international legal institutions.*

The anti-international law ideas espoused by this group, Ohlin argues convincingly, were adopted as Justice Department doctrine during the George W. Bush administration in the aftermath of the 9/11 attacks, with significant congressional support, and were further cemented into place during the Trump administration, particularly through the efforts of then-National Security Advisor John Bolton. During the Bush administration, the urgency of the effort was driven by the perceived need to ensure that the administration could prosecute the War on Terror unfettered by any consideration or requirement of international law. The intent to cast off any international law restrictions was deemed particularly important in reference to the administration's 2002 decision to employ torture as a weapon of war and to do so with impunity.

C. The distorting our use of torture has had in our attitude towards international law.

The Bush administration's use of torture after 9/11 and our continuing unwillingness to hold ourselves accountable continue to distort our nation's stance towards international law and may turn out to influence the policy decisions we will make about Russia's accountability. Accordingly, it would be appropriate for us to reflect on the history of that temporary descent into illegality. This was an issue of particular concern to Sandy.

American history has many glorious chapters but some terrible ones, too. The latter is illustrated by the history of slavery and the scars to our national character that its still-unresolved legacy of racism has bequeathed

to us. Still, our nation is powered by a bedrock belief in human dignity, rights, and equality that define our national ethos. One of our saving graces is our confidence that while we are not perfect, we are perfectible. I believe —as did Barrack Obama, amplifying the words of Theodore Parker and Martin Luther King—that "the arc of the moral universe is long, but it bends toward justice." There may be dips and wrong turns along the way, but the trajectory of our history is clear.

President Obama's use of the quote has been criticized because it implies inevitability. That caution is well-placed. As the events of January 6 demonstrate, there is nothing inevitable about the maintenance of the rule of law. This requires further effort and constant vigilance on our part. And we are fully capable of backsliding, of hollowing fundamental rights long believed to have been secured.

One such example of backsliding is our nation's use of torture as a weapon of war following the terrorist attacks on 9/11.

Before 9/11, there could have not been any serious debate about the use of torture because were no two sides to debate: the nation had categorically rejected the use of torture as a matter of national values, constitutional doctrine, statutory law, international law and treaty, and military practice. In our two existential conflicts, the Revolutionary War and the Civil War, our two iconic wartime leaders, George Washington and Abraham Lincoln, personally barred the use of torture, Washington because he would not countenance the Continental Army emulating the notorious brutality of the British forces and Lincoln through the adoption of the Lieber Code, which became the foundation for the Geneva Conventions.

It is difficult to overstate the importance of the prohibition against torture to our values and our laws. The noted legal philosopher Jeremy Waldron has written this:

> *The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and with law's forcefulness with regard to the persons it rules. The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation; law is not savage; law does not rule through abject fear and terror, or by breaking the will of those whom it confronts…. [The rule] is vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of trying to break a person's will.*

After 9/11, all this was swept away.

The fear and fury felt by our nation and our leaders prompted the adoption and use of torture methods, including the euphemistically labeled "enhanced interrogation techniques" and "extraordinary renditions." Originally limited to Guantanamo and a few interrogation "black sites," the use of torture metastasized informally to many operational military units. Once an opponent of torture, the United States now recruited other governments to conduct brutal interrogations and to establish interrogation black sites in their own territory, often in violation of their own laws. And when some of these governments years later began to investigate the crimes of torture in their own countries, the United States refused to provide evidence or to otherwise cooperate.

The legal and strategic consequences of our use of torture were immense. When we used torture, we neglected to heed the counsel of Albert Camus who, writing about the Algerian War of Independence, observed that when countries fight, they should take care not to destroy what they are trying to protect. When we applied waterboarding to our first detainee, it was because we had necessarily taken the position that the right to be free from cruelty is not an inherent, inalienable right possessed every person. Rather, we replaced that with the notion that every government, including ours, has the unfettered right to apply cruelty to others as a matter of state policy subject to their sole discretion. By taking the right to be free from torture out of the basket of protected rights, we diminished the ambit of human rights and assaulted the very fabric of constitutional rights and international law. We also weakened our ability to defend ourselves against terrorism because we had created a legal fissure between ourselves and our allies, none of whom would alter their legal system to accommodate the U.S. desire to use torture. In some cases, foreign militaries began to refuse to train with us, cooperate in the field with us, or to fight with the U.S. military. Intelligence cooperation narrowed. Public opposition to the United States increased, along with the rise of anti-Americanism. Our enemies enjoyed a surge of public support that made itself felt in the battlefield.

The U.S. use of torture had largely ended by the end of 2004 as details of the program began to leak out, the atrocities at Abu Ghraib exploded in the news, and the program's ineffectiveness and costs became more apparent. In 2009, on his second day in office, President Obama formally terminated the program. However, he opted not to seek accountability for those responsible for the design and implementation of the program, a step that would have been painful, legally problematic, and almost certainly politically costly.

In December 2014, the Senate Intelligence Committee's release of a highly redacted version of its mammoth Committee Study of the Central

Intelligence Agency's Detention and Interrogation Program finally settled the debate as to whether the "enhanced interrogation techniques" and the conditions of confinement that some detainees were subject to were torture or something less. The conclusion: it was torture. This report did not alter the administration's or Congress' unwillingness to hold ourselves accountable. This, despite the black letter legal requirements imposed on the United States both by domestic and international law with respect to torture are to prohibit, investigate, prosecute, punish, and make restitution. With the possible exception of portions of the requirement to investigate, the settled consensus among the international community, academia, and the human rights community is that the United States both committed torture and has not sufficiently complied with any of these obligations.

By failing to hold itself accountable for its acts of torture, the United States has put itself in a terrible, untenable position that is at odds with our core values, the requirements of the rule of law, and our national interest. Our national purpose is to protect and expand liberty and human dignity. Our purpose abroad is, similarly, to help create a world that is increasingly protective of human dignity and increasingly free. Yet our actions have corroded the laws and norms that categorically prohibit the use of torture and cruel, inhuman, and degrading treatment, the linchpin of our and any humane legal system. These actions suggest a loss of confidence in law and the rule of law as a mechanism to secure a more just, freer world. By failing to hold ourselves accountable, we join company with all those regimes that would similarly claim to act with impunity and to hold themselves exempt from the requirements of international law.

VIII.

This brings us to the current moment and the policy choices the Biden administration faces with respect to the ICC's role in the Ukraine war and to the larger questions with respect to the U.S. relationship with international law.

The Rome Statute entered into force in July 2002, less than a year after the 9/11 attacks. By then, the U.S. was already deep in the War on Terror and had made the fateful decision to "turn to the dark side," as Vice President Cheney put it, in the fight against Al Qaeda. This turn included the exercise to identify all potential domestic or international legal impediments to the implementation of the administration's war plan, including the CIA-led rendition, detention, and interrogation program which featured the "enhanced interrogation techniques."

It was at that time the administration launched a widespread campaign

to undermine the ICC. In May 2002, the U.S. "unsigned" the Rome Statute. In July, the administration sought a UN resolution exempting citizens of non-state parties participating in UN peacekeeping missions from ICC jurisdiction. Bilateral agreements were signed with most nations prohibiting the surrender of U.S. citizens to the ICC. In August of that year, the American Service-Members' Protection Act, also known as the "Hague Invasion Act," was enacted. This sought to protect Americans from prosecution by international criminal courts to which the U.S. was not a party. All of this created overlapping layers of protection against the court and put in place an impunity mechanism from international prosecution.

The ICC, of course, as did the rest of the world, eventually became aware of the U.S. torture practices in Guantanamo, Abu Ghraib, and CIA black sites in Europe and elsewhere, and of CIA outsourced torture through rendition. Unconfirmed reports state that the court delayed opening up an investigation into these war crimes in the hope and expectation that the U.S. would fulfill its accountability obligations under the Convention Against Torture to investigate, prosecute, and punish those responsible. This never happened. Finally, following the election of Donald Trump, an enthusiastic supporter of torture, the ICC acted. On November of 2017, the ICC announced that it had opened a formal investigation into alleged crimes against humanity and war crimes, including those allegedly committed by U.S. forces in Afghanistan.

This triggered a furious reaction by the Trump administration. Financial sanctions were imposed against the ICC and ICC staff members, including the chief prosecutor. In September 2018, John Bolton, the national security adviser, gave a blistering speech at a Federalist Society meeting condemning the ICC and outlining the measures the U.S. would take in response. In his speech, which is worth reading in its entirety, Bolton states:

> *[A]n international court so deeply divisive and so deeply flawed can have no legitimate claim to jurisdiction of the citizen of sovereign nations that have rejected its authority. Americans can rest assured that the United States will not provide any form of legitimacy or support to the court. We will not cooperate, engage, fund, or assist the ICC in any way.*

For good measure, Bolton added: "We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us."

This history of the U.S. relationship with the International Criminal Court illustrates the estrangement between the U.S. and international law. There is more than a little irony here. The ICC was not wrong to recognize

that there is prima facie evidence of U.S. war crimes or to seek to hold those responsible to account. That is what it was designed to do. The ICC was not designed, as Bolton also intimated, to constrain America's use of power; rather, it was designed to constrain all **unlawful** use of power, whether it be American or Russian, consonant with Nuremberg. And it was designed that way largely because the United States sought to extend the rule of law globally by its contributions to the design of the Nuremberg Trials, to the adoption of the Nuremberg principles, and to the very the creation of the ICC. There is irony, too, in the fact that the rationale that the U.S. employed in objecting to the ICC is the same rationale that Russia is now using to avoid accountability. The question is: Will we give them that pass?

IX.

I'll conclude by pointing out that the Ukraine war represents a watershed moment for international law and for America's relationship with international law. We can join the world, as Robert Jackson urged us to, or we can continue pulling away from it. We can strengthen the ICC and help it become what it can be, or continue to try to weaken it and international criminal law in the process. We can help hold Russia accountable for its atrocities, or we facilitate its effort to act with impunity. We can live up to our ideals, or we can dispense with them. We can exercise leadership, or we can retreat to our corner. Lastly, we can choose to try to live in a world ruled by law, or we can choose not to.

Thank you all for your attention. And thank you again, Patsy, Erin, Mark, and Homer for inviting me to help you honor Sandy.