

**Testimony Of  
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**Before The**

**Tom Lantos Human Rights Commission  
United States House of Representatives**

**on**

**Pursuing Accountability for Atrocities**

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# Stanford Law School

## Table of Contents

I.	Introduction .....	3
II.	Repairing Title 18’s Blindspots.....	3
	A. Enact a Law Penalizing Crimes Against Humanity.....	4
	B. Expand the Jurisdictional Bases to Prosecute War Crimes to Include “Present In” Jurisdiction in Keeping with Other International Crimes Statutes.....	6
	C. Empower U.S. Courts to Prosecute Offenders Under the Doctrine of Superior Responsibility.....	8
	D. Better Protect U.S. Citizens Abroad by Expanding the Exercise of Passive Personality Jurisdiction .....	10
	E. Amend the Statute Penalizing the Commission of Female Genital Mutilation to Satisfy the Commerce Clause .....	11
	F. Render the Genocide Statute Retroactive .....	12
III.	Tighten U.S. Immigration Law to Bar All Human Rights Abusers.....	13
	A. Enact a Comprehensive Persecutor Bar.....	13
	B. Extend or Eliminate the Statute of Limitations of Some Immigration Offences.....	14
	C. Focus on Criminal Charges for Substantive Offenses Where Possible .....	15
IV.	Enhance the Ability of Victims to Advance Civil Claims Against Perpetrators of Atrocity Crimes.....	15
	A. Add Additional Causes of Action to the Torture Victim Protection Act and Remove the State Action Nexus.....	15
	B. Render the Alien Tort Statute Expressly Extra-Territorial .....	16
V.	Retain and Expand Inter-Agency Institutional Capabilities .....	16
	A. Work with the Department of Justice to Enable More Prosecutions for International Crimes .....	16
	B. Preserve the Federal Bureau of Investigations’ Specialized War Crimes Unit .....	18
VI.	Conclusion .....	18

## **I. Introduction**

Good morning Chairman McGovern, Chairman Smith, and distinguished members of the Tom Lantos Human Rights Commission. I am Professor Beth Van Schaack; I teach human rights and international justice at Stanford Law School. I joined the faculty after serving as Deputy to the Ambassador at Large for War Crimes Issues in the U.S. State Department under the Obama Administration. Early in my career, I worked as a war crimes prosecutor with the International Criminal Tribunal for the former Yugoslavia and as a human rights lawyer with the Center for Justice & Accountability, now under the direction of my co-panelist.

I would like to thank you and the Members of this Commission for including me in this critically important hearing and for giving me the opportunity to suggest several concrete and discrete proposals that would strengthen the United States' ability to prosecute perpetrators of atrocities found on U.S. territory and permit the more effective use of our immigration laws and criminal fraud penalties to hold accountable perpetrators of mass atrocities. Together, these proposals would also prevent the United States from serving as a safe haven for human rights abusers.

Many of these proposals could be implemented through the passage of a criminal law technical amendments act; others would require a more elaborate drafting exercise. All would expand the ability of the United States to exercise leadership in atrocity prevention and response along a number of dimensions: Ensuring that the United States has a comprehensive and robust penal regime to address perpetrators in its midst; modeling what the responsible exercise of the range of jurisdictional bases should entail; taking U.S. treaty obligations seriously through conforming implementing legislation; and promoting the complementarity norm by enabling U.S. courts to prosecute the core international crimes. Putting these authorities in place now will ensure that the United States has the tools it needs to address the next cohort of persecutors who attempt to find safe haven in the United States after committing international crimes in today's conflicts and repressive states.

Mr. Chairman, I request that this written testimony be made part of the record.

## **II. Repairing Title 18's Blind Spots**

A quick survey of Title 18 reveals three obvious gaps in the federal penal code: The United States lacks a statute penalizing crimes against humanity, the war crimes statute has only a limited jurisdictional reach and does not conform to U.S. obligations under the 1949 Geneva Conventions, and the list of chargeable forms of responsibility excludes express mention of superior responsibility. Furthermore, the United States could offer enhanced protections to U.S. persons abroad—including citizens and domiciliaries—by making better use of the principle of passive personality jurisdiction. In terms of other discrete “fixes,” recent jurisprudence has invalidated the United States' statute criminalizing female genital mutilation, vitiating the deterrent value of the law and leaving thousands of girls in our communities at risk of being subject to the procedure.

Finally, the genocide statute does not apply to events that predate its passage, which has hindered the United States' ability to prosecute *génocidaires* in our midst.

These gaps and prosecutorial limitations significantly hinder the reach of the United States' prosecutorial authorities and have led to instances of impunity, and incomplete accountability, where perpetrators found here cannot be prosecuted for their substantive crimes and must be dealt with through immigration and other remedies—a distant second-best option when grave international crimes are at issue. I am hopeful that these proposals will find favor with the Commission and your colleagues and inspire them to strengthen the U.S. legal framework around atrocity crimes from all possible perspectives: criminal law, immigration law, and civil law.

## A. Enact a Law Penalizing Crimes Against Humanity

U.S. federal authorities can prosecute war crimes,<sup>1</sup> genocide,<sup>2</sup> torture,<sup>3</sup> the recruitment and use of child soldiers,<sup>4</sup> a comprehensive array of terrorist acts,<sup>5</sup> piracy,<sup>6</sup> and many manifestations of human trafficking and modern forms of slavery.<sup>7</sup> They cannot, however, prosecute crimes against humanity—a central pillar of international criminal law since the World War II era and arguably one of the most grave crimes known to humankind.

Crimes against humanity are a constellation of acts made criminal under international law when they are committed as part of a widespread or systematic attack against a civilian population. The statutes of the modern war crimes tribunals, which the United States was instrumental in establishing, almost all contain provisions allowing for the prosecution of crimes against humanity.<sup>8</sup> The majority of our allies have also enacted crimes against humanity statutes,<sup>9</sup> often—but not always—as a result of ratifying the Rome Statute establishing the International Criminal Court.<sup>10</sup>

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<sup>1</sup> 18 U.S.C. § 2441 (1996). The original War Crimes Act was amended by the Military Commission Act of 2006.

<sup>2</sup> The Genocide Convention Implementation Act of 1987 (the Proxmire Act), 18 U.S.C. § 1091 (1988). Congress in 2007 passed the Genocide Accountability Act to expand jurisdiction to allow for the prosecution of any individual, regardless of nationality, who commits genocide anywhere in the world so long as the person is found within the United States.

<sup>3</sup> 18 U.S.C. § 2340 (1996). *See, e.g., United States v. Belfast* 611 F.3d 783 (11th Cir 2010).

<sup>4</sup> 18 U.S.C. § 2442 (2008).

<sup>5</sup> 18 U.S.C. § 2332 *et seq.*

<sup>6</sup> 18 U.S.C. § 1651 (1948).

<sup>7</sup> 18 U.S.C. § 1581 *et seq.*

<sup>8</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, art. 6(c), Aug. 8 1945, 59 Stat. 1546, 82 U.N.T.S. 279; Charter for the International Military Tribunal of the Far East, art. 5(c), Jan. 19, 1946, T.I.A.S. 1589, 4 Bevens 20 (1968); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the Special Court for Sierra Leone, art. 2, Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the Iraqi High Tribunal, art. 12, Oct. 18, 2005. The one exception is the Special Tribunal for Lebanon, which focuses exclusively on terrorism crimes under Lebanese law. Statute of the Special Tribunal for Lebanon, appended to S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

<sup>9</sup> *See* AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE (Oct. 2012), available at <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>; Beth Van Schaack & Zarko Perovic, *The Prevalence of “Present-In” Jurisdiction*, PROC. ANNUAL MEETING AMERICAN SOCIETY INT’L L. 237 (April 2013).

<sup>10</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

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A draft crimes against humanity bill has been produced, but it never emerged from committee. In 2008, Senator Dick Durbin (D-IL) held the first congressional hearing devoted to crimes against humanity (entitled “From Nuremberg to Darfur: Accountability for Crimes Against Humanity”), which identified the crimes against humanity “loophole” in U.S. law.<sup>11</sup> Accordingly, with Senators Patrick Leahy (D-VT) and Russ Feingold (D-WI) as cosponsors, Senator Durbin introduced legislation in 2009 (S.1346) that would have allowed for the exercise of jurisdiction over many of the crimes against humanity recognized by international criminal law.<sup>12</sup> In introducing his draft legislation, Durbin invoked the role played by the United States in the first prosecutions for crimes against humanity following World War II.<sup>13</sup>

Rather than define crimes against humanity identically to the way in which it is defined in most international court statutes, Senator Durbin’s bill cleverly incorporated existing federal crimes contained within Title 18 (e.g., rape, murder, enslavement, and torture) alongside some predicate acts without ready analogs within Title 18. To these were added other federal crimes, such as hostage taking/kidnapping and trafficking, which are not generally included in international formulations of crimes against humanity but which find affinity with the more standard constitutive acts. The draft statute granted jurisdiction over these crimes when certain conditions were met that distinguish crimes against humanity from ordinary crimes under international law, namely: the knowing commission of such acts within the context of a widespread or systematic attack against a civilian population. Although this borrowing approach differed from the way other nations have incorporated crimes against humanity within their penal codes, which tend to mirror the Rome Statute’s formulation, it had the benefit of relying on extant U.S. law and not hewing too closely to the definition within a treaty that the United States has not ratified.

The bill did not get out of committee. The *coup de grâce* from the perspective of many of its prior supporters, including members of Department of Justice who treasure their prosecutorial discretion, was that a revised version of the bill gave the Secretary of State, the Secretary of Defense, and the Director of National Intelligence what amounted to a veto on crimes against humanity charges going forward.<sup>14</sup> The bill died after being reported out of the Judiciary Committee in 2010, having lost the support from the human rights community.

This persistent gap in U.S. law is significant because it means that an individual who commits a peacetime massacre of civilians abroad and then makes his or her way to United States could not be criminally prosecuted for that act. This horrific crime would not constitute a war crime because it is not connected with an armed conflict (a necessary predicate for a war crimes prosecution). In any case, it could not be prosecuted under the United States’ war crimes statute

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<sup>11</sup> “From Nuremberg to Darfur: Accountability for Crimes Against Humanity,” Hearing before the Subcommittee on Human Rights and the Law of the Committee on the Judiciary, U.S. Senate Hearing 110-786 (June 24, 2008), available at [www.gpo.gov/fdsys/pkg/CHRG-110shrg48219/html/CHRG-110shrg48219.htm](http://www.gpo.gov/fdsys/pkg/CHRG-110shrg48219/html/CHRG-110shrg48219.htm).

<sup>12</sup> See S.1346 (111<sup>th</sup>): Crimes Against Humanity Act of 2010, available at <https://www.govtrack.us/congress/bills/111/s1346>.

<sup>13</sup> Press Release: “Durbin, Leahy, and Feingold Introduce Legislation Making Crimes Against Humanity a Violation of US Law” (June 24, 2009), available at [www.durbin.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=f46c9bff-261a-4b41-a14c-383379c05364](http://www.durbin.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=f46c9bff-261a-4b41-a14c-383379c05364).

<sup>14</sup> See S.1346, *supra*, § 519(1)(B) (allowing suit only if “the Secretary of State, the Secretary of Defense, and the Director of National Intelligence do not object to the prosecution.”).

unless the perpetrator or victim was a U.S. citizen (more on this below). Likewise, this atrocity could not be prosecuted as an act of genocide, unless it could be proven that the victims constituted members of a protected group and that the perpetrator acted with the specific intent to destroy that group, a high evidentiary bar. When it comes to cases of enforced disappearances—where it is often impossible to prove that the victim has been tortured or summarily executed—ethnic cleansing absent genocidal intent, or religious persecution, the U.S. is similarly hamstrung from a prosecutorial perspective. Under extant law, federal authorities are thus reduced to utilizing immigration law to prosecute for fraud individuals who commit such grave crimes (assuming it can be proven that the perpetrator undeservedly received some type of immigration benefit) or to simply deporting them back to the country where they committed their depredations, potentially entrenching further insecurity and instability there.

If the United States had a crimes against humanity statute, the perpetrators of these types of atrocities could be prosecuted here in the United States so long as U.S. law enforcement could get physical custody of them. In addition, a crimes against humanity statute would have the benefit of applying to non-state actors—such as members of Al Qaida, the Lord’s Resistance Army (LRA), and the Islamic State of Iraq and the Levant (ISIL)—in contradistinction to the crime of torture, which under U.S. law requires the perpetrator to be acting under color of law.<sup>15</sup> If Congress were to draft such a statute, it should include an expansive array of jurisdictional grounds to ensure that it is not a dead letter upon passage.

## **B. Expand the Jurisdictional Bases to Prosecute War Crimes to Include “Present In” Jurisdiction in Keeping with Other International Crimes Statutes**

Turning to questions of jurisdiction, most of the United States’ existing international crimes statutes authorize the exercise of jurisdiction over a perpetrator who is found or present in the United States.<sup>16</sup> Such “present-in” jurisdiction exists over a range of terrorism crimes (e.g., the provision of material support to terrorism, receiving terrorist training, and engaging in terrorist bombings),<sup>17</sup> genocide,<sup>18</sup> the recruitment and use of child soldiers,<sup>19</sup> torture,<sup>20</sup> various forms of trafficking<sup>21</sup> and other modern forms of slavery,<sup>22</sup> and the ancient crime of piracy.<sup>23</sup>

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<sup>15</sup> See 18 U.S.C. § 2340(1) (requiring proof that the defendant acted under color of law).

<sup>16</sup> It is well established that the individual may be forcibly brought within the United States in order to satisfy this jurisdictional requirement. See *United States v Yunis* 924 F.2d 1086 (D.C. Cir. 1991).

<sup>17</sup> See e.g., 18 U.S.C. § 2332b (1996); 18 U.S.C. § 2339A-D (1994). Many of the cases brought under these authorities, such as those involving members of Al-Shabaab, have little in the way of a direct nexus to the United States other than the fact that terrorism constitutes a global threat. See *United States v Ahmed*, 2011 U.S. Dist. LEXIS 123182, 4-5 (S.D.N.Y. 2011) (“Both the material support and the military-type training statutes explicitly grant extraterritorial jurisdiction, as follows: extraterritorial jurisdiction may be exercised when the ‘offender is brought into . . . the United States’”).

<sup>18</sup> 18 U.S.C. § 1091(e) (“There is jurisdiction over the offenses . . . if . . . regardless of where the offense is committed, the alleged offender is . . . (D) present in the United States.”).

<sup>19</sup> 18 U.S.C. § 2442(c) (allowing for jurisdiction if “the alleged offender is present in the United States, irrespective of the nationality of the alleged offender”).

<sup>20</sup> 18 U.S.C. § 2340A(b) (allowing for jurisdiction if “the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender”).

<sup>21</sup> See, e.g., 18 U.S.C. § 1596 (2008).

<sup>22</sup> See, e.g., 18 U.S.C. § 1581 (1948).

<sup>23</sup> 18 U.S.C. § 1651 (1948).



In some instances, this expanded form of jurisdiction is in keeping with the provisions of an international treaty to which the United States is a party, such as the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.<sup>24</sup> In other instances, the United States has exceeded its treaty obligations. For example, the United States can assert present-in jurisdiction over genocide, although this is not mandated by the Convention on the Prevention and Prosecution of the Crime of Genocide.<sup>25</sup> This policy choice no doubt reflects the gravity of the crimes in question, the perceived utility of present-in jurisdiction, a permissive customary international law rule, and modern expectations that states should enact robust penal regimes for atrocity crimes.<sup>26</sup>

This suite of statutes stands in stark contrast to the U.S. War Crimes Act, which allows for the exercise of nationality jurisdiction only: the victim or perpetrator must be a U.S. national (as defined by the Immigration and Nationality Act of 1952 (INA)) or a member of the U.S. armed forces. When Congress was considering enacting the War Crimes Act in the mid-1990s, the Departments of Defense<sup>27</sup> and State<sup>28</sup> testified that Congress should adopt present-in jurisdiction in order to be in compliance with the 1949 Geneva Conventions.<sup>29</sup> This position was consistent with the United States' understanding at the time the treaties were opened for signature.<sup>30</sup> When

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<sup>24</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5-7, Dec. 10, 1984, 1465 U.N.T.S. 85. *See also* The Torture Victim Protection Act of 1991, Sen. Rep. No. 102- 249 (Nov. 26, 1991) (“according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over ‘offenses of universal interest.’”) (citations removed).

<sup>25</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. VII, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>26</sup> *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AM. LAW INST. 2018) (noting that the United States has not asserted its penal jurisdiction to the full extent allowed by international law).

<sup>27</sup> Testimony of John H McNeill, Senior Deputy General Counsel, during the Hearing before the Subcommittee on Immigration and claims of the Committee on the Judiciary, House of Representatives, on H.R. 2587, War Crimes Act of 1995 (12 June 1996) [hereinafter Hearing on H.R. 2597]; Letter from General Counsel Judith Miller, War Crimes Act of 1996, House of Representatives, Committee on the Judiciary, Report to accompany H.R. 3680, Report 104- 698 (24 July 1996), [www.pegc.us/LAW\\_/hr.104-698.pdf](http://www.pegc.us/LAW_/hr.104-698.pdf) [hereinafter Report 104- 698]

<sup>28</sup> Hearing on H.R. 2597 (n 35) (testimony of Michael J. Matheson, Principal Deputy Legal Adviser); Report 104- 698 (n 35) (letter by Barbara Larkin, Acting Assistant Secretary, Legislative Affairs). *See also* Joint letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Law Study (2007) 46 I.L.M. 514 (letter by State Legal Adviser and DOD General Council noting that ‘Article 146 of the Fourth Geneva Convention requires all States Parties to extradite or prosecute an individual suspected of a grave breach, even when a State lacks a direct connection to the crime’).

<sup>29</sup> *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 146-7, Aug. 12, 1949, 75 U.N.T.S. 287 (obliging states parties to codify the prohibition against grave breaches of the treaties and prosecute all offenders, regardless of nationality).

<sup>30</sup> Members of the U.S. delegation to the Geneva Conventions drafting conference representing the Departments of State and Justice wrote this in a contemporaneous article:

In brief, by analogy to the law of piracy, this provision would impose upon even a neutral country the duty to hunt out and try, or permit the extradition of, persons accused of “grave breaches,” regardless of their nationality or the nationality of their victims. The purpose of this provision is to deprive such persons of the sanctuary which they have heretofore found in certain neutral countries. In the case of the United States, whose regular courts generally exercise jurisdiction only over crimes committed within their territorial jurisdiction, legislation may be required to provide for the trial, or permissively to allow the extradition, of persons who are accused of having committed grave breaches in a conflict to which the United States was not a party.

the War Crimes Act was being drafted, however, the Department of Justice—reversing the views it held when the treaties were first drafted—resisted the inclusion of a more expansive jurisdictional framework on the ground that extraterritorial cases are difficult to prosecute.<sup>31</sup>

Extending present-in jurisdiction to war crimes would bring greater coherence to the U.S. penal code, and eliminate the current patchwork approach, while at the same time signaling a U.S. commitment to enable its courts to prosecute all atrocity crimes in equal measure. It would also be in keeping with the legal frameworks of our coalition partners.<sup>32</sup> Although the Geneva Conventions do not mandate the exercise of present-in jurisdiction over war crimes committed in non-international armed conflicts, any amendment to the War Crimes Act should apply the same jurisdictional regime to all war crimes, regardless of conflict classification. This would obviate the need for U.S. courts to engage in complex conflict classification exercises and recognize that today’s conflicts increasingly involve non-state actors and transnational dimensions. Indeed, language in the form of a conforming amendment to the War Crimes Act could be included in a new crimes against humanity statute to ensure that the jurisdictional regimes are consistent with each other and across Title 18.

### **C. Empower U.S. Courts to Prosecute Offenders Under the Doctrine of Superior Responsibility**

Turning to forms of criminal responsibility, under U.S. federal law, individuals may be prosecuted as principals and accomplices,<sup>33</sup> as accessories after-the-fact,<sup>34</sup> under theories of attempt,<sup>35</sup> and when they commit crimes as part of a conspiracy.<sup>36</sup> However, there is no superior responsibility statute that applies to federal crimes generally or to the suite of atrocity crimes in particular—an unfortunate accountability gap that makes it difficult to prosecute leaders who have a duty under law to supervise their subordinates and to punish infractions. Because the doctrine of superior responsibility already finds expression in other areas of U.S. law—including U.S. military, tort, and immigration law—devising an appropriate standard that could also apply to all the atrocity crimes within Title 18 should be a straightforward drafting exercise.

The clearest articulation of the doctrine in U.S. law appears in the Military Commissions Act of 2006, which governs the prosecution before military commission of certain enemy combatants, including those superiors whose subordinates commit offenses.<sup>37</sup> This definition

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R. T. Yingling and R. W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT’L L. 393, 426 (1952).

<sup>31</sup> Department of Justice, *War Crimes Act of 1996 (P.L. 104-192)* (July 10, 2015), available at <https://www.justice.gov/jmd/war-crimes-act-1996-pl-104-192> (compiling legislative history).

<sup>32</sup> See American University, Washington College of Law, War Crimes Research Office, *Universal Jurisdiction Project*, available at <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/universal-jurisdiction-project/> (cataloguing the war crimes statutes of U.N. member states).

<sup>33</sup> 18 U.S.C. § 2(a) (1948) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

<sup>34</sup> 18 U.S.C. § 3 (1948).

<sup>35</sup> See e.g., 18 U.S.C. § 1113 (1948) (attempt to commit murder or manslaughter).

<sup>36</sup> 18 U.S.C. § 371.

<sup>37</sup> 10 U.S.C. § 950q (2006) (“Any person punishable under this chapter who . . . (3) is a superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.”). The U.S. military commissions convened following World War II also prosecuted senior officials for command responsibility. See, e.g., “The High Command Case,” 10



could simply be incorporated by reference to apply to crimes against humanity and other atrocity crimes litigation. The federal courts have also adjudicated superior responsibility cases in the context of suits under the Alien Tort Statute and the Torture Victim Protection Act.<sup>38</sup> Under U.S. immigration law, alien superiors can be excluded or removed from the United States if they failed to prevent or punish crimes committed by their subordinates.<sup>39</sup> For example, the Immigration and Nationality Act considers as inadmissible any alien “who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in” an act of torture or any extrajudicial killing<sup>40</sup>—a formulation that has been interpreted to include superior responsibility.<sup>41</sup> The doctrine is also well established in international criminal law (and is prosecutable before all the international criminal tribunals),<sup>42</sup> international humanitarian law,<sup>43</sup> the Department of Defense’s new LAW OF WAR MANUAL,<sup>44</sup> customary international law,<sup>45</sup> and foreign law, including the codes of our closest allies.<sup>46</sup> Including superior responsibility as a punishable form of

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TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 3 (1951).

<sup>38</sup> See e.g., *Chavez v Carranza*, 559 F.3d 486, 499 (6th Cir 2009); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir 1996); *Ford v Garcia*, 289 F.3d 1283, 1286, 1289-90 (11th Cir 2002). See generally Beth Van Schaack, *Command Responsibility: The Anatomy of Proof* in Romagoza v. Garcia, 36 U.C. DAVIS L. REV. 1213 (2003).

<sup>39</sup> See, e.g., Presidential Proclamation 8697—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses (Aug. 4, 2011) (suspending entry to “[a]ny alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population.”).

<sup>40</sup> 8 U.S.C. § 1182(a)(3)(E)

<sup>41</sup> See, e.g., *In re D- R-*, 25 I. & N. Dec. 445 (BIA 2011). In *D- R-*, the Board of Immigration Appeals ruled that a police officer of the Republic of Srpska was subject to removal because as a commander, “he knew, or, in light of the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts,” including extrajudicial killings. *Id.*

<sup>42</sup> See, e.g., *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement of the Int’l Crim. Trib. Former Yugo., Tr. Chamber (Nov. 16, 1998), aff’d in part and rev’d in part, *Prosecutor v. Delalić*, Judgement, App. Chamber (Feb. 20, 2001).

<sup>43</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts arts 86-87, June 9, 1977, 1125 U.N.T.S. 3. Although the United States has articulated several criticisms of this treaty (mostly concerned with the standard for granting combatant status to certain fighters), it has not taken issue with the treaty’s formulation of superior responsibility. See Message from the President of the United States Transmitting Protocol II to the Senate (Jan. 29, 1987), [www.loc.gov/r/frd/Military\\_Law/pdf/protocol-II-100-2.pdf](http://www.loc.gov/r/frd/Military_Law/pdf/protocol-II-100-2.pdf). Indeed, the U.S. Army Field Manual & Regulations incorporated a parallel formulation of superior responsibility.

<sup>44</sup> Department of Defense, *Law of War Manual*, § 18.23.3 (June 2015). This provision has a long pedigree in U.S. military field manuals. See DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE*, FM 27-10, § 501 (July 1956).

<sup>45</sup> In their monumental study of the customary international law governing armed conflicts, the International Committee of the Red Cross (ICRC) has identified the following customary rule:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

The International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 153, [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule153](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule153).

<sup>46</sup> The ICRC has collected international formulations of the doctrine as well as state practice; see [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule153](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule153).

responsibility would extend the reach of U.S. law to individuals who may not commit atrocities themselves but instead allow their subordinates to do so with impunity. It would ensure that the United States can prosecute superiors—and not just the rank and file—particularly given that the former are more likely to have the financial and other means to travel to the United States.

## **D. Better Protect U.S. Citizens and Residents Abroad by Expanding the Exercise of Passive Personality Jurisdiction**

The “passive personality principle” permits the exercise of domestic jurisdiction when the victim is a national (or domiciliary) of the prosecuting state on the theory that states are entitled, if not expected, to protect their residents abroad.<sup>47</sup> The exercise of passive personality jurisdiction was historically more rare and more contested because it predicated penal jurisdiction on the fortuity of the victim’s nationality.<sup>48</sup> Notwithstanding this initial resistance, the concept has become less controversial and more commonplace as states increasingly promulgate terrorism treaties containing the principle and adopt legislation aimed at protecting their nationals from acts of violence abroad.<sup>49</sup> The drafters of the Fourth RESTATEMENT OF FOREIGN RELATIONS LAW now confirm that “[i]nternational law recognizes a state’s jurisdiction to prescribe law with respect to certain conduct outside its territory that harms its nationals” or even its domiciliaries.<sup>50</sup> Generally, it is not necessary to show that the victims have been targeted because of their place of habitual residence.<sup>51</sup>

Under U.S. law, the passive personality principle is a prominent feature of our suite of terrorism statutes<sup>52</sup> as well as the War Crimes Act of 1996.<sup>53</sup> Other international crimes statutes—notably torture and genocide—only allow for an indictment if the alleged perpetrator is found or present in the jurisdiction. This makes extradition difficult because U.S. courts lack jurisdiction if the alleged perpetrator is not present in the United States and yet they cannot secure the person’s extradition without an indictment in hand. And, it is not enough to simply charge the person with another crime and then draft a superseding indictment. According to the international law doctrine of specialty, the receiving state can only prosecute an individual for the crime that served as the basis for the extradition.

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<sup>47</sup> INTERNATIONAL BAR ASSOCIATION, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 147-148 (2009), available at <http://tinyurl.com/taskforce-etj-pdf>. See, e.g., *United States v. Yunis*, 681 F.Supp. 896, 901 (D.D.C. 1988) (“[the passive personality principle] recognizes that each state has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries”), aff’d 924 F.2d 1086 (D.C. Cir. 1991).

<sup>48</sup> The United States, for example, originally rejected the passive personality principle in the 1887 *Cutting’s Case*, a successful diplomatic protest following Mexico’s effort to prosecute a U.S. national for allegedly libeling a Mexican national in a U.S. publication. U.S. Dep’t of State, 1887 For. Rel. 751 (1888), reprinted in 2 J.B. MOORE, INTERNATIONAL LAW DIGEST 232 (1906).

<sup>49</sup> See, e.g., 18 U.S.C. § 2332 (criminalizing the killing of a U.S. national abroad). See generally, John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT’L L. J. 298 (1989).

<sup>50</sup> RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 411 (AM. LAW INST. 2018).

<sup>51</sup> See *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (noting that the U.S. victims were not the intended target of the terrorist act).

<sup>52</sup> See, e.g., 18 U.S.C. § 2332a (criminalizing the use of a weapon of mass destruction against a U.S. national abroad).

<sup>53</sup> 18 U.S.C. § 2441(b) (allowing for jurisdiction so long as “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States”).

Imagine a scenario in which a U.S. citizen or resident is tortured abroad outside of a situation of armed conflict (so the act would not constitute a war crime). The tragic death of journalist Jamal Khashoggi comes immediately to mind. The United States cannot exercise jurisdiction over these acts of torture unless an overseas perpetrator is found “present in” the United States. Theoretically, the United States could indict the presumed perpetrator for something else (although nothing comes to mind), secure their extradition on that crime, and then convince the sending state to waive specialty if U.S. authorities decide to add a torture count. These complications would all be eliminated if the torture statute were amended to allow for the exercise of passive personality jurisdiction when U.S. persons are subjected to torture overseas.<sup>54</sup> With a technical amendment, Congress could extend passive personality jurisdiction to all international crimes statutes as needed and thus better protect U.S. nationals and residents abroad.

## **E. Amend the Statute Penalizing Female Genital Mutilation to Satisfy the Commerce Clause**

The first case to be brought under the new statute penalizing the commission of female genital mutilation (FGM) unfortunately resulted in a determination that the statute was unconstitutional.<sup>55</sup> Section 116(a) of Title 18 makes it a criminal offense to “knowingly circumcise[], excise[], or infibulate[] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years.”<sup>56</sup> A district court in Michigan ruled that the statute was not “necessary and proper” to implement a treaty ratified by the United States.<sup>57</sup> In defense of the legislation, the United States had cited the International Covenant on Civil and Political Rights (ICCPR), which contains a number of provisions aimed at protecting the physical integrity of persons within the United States from assault, but the court determined that the FGM statute was not “rationally related” to implementing those obligations.<sup>58</sup> The court also held that the statute exceeded Congress’s powers under the Commerce Clause of the U.S. Constitution,<sup>59</sup> because there was insufficient evidence in the record that FGM was an economic activity or that it affected interstate commerce. Although several of the victims in that case had been taken across state lines in order to be subjected to FGM, the statute as written lacked a jurisdictional element allowing prosecution where the charged offense had a connection with, or effect on, interstate commerce.

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<sup>54</sup> See 18 U.S.C. § 3077(2) (defining “U.S. persons”).

<sup>55</sup> *United States v. Jumana Nagarwala et al.*, 350 F. Supp.3d 613 (E.D. Mich. 2018).

<sup>56</sup> 18 U.S.C. § 116. The Transport for Female Genital Mutilation Act, P.L. 112-239 (Jan. 2, 2013), made it a crime to knowingly transport a girl outside of the United States for the purpose of committing FGM. See 18 U.S.C. § 116(d). Congress might also consider amending the *actus reus* of this crime to cover the whole range of ways that FGM can be committed, including through cauterization for example. Language could be added to the effect that it is also a crime to “otherwise cause bodily harm to the female genitalia for non-medical reasons.”

<sup>57</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>58</sup> International Covenant on Civil and Political Rights arts.7, 9, Dec. 19, 1966, 999 U.N.T.S. 171. This argument might have been strengthened had the United States ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), Mar. 1, 1980, 1249 U.N.T.S. 13, or the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>59</sup> See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

The Department of Justice declined to appeal on the ground that it lacked a reasonable defense to these constitutional infirmities.<sup>60</sup> It has since proposed prudent and straightforward amendments that would require proof of a nexus between the conduct at issue (performing FGM on minors) and interstate commerce. These might include evidence that the defendant or victim traveled in, or used, a channel or instrumentality of interstate or foreign commerce in furtherance of FGM—including through communication, or payment—or that the act of FGM otherwise occurred in, or affected, interstate or foreign commerce.<sup>61</sup> Congress should quickly implement these amendments in order to better protect the thousands of girls and young women here in the United States who are at risk of being subjected to FGM.<sup>62</sup> Medical authorities estimate that half a million girls and women are affected by FGM, and it is crucial that the Department of Justice has the tools it needs to prosecute FGM practitioners who engage in or profit from the mutilation of children.<sup>63</sup>

## F. Render the Genocide Statute Retroactive

The United States' genocide statute was originally enacted in 1988.<sup>64</sup> At the time, however, it only applied to U.S. nationals who committed genocide abroad or to aliens who committed genocide in the United States. With passage of the Genocide Accountability Act of 2007 and the Human Rights Enforcement Act of 2009, the genocide statute was amended to include present-in jurisdiction so that U.S. courts can now adjudge any alien accused of committing genocide anywhere in the world provided that alien is subsequently brought into, or found, in the United States.<sup>65</sup> These amendments closed a vast jurisdictional gap that created a safe haven for alleged alien perpetrators of genocide who managed to enter U.S. territory. As a result of this prior loophole, individuals responsible for the 1994 Rwandan genocide—which resulted in the murder of upwards of 700,000 Tutsi citizens, in many cases with rudimentary farm implements—who are later found here in the United States cannot be prosecuted for genocide but only for any immigration violations they committed in the process of coming here.<sup>66</sup>

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<sup>60</sup> The House of Representatives sought to appeal this decision. See *United States v. Nagarwala, et al.*, Motion of the U.S. House of Representatives to Intervene (Apr. 30, 2019), available at <https://www.speaker.gov/wp-content/uploads/2019/05/Nagarwala-Motion-to-Intervene-As-Filed.pdf>.

<sup>61</sup> The Department of Justice's full proposal with recommended statutory language is available here: [https://www.justice.gov/oip/foia-library/osg-530d-letters/4\\_10\\_2019/download](https://www.justice.gov/oip/foia-library/osg-530d-letters/4_10_2019/download).

<sup>62</sup> It remains important to have a federal statute even though about three-quarters of states have enacted anti-FGM laws. Equality Now, *US Laws Against FGM—State-by-State*, [https://www.equalitynow.org/fgm\\_in\\_the\\_us\\_learn\\_more](https://www.equalitynow.org/fgm_in_the_us_learn_more).

<sup>63</sup> Howard Goldberg, MD, *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk*, 131 PUBLIC HEALTH REPORTS (March-April 2016), <https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/fgmutilation.pdf>; Arefa Cassoobhoy, MD, MPH; Deborah L. Ottenheimer, MD & Ranit Mishori, MD, MHS, *Under the Radar: Female Genital Mutilation in the United States: What Clinicians Should Know*, MEDSCAPE (March 6, 2019), <https://www.medscape.com/viewarticle/909508>.

<sup>64</sup> Genocide Convention Implementation Act of 1987 (the Proxmire Act), P.L. 100-606 (1988).

<sup>65</sup> The amendments originally allowed for the exercise of jurisdiction over individuals brought into, or found within, the United States. Genocide Accountability Act of 2007, P.L. 110-151 (2007). This was later amended to the simpler “present in” formulation. Human Rights Enforcement Act of 2009, P.L. 111-122 (2009).

<sup>66</sup> For example, the United States had to prosecute Rwandan sisters Prudence Kantengwa and Beatrice Munyenyezi, the latter of whom was accused of manning a roadblock that identified Tutsi individuals to be killed, for immigration fraud, perjury, and obstruction of justice because the genocide in Rwanda predated the 2007 amendment to the

Because the crime of genocide was already on the books in 1988, Congress could render the new jurisdictional provisions retroactive without running afoul of the U.S. Constitution's *ex post facto* clause.<sup>67</sup> Amending the genocide statute would be consistent with the ICCPR, which at Article 15 recognizes that there are no *ex post facto* concerns when a state enacts an international crimes statute that applies to prior conduct so long as the conduct in question was already criminal under international law.<sup>68</sup> This too is a discrete fix that could easily be effectuated through technical amendments.

### III. Tighten U.S. Immigration Law to Bar All Human Rights Abusers

#### A. Enact a Comprehensive Persecutor Bar

In addition to these substantive criminal law statutes, Congress has enacted a range of immigration statutes aimed at the perpetrators of atrocity crimes. Although there are legal barriers to entry into the United States for many such individuals, these filters are incomplete and imperfect. Indeed, in 2011, officials from the Department of Homeland Security (DHS) testified before this Commission that there were almost 2,000 perpetrators in the United States.<sup>69</sup>

For example, the United States can bar the entry of individuals who participated in Nazi persecution, acts of genocide, or the commission of any act of torture or extrajudicial killing.<sup>70</sup> The latter conduct renders individuals inadmissible and removable only if the person was acting under the direction of, or in association with, a foreign government. In addition, there is a strong bar for aliens who have engaged in terrorist activities, broadly defined.<sup>71</sup>

However, there is no general persecutor bar that would apply to other human rights abuses—including war crimes, crimes against humanity, or the persecution of others on account

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genocide statute extending present-in jurisdiction over the crime. See Michele McPhee, *The Monster Next Door*, BOSTON (March 24, 2015), <https://www.bostonmagazine.com/news/2015/03/24/rwandan-genocide/>.

<sup>67</sup> U.S. Const., Art. 1, § 9. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>68</sup> ICCPR, *supra*, at art. 15. According to this provision:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ... Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

<sup>69</sup> Statement of John P. Woods, Deputy Assistant Director, National Security Investigations Division, Homeland Security Investigations, U.S. Immigration and Customs Enforcement, Before the House Committee on Foreign Affairs, Tom Lantos Human Rights Commission, *No Safe Haven: Law Enforcement Operations Against Human Rights Violators in the US* (Oct. 12, 2011), available at <https://humanrightscommission.house.gov/events/hearings/no-safe-haven-law-enforcement-operations-against-foreign-human-rights-violators-us>. See also Annie Hylton, *How the U.S. Became a Haven for War Criminals*, NEW REPUBLIC, Apr. 29, 2019, <https://newrepublic.com/article/153416/us-became-haven-war-criminals>.

<sup>70</sup> 8 U.S.C. 1182(a)(3)(E).

<sup>71</sup> 8 U.S.C. 1182(a)(3)(B).



of race, religion, nationality, membership in a particular social group, or political opinion.<sup>72</sup> Nor are individuals who commit certain human rights abuses as part of an armed group exercising *de facto* control or authority inadmissible or deportable (in contradistinction to state actors). Furthermore, there are no grounds to render inadmissible or deportable individuals who commit, ordered, assist, or otherwise participate in FGM. Without a specific ground for inadmissibility or removability, those who have committed these deplorable acts remain admissible and can even adjust their status, obtain visas to visit this great country, and otherwise seek to remain in the United States. Indeed, and paradoxically, an individual can be rejected for refugee status if he or she is a participant in persecution and yet qualify for an ordinary immigrant visa.<sup>73</sup>

Accordingly, Congress could expand these provisions within Title 8 of the U.S. Code to strengthen the tools available under immigration law. Such provisions could be rendered retroactive so they would apply to offenses committed before the date of the enactment of any amendment. Removing references to state action or color of law of any foreign nation here and elsewhere in the U.S. Code's human rights provisions would ensure that the United States' atrocity crimes legislation reflects the rise of extremist non-state actors who commit human rights abuses and that government actors are not held to higher standards than terrorist or other armed groups.<sup>74</sup>

## **B. Extend or Eliminate the Statute of Limitations of Immigration Offences**

Collectively, U.S. immigration authorities allow the U.S. government to denaturalize, deport, remove, or pursue related remedies against individuals who committed fraud during an immigration proceeding or process, including while completing visa forms to come to the United States.<sup>75</sup> The default statute of limitations for non-capital federal crimes is five years, and ten years for some types of immigration fraud.<sup>76</sup> Extending this statute of limitations would better enable U.S. authorities to prosecute these acts given that perpetrators may live undercover for years before being recognized and brought to the attention of law enforcement. This short fuse hinders the utility of these statutes in the atrocity crimes context, an impediment to accountability that can easily be rectified.

In addition, since many of the international crimes at issue do not have a statute of limitation, it could be argued that such limitations could be removed for related acts of immigration fraud. Thus, the statute of limitations could be eliminated for identified offences that involve the

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<sup>72</sup> In the 1970s, a broad persecutor bar was under consideration but a competing bill was enacted that applies only to individuals associated with Nazi Germany. *See* Legislative History, Immigration and Nationality Act—Nazi Germany, P.L. 95-549, 124 CONG. RECORD 4700 (1978).

<sup>73</sup> 8 U.S.C. § 1101(42) (“The term ‘refugee’ does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”).

<sup>74</sup> The Torture Victim Protection Act, for example, also requires proof that the defendant “acted under actual or apparent authority, or color of law, of any foreign nation.” 28 U.S.C. § 1350 note (2)(a). Instead, such provisions could reach conduct “whether committed under color or law or in furtherance of a plan or policy of an armed group” or some such.

<sup>75</sup> *See* 18 U.S.C. § 1425 (1948) (Procurement of Citizenship or Naturalization Unlawfully); 18 U.S.C. § 1546 (1948) (Fraud and Misuse of Visas, Permits, and Other Documents); 18 U.S.C. § 1001 (1948) (false statements); and 18 U.S.C. § 1621 (1948) (perjury). For a fuller list of such statutes, see [www.justice.gov/criminal/hrsp/statutes/immigration.html](http://www.justice.gov/criminal/hrsp/statutes/immigration.html).

<sup>76</sup> *See* 18 U.S.C. § 3282(a) (2006) (default five-year statute of limitations for non-capital offenses); 18 U.S.C. § 3291 (1994) (ten-year limitation for various enumerated crimes involving nationality, citizenship, and passports).



concealment or misrepresentation of human rights violations, including terrorism, trafficking, torture, genocide, war crimes, the use of child soldiers, and crimes against humanity.

### **C. Focus on Criminal Charges for Substantive Offenses Where Possible**

The United States invokes these immigration fraud statutes when it is impossible to prosecute a person for the underlying substantive crime due to a deficiency in substantive law (e.g., if the conduct in question involves a mass killing that is not genocide or does not involve torture), some jurisdictional bar (such as the lack of present-in jurisdiction over the offense), a constitutional infirmity (such as the prohibition against *ex post facto* prosecutions), evidentiary deficits, or other impediments. Indeed, DHS has catalogued dozens of cases of human rights violators being dealt with through immigration and related remedies for lack of more robust penal options.

These immigration remedies offer an expedient solution to the presence of a perpetrator in our midst by preventing the United States from becoming a safe haven for human rights abusers. However, such remedies are unsatisfying when the underlying criminal conduct rises to the level of genocide, war crimes, crimes against humanity, or other forms of persecution. Administrative proceedings, and even criminal convictions for immigration fraud, do not carry the stigma of the substantive penal law or allow for the imposition of penalties commensurate with the underlying criminal conduct. Moreover, the resort to such remedies may result in merely returning a perpetrator to a national system that lacks the legal framework, juridical capacity, or political will to prosecute for the substantive crime or where the suspect's reintroduction could exert a destabilizing effect or result in the intimidation or retraumatization of victims. Expanding the reach of our atrocity crimes statutes will help reduce these instances of impunity (or imperfect accountability) for the next wave of perpetrators who manage to make their way to the United States.

## **IV. Enhance the Ability of Victims to Advance Civil Claims Against Perpetrators of Atrocity Crimes**

Although this Commission is primarily concerned with enhancing the U.S. government's capacities to pursue accountability for perpetrators of grave human rights abuses, there are some discrete amendments to the U.S. Code that would augment the ability of victims of atrocity crimes to seek justice in U.S. courts by way of civil remedies.

### **A. Add Additional Causes of Action to the Torture Victim Protection Act and Remove the State Action Nexus**

Congress has encouraged the advancement of civil claims for a whole range of terrorism crimes<sup>77</sup> as well as for human trafficking and other modern forms of slavery.<sup>78</sup> By contrast, there are more limited grounds on which victims of other human rights violations can bring suit. The Torture Victim Protection Act (TVPA) allows for the assertion of federal jurisdiction over acts of

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<sup>77</sup> 18 U.S.C. § 2333 (providing for civil remedies for acts of international terrorism).

<sup>78</sup> 18 U.S.C. § 1595 (providing for civil remedies for all acts of peonage, slavery, and trafficking in persons criminalized within Chapter 77 of Title 18).

torture and extrajudicial killing and only when the perpetrator acts under color of law of a foreign nation.<sup>79</sup>

Congress could expand the reach of the TVPA by allowing civil parties to assert claims for war crimes, as defined in U.S. law,<sup>80</sup> and crimes against humanity. Furthermore, Congress could remove the TVPA's foreign color-of-law requirement, which would enable civil parties to bring suit against non-state actors—such as members of Al Qaida, ISIL, and the LRA—who habitually torture victims in their custody or control. In this regard, the statute criminalizing the use, recruitment, enlistment, or conscription of child soldiers offers a useful model as it applies to any militia, whether or not it is state-sponsored.<sup>81</sup>

## **B. Render the Alien Tort Statute Expressly Extraterritorial**

In *Kiobel v. Royal Dutch Petroleum Co.*,<sup>82</sup> the U.S. Supreme Court determined that civil parties must overcome the presumption against extraterritoriality if they seek to hold perpetrators liable for torts in violation of the law of nations under the Alien Tort Statute (ATS).<sup>83</sup> Congress could effectively overturn this ruling and render the ATS expressly extraterritorial so that it is better harmonized with the TVPA. This would recognize the fact that when courts hear suits under the ATS, they are not projecting U.S. national law to conduct that occurred abroad; rather, they are doing their part to enforce international law by applying it to individuals who fall within the United States' personal jurisdiction. As the Supreme Court noted in *United States v. Smith*—which involved the crime of piracy, the first offense to be subject to universal jurisdiction under international law—the common law:

recognizes and punishes piracy as an offence not against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race.<sup>84</sup>

By the Supreme Court's reasoning in *Smith*, Congress could restore the ability of the victims of other enemies of the human race to seek civil redress in U.S. courts by expressly affirming that the ATS applies extraterritorially.

## **V. Retain and Expand Inter-Agency Institutional Capabilities**

### **A. Work with the Department of Justice to Enable More Prosecutions for International Crimes**

As discussed above, there are a number of discrete legislative amendments and enactments that could enhance the United States' ability to hold perpetrators accountable for human rights violations and abuses. That said, there are existing authorities that are underutilized. To date, the

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<sup>79</sup> 13 U.S.C. § 1350 note.

<sup>80</sup> 18 U.S.C. § 2441. This could include claims by former child soldiers. *See* 18 U.S.C. § 2442.

<sup>81</sup> 18 U.S.C. § 2442(d)(2) (“The term “armed force or group” means any army, militia, or other military organization, whether or not it is state-sponsored.”).

<sup>82</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>83</sup> 28 U.S.C. § 1350.

<sup>84</sup> *United States v. Smith*, 18 U.S. 153, 161 (1820).

United States has brought only two indictments under the federal torture statute: one case went successfully to trial and produced an historic verdict;<sup>85</sup> the other resulted in a favorable extradition to the *locus delicti*.<sup>86</sup> There have been no other cases brought under this or other human rights criminal statutes, notwithstanding evidence of the presence of human rights abusers here in the United States, including U.S. citizens.<sup>87</sup> By contrast, there are dozens of cases brought under the United States' terrorism and trafficking statutes, even though these cases present many of the same challenges as human rights litigation, including the need to marshal overseas witnesses and evidence.

Members of Congress should seek to understand why the imperative statutory authorities they have created have been rendered a dead letter. This could involve working with the Department of Justice to determine where the obstacles to bringing such charges are and how Congress might assist in overcoming these impediments so that these statutes are fully utilized. Oversight options available to Congress include holding more expansive hearings like this one in which Department of Justice personnel can speak frankly about the challenges of these cases; convening a dedicated commission to study prior efforts to invoke these statutes and why charges were ultimately not brought; or asking the Department of Justice to report regularly on its efforts to activate existing human rights authorities.

In addition, Congress could identify ways to encourage human rights charges to be added to terrorism cases. There is a tendency to think of human rights and counter-terrorism legislation as occupying siloed domains. The depredations of extremist groups such as ISIL prove this to be a false dichotomy. So, for example, Um Sayyaf—the wife of high-ranking ISIL leader—has been charged with participating in a conspiracy to provide material support to a designated foreign terrorist organization.<sup>88</sup> Inexplicably, she has not been charged with war crimes,<sup>89</sup> even though she played a part in the rape of U.S. aid worker Kayla Mueller, which could be charged as a war crime under the still-dormant War Crimes Act,<sup>90</sup> as discussed in prior hearings before this Commission.<sup>91</sup>

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<sup>85</sup> *United States v. Charles Emmanuel*, 2007 U.S. Dist. LEXIS 48510 (S.D. Fl. 2007) (upholding the constitutionality of the federal torture statute). “Chuckie” Taylor—the son of former Liberian President Charles Taylor (himself serving what amounts to a life sentence)—was sentenced to 97 years’ imprisonment. Carmen Gentile, *Son of Ex-President of Liberia Gets 97 Years*, N.Y. TIMES (Jan. 9, 2009).

<sup>86</sup> The United States indicted Bosnian national Sulejman Mujagic for torture; it later extradited him to Bosnia-Herzegovina to stand trial for a wider array of war crimes than could be prosecuted here. See Department of Justice, *Bosnian National Extradited to Stand Trial for Murder and Torture* (June 3, 2013), [www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture](http://www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture).

<sup>87</sup> Beth Van Schaack, *BREAKING: Sri Lankan Presidential Hopeful Sued in Federal Court for Human Rights Violations*, JUST SECURITY (Apr. 8, 2019), <https://www.justsecurity.org/63564/breaking-sri-lankan-presidential-hopeful-sued-in-federal-court-for-human-rights-violations/>.

<sup>88</sup> 18 U.S.C. § 2339B.

<sup>89</sup> *United States v. Nisreen Assaad Ibrahim Bahar (a/k/a “Um Sayyaf”)*, Case No. 1:16-mj-63, Affidavit in Support of Criminal Complaint and Arrest Warrant (Feb. 8, 2016), available at <https://www.justsecurity.org/wp-content/uploads/2016/02/Umm-Sayyaf-Criminal-Complaint-Affidavit.pdf>.

<sup>90</sup> See 18 U.S.C. § 2441(d)(1) (prohibiting the commission of war crimes against U.S. citizens in a non-international armed conflict).

<sup>91</sup> See “Seeking Justice for Atrocities: How the International Criminal Court Could Advance Accountability in Iraq and Syria,” Tom Lantos Human Rights Commission, Feb. 10, 2016, available at <https://humanrightscommission.house.gov/events/hearings/seeking-justice-atrocities-how-international-criminal-court-could-advance>.

If the regrettable rise of ISIL has taught us anything, it is that terrorism and human rights violations go hand-in-hand, a reality that should be reflected in any criminal charges brought under U.S. law. And yet, our investigative and prosecutorial teams are often structured in such a way that does not encourage this sort of cross-over investigation and indictment. As a result, the human rights dimensions of acts of terrorism remain invisible in domestic prosecutions.

## **B. Preserve the Federal Bureau of Investigations' Specialized War Crimes Unit**

Finally, Congress should endeavor to preserve the Federal Bureau of Investigations' specialized war crimes unit in the face of proposals to merge it into the Department of Justice's Civil Rights Division. The FBI's International Human Rights Unit takes the lead on investigating individuals within the United States who have been accused of committing international crimes, including war crimes, torture, genocide, female genital mutilation, and the recruitment of child soldiers. It also investigates international crimes committed against or by U.S. citizens abroad and enforces immigration statutes that can be invoked against abusers who cannot be prosecuted for their underlying crimes for whatever reason. It is an essential part of an inter-agency Human Rights Violators and War Crimes Center established by DHS.

The Civil Rights Division's core mandate is dedicated to enforcing domestic civil rights authorities on behalf of vulnerable individuals and groups within the United States. It has little experience with international investigations, trying to understand complex foreign conflict situations, the execution of requests for mutual legal assistance, or the unique elements and evidentiary bases of international crimes. Removing or dispersing this concentrated war crimes expertise within the Bureau will undermine operations in the field when it comes to this most specialized of cases. Experts within the FBI's International Human Rights Unit, which include historians with expertise in global conflict situations, work up the cases and then, after handing them off, continue to provide support to investigators and prosecutors in the field, helping to link them with foreign counterparts, enable witness interviews, and connect to additional lead and background sources. New investigations will inevitably suffer absent this dedicated team of war crimes investigators in the Bureau, just as perpetrators operating in contemporary conflicts in places like Syria, Yemen, and Myanmar start seeking safe haven abroad.

## **VI. Conclusion**

These legislative proposals would remedy longstanding gaps in U.S. law, protect against impunity, and prevent the immediate return of a perpetrator to the *locus delicti*. Many of the human rights statutes that are now found in the U.S. Code enjoyed strong bipartisan support and were, in fact, enacted during Republican administrations. I am hopeful that this Congress can follow suit.

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