

Crimes against Humanity

Repairing Title 18's Blind Spots

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I. INTRODUCTION

This volume marks a fitting tribute to Bill's tremendous contributions to international criminal law in his many incarnations: academic, policymaker, jurist, and advocate. Bill is not only an engaging professor and astute theoretician; he also manifests a practitioner's grasp of the elements of crimes and the sources of proof and a jurist's devotion to precision and restraint. He has dedicated his professional career to creating a strong system of international criminal law, but not at the expense of either juridical precision or fundamental fairness. Indeed, he has worked in multiple ways to codify international crimes to ensure respect for the principle of legality and the right of future defendants to have fair notice of the standards against which their conduct will be judged while also focusing on systematizing those legal principles that continue to find exclusive expression in customary international law. In this regard, although he is known for his magnum opus on genocide,¹ Bill has played a central role in Professor Leila Sadat's crimes against humanity convention initiative—which is fittingly the subject of another chapter in this festschrift²—and

1. William Schabas, *Genocide in International Law: The Crime of Crimes* 2nd edn (Cambridge: Cambridge University Press 2009).

2. See Chapter 19 in this volume, Leila Nadya Sadat, 'A New Global Treaty on Crimes against Humanity: Future Prospects'. See also William Schabas, 'Why Is There a Need for a Convention for Crimes against Humanity?' in Elizabeth Anderson and David Crane (eds), *Proceedings of*

has contributed to our understanding of this increasingly important international crime in a number of important works.³

My contribution to this compendium picks up on these themes in Bill's oeuvre along with his emphasis on accountability for international crimes,⁴ the prevention of atrocities,⁵ and the relationship between these two imperatives. It takes as its starting point President Obama's atrocities prevention and response initiative, a key product of which was a concerted interagency effort to improve the United States' ability to prosecute atrocity crimes by closing gaps in our penal and immigration codes and preventing this country from serving as a safe haven for abusers. A quick survey of Title 18 reveals three obvious gaps in the federal penal code:⁶ the United States lacks a crimes against humanity (CAH) statute, the war crimes statute has only a limited jurisdictional reach⁷ and does not conform to US obligations under the 1949 Geneva Conventions,⁸ and the list of chargeable forms of responsibility excludes express mention of superior responsibility.⁹ These gaps significantly hinder the reach of the United States' prosecutorial authorities and have led to instances of impunity, and incomplete accountability, where perpetrators in our midst cannot be prosecuted for their substantive crimes and must be dealt with through immigration and other remedies—a distant second-best option when crimes against humanity are at issue.

Through the platform of the Atrocities Prevention Board, the Trump administration should work with Congress to rectify these statutory shortcomings, and a

the Fifth International Humanitarian Law Dialogs (Washington, DC: American Society of International Law 2012) 251–70.

3. See eg William Schabas, 'Genocide and Crimes against Humanity: Clarifying the Relationship' in Harmen G van der Wilt et al. (eds), *The Genocide Convention, The Legacy of 60 Years* (Leiden: Martinus Nijhoff 2012); 'Crimes against Humanity' in Dinah Shelton et al. (eds), *Encyclopedia of Genocide and Crimes against Humanity* (Detroit, MI: Thompson Gale 2005).

4. William Schabas, 'Semantics or Substance: David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities' (2007) 2 *Genocide Studies and Prevention* 31.

5. See eg William Schabas, 'Preventing Genocide and Mass Killing: The Challenge for the United Nations' (2006) *Minority Rights Group Intl Rep*; William Schabas, 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes' (2007) 2(2) *Genocide Studies & Prevention* 101.

6. For a more fulsome discussion of these gaps, see the congressional testimony of David Scheffer, former Ambassador-at-Large for War Crimes Issues. David Scheffer, 'Closing the Impunity Gap in U.S. Law' (2009) 8 *Northwestern J Intl Human Rights* 30.

7. War Crimes Act of 1996, 18 USC § 2441(b) ([1996]).

8. See eg Article 146-7 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

9. See eg 18 USC § 2 (1948) (listing prosecutable forms of direct and accomplice liability). As a result of this gap, the United States can only prosecute direct perpetrators, their accomplices, and their co-conspirators, for a whole range of crimes, but not superiors who are aware that their subordinates are committing abuses but fail to take preventative action or to punish those responsible after the fact. By contrast, civil plaintiffs have advanced superior responsibility claims under customary international law. See Beth Van Schaack, 'Command Responsibility: The Anatomy of Proof in *Romagoza v. Garcia*' (2002) 36 *U of California Davis L Rev* 1213.

domestic crimes against humanity statute should be the first priority.¹⁰ That Congress is now Republican-controlled is no barrier to such reforms; indeed, much of the international criminal law that is now found in the US Code enjoyed broad bipartisan support and was, in fact, enacted during Republican administrations. The real challenge will be to keep atrocities prevention and response a priority and overcome the deep-seated anti-cooperative ethos that has descended upon Congress. And yet, improving the ability of the United States to prosecute those who commit crimes against humanity offers a sliver of common ground to lawmakers hailing from both sides of the aisle. Inspired by the same ideals that have undergirded all of Bill's work, the US government should take advantage of this clear consensus to strengthen the United States' prosecutorial authorities in the service of atrocities prevention and response.

To this end, this chapter describes efforts to draft just such a statute undertaken at the behest of the Atrocities Prevention Board. After providing a brief history of the Board and its mandate, the chapter maps the US federal law in order to identify existing international criminal law authorities and gaps. It then proposes and evaluates various elements for a possible crimes against humanity statute and other discrete statutory amendments, drawing upon previous draft bills, international criminal law, and other federal statutes. It closes by demonstrating that the United States can implement the proposed changes and exercise leadership in atrocities prevention and response without increasing the risk that US personnel or service members will be subjected to litigation overseas.

II. THE ATROCITIES PREVENTION IMPERATIVE

The failure of the international community to halt, or even decelerate, the 1994 genocide in Rwanda—during which time almost a million people were killed with rudimentary farm implements over a period of 100 days—has left an indelible stain on the international community. It also instilled a profound sense of remorse within the collective conscience of many of that era's policymakers who had the power to do more. Indeed, Rwanda was a defining moment for the presidency of William J. Clinton¹¹ and the careers of many in his inner circle.¹² While tragic, the Rwandan experience also demonstrates that hope and inspiration can emerge from cataclysm. Notably, these events inspired a global effort to sharpen the international community's atrocities prevention and response tools and to solidify the collective political will to act in the face of brutality.

One such effort was launched in 2007 when the U.S. Holocaust Museum and Memorial, the American Academy of Diplomacy, and the U.S. Institute of Peace convened a bipartisan Genocide Prevention Task Force cochaired by former secretary

10. In 2014, the American Bar Association issued a resolution calling for the United States to enact a CAH statute and support efforts to draft a multilateral CAH treaty. See ABA Resolution 300 (adopted 18 August 2014), <https://www.international-criminal-justice-today.org/news/aba-urges-us-government-to-act-on-crimes-against-humanity/>.

11. William J. Clinton, 'Text of Clinton's Rwanda Speech', *CBS News*, 25 March 1998.

12. Elias Groll, '5 Highlights from Susan's Rice's Diplomatic Career', *Foreign Policy*, 5 June 2013, <http://foreignpolicy.com/2013/06/05/5-highlights-from-susan-rices-diplomatic-career/>.

of state Madeleine K. Albright and former secretary of defense William S. Cohen. The Task Force's mandate was to raise awareness of the atrocities prevention imperative and generate a set of concrete policy recommendations to enhance the capacity of the US government to respond to emerging atrocity situations. In December 2008, the Task Force released a detailed and highly practical blueprint for preventative and responsive action.¹³ Its recommendations coalesced around five lines of effort: improving risk assessment and early warning tools, undertaking pre-crisis engagement in at-risk countries, developing comprehensive plans for halting and reversing the escalation of violence in crisis situations, deploying a range of military options short of and including armed force, and launching a major diplomatic initiative to strengthen the international system and the capabilities of partner nations. Although the Task Force called upon the secretary of state to reaffirm the United States' commitment to deny impunity to perpetrators (Recommendation 6-5), the Task Force's accountability recommendations largely focused on international efforts and did not offer any tangible suggestions for the reform of US law.

The Task Force also produced a number of overarching recommendations geared toward restructuring the bureaucratic architecture around the atrocity prevention imperative. In this regard, the Report called for the creation of a standing interagency 'Atrocities Prevention Committee' (APC) dedicated to coordinating the United States' response to emerging and full-blown atrocity situations (Recommendation 1-3). It was envisioned that the APC would convene monthly, and as necessary, to discuss the latest risk assessments and develop prevention and response plans across a range of unstable situations.

When he took office, President Obama set about implementing many of the Task Force's recommendations. For example, in 2010, he created a new White House position dedicated to civilian protection and the prevention of international crimes.¹⁴ In August 2011, he issued Presidential Study Directive No. 10 (PSD-10), declaring the prevention of genocide and other mass atrocities to be a 'core national security interest and core moral responsibility' of the United States.¹⁵ PSD-10 directed the National Security Advisor, then Tom Donilon, to launch a 100-day comprehensive review of the US government's anti-atrocity capabilities across the interagency and recommend steps for creating a whole-of-government policy framework for preventing and responding to mass atrocities. In particular, Donilon was to

conduct[] an inventory of existing tools and authorities across the Government that can be drawn upon to prevent atrocities [and] identify[] new tools or capabilities that may be required . . . in order to be better prepared to prevent and respond to mass atrocities or genocide.¹⁶

13. Madeleine K. Albright and William S. Cohen, 'Preventing Genocide: A Blueprint for U.S. Policymakers' (2008). *The United States Holocaust Memorial Museum*.

14. Sandra McElwaine, 'Obama Hires a Clooney Confidant', *The Daily Beast*, 13 April 2010, www.thedailybeast.com/articles/2010/04/13/obama-hires-a-clooney-sidekick.html.

15. Executive Office of the President, PSD-10, *Presidential Study Directive 10: Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review* (2011).

16. *Ibid.*

Adopting one of the Task Force's central recommendations, President Obama also mandated the creation of an Atrocities Prevention Board (APB) featuring high-level interagency representation to 'institutionaliz[e] the coordination of atrocity prevention'.¹⁷ He asked Donilon to compile recommendations for this new Board with respect to its membership, mandate, operational protocols, and sources of support. In April 2012, President Obama approved the recommendations generated by this review and directed his administration to take a range of steps to strengthen the US government's ability to foresee, prevent, and respond to mass atrocities.¹⁸ Although Donilon's report remains classified,¹⁹ the administration has periodically released some information about the Board's membership, key priorities, operations, and activities.²⁰

The PSD-10 process characterized accountability as a critical element of atrocities prevention and response.²¹ Accordingly, the executive branch undertook a process of identifying ways to improve the ability of US, foreign, and international courts to prosecute atrocity crimes. To this end, the Departments of Justice (DOJ), Homeland Security (DHS), and State were directed to develop proposals that would strengthen the United States' ability to prosecute perpetrators of atrocities found on US territory, and permit the more effective use of immigration laws and immigration fraud penalties to hold accountable perpetrators of mass atrocities. The United States also announced its intention to continue to support national, hybrid, and international

17. Ibid. The APB includes representatives of the Departments of State (DOS), Defense (DOD), Treasury, Justice (DOJ), and Homeland Security (DHS), the Joint Staff, the US Agency for International Development, the US Mission to the United Nations, the Office of the Director of National Intelligence (DNI), the Central Intelligence Agency (CIA), and the Office of the Vice President. All representatives are at the assistant secretary level or higher and have been appointed by name by their respective principals.

18. U.S. Dep't of Def., 'Obama Announces Strategy to Counter Atrocities', *U.S. Department of Defense Press Release*, 23 April 2012.

19. Letter to President Obama on Atrocities Prevention, 1 May 2013, <https://freedomhouse.org/article/letter-president-obama-atrocities-prevention#.VKx5qjg5C00>.

20. See *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities* (23 April 2012), www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro/; Sarah Sewell, 'Preventing Mass Atrocities: Progress in Addressing an Enduring Challenge', 30 March 2015, www.humanrights.gov/dyn/2015/03/preventing-mass-atrocities-progress-in-addressing-an-enduring-challenge/. After six months of operation, work was to begin on an executive order that could be made public and that would set forth the priorities and objectives of the Board as well as the measures under development to strengthen the United States' atrocity prevention and response capabilities. See McElwaine (n 14); James P Finkel, 'Moving beyond the Crossroads: Strengthening the Atrocity Prevention Board' (2015) *Genocide Studies and Prevention: An Intl J* 138, 139 ('An Executive Order that was supposed to have followed the President's announcement of the Board and the acceptance of PSD 10's recommendations was quietly shelved without explanation'). The executive order, which gives the APB the force of law, was finally released in 2016. Executive Order 13729, Comprehensive Approach to Atrocity Prevention and Response (18 May 2016).

21. See *Fact Sheet: The Obama Administration's Comprehensive Efforts to Prevent Atrocities over the Past Year* (1 May 2013), www.whitehouse.gov/sites/default/files/docs/fact_sheet_-_administration_efforts_to_prevent_mass_atrocities5.pdf.

accountability mechanisms when doing so advances US interests and values, consistent with the requirements of US law.²² In addition, State, DOJ, and DHS were to develop options for assisting with witness protection measures and providing technical assistance in connection with foreign and international prosecutions.

III. TITLE 18'S BLIND SPOTS

The United States' penal code is a bit of a checkerboard when it comes to the codification of international crimes. Federal authorities can prosecute war crimes,²³ genocide,²⁴ torture,²⁵ and other international crimes (such as the recruitment and use of child soldiers²⁶ and many forms of terrorism²⁷) but not crimes against humanity—a central pillar of international criminal law since the WWII era and arguably more grave than some of these other crimes. Most of the existing statutes now incorporate a form of universal jurisdiction by authorizing the exercise of jurisdiction over a perpetrator who is found or present in the United States.²⁸ Such 'present-in' jurisdiction exists over a range of terrorism crimes,²⁹ genocide, the recruitment and use of child soldiers, torture, various forms of trafficking,³⁰ piracy,³¹ and the slavery-related crimes.³² This suite of statutes stands in stark contrast to the US War Crimes Act, which allows for the exercise of nationality jurisdiction only: the victim or perpetrator must

22. Most important, the American Service-Members Protection Act structures the United States' cooperation with the ICC. 22 USC § 7421 (2002).

23. 18 USC § 2441 (1996). The original War Crimes Act was amended by the Military Commission Act of 2006. See generally Beth Van Schaack, 'Amending the Amendments: The War Crimes Act of 1996' *IntLawGrrls* (15 April 2009), www.intlawgrrls.com/2009/04/obama-administration-is-receiving-no.html (last accessed 16 February 2017).

24. The Genocide Convention Implementation Act of 1987 (the Proxmire Act), 18 USC § 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.

25. 18 USC § 2340 (1996). See eg *United States v Belfast* 611 F 3d 783 (11th Cir 2010).

26. 18 USC § 2442 (2008).

27. See 18 USC § 2332 *et seq.*

28. 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 (DC Cir 1991).

29. See eg 18 USC § 2332b (1996) ; 18 USC § 2339A–D (1994). Many of these cases, such as those involving members of Al-Shabaab, have little in the way of a nexus to the United States. See *United States v Ahmed*, 2011 US Dist LEXIS 123182, 4–5 (SDNY 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"').

30. 18 USC § 1596 (2008). The Trafficking in Persons Accountability Act of 2008 was enacted as part of the Trafficking Victims Protection Reauthorization Act.

31. 18 USC § 1651 (1948).

32. 18 USC § 1581 (1948).

be a US national (as defined by the Immigration and Nationality Act of 1952 (INA))³³ or member of the US armed forces.³⁴ When Congress was considering enacting the War Crimes Act in the mid-1990s, the Departments of Defense³⁵ and State³⁶ testified that Congress must adopt present-in jurisdiction in order to be in compliance with the Geneva Conventions. This position was consistent with the United States' understanding at the time the treaties were opened for signature.³⁷ The DOJ—reversing the views it held at the time the treaties were drafted³⁸—resisted on the ground that extraterritorial cases are difficult to prosecute.³⁹ President Clinton, upon signing the statute into law, expressed a commitment to work with Congress to later expand the scope of the legislation to enable the prosecution of war crimes committed by any person who comes within the jurisdiction of US courts.⁴⁰

In addition to these substantive criminal law statutes, Congress has enacted a range of immigration statutes aimed at the perpetrators of atrocity crimes.⁴¹ Although there

33. 8 USC § 1101 (1952).

34. 18 USC § 2441 (1996).

35. 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 [hereinafter Report 104-698].

36. 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 *ILM* 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').

37. R T Yingling and R W Ginnane, 'The Geneva Conventions of 1949' (1952) 46 *AJIL* 393, 426 ('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') (article by State and DOJ members of US delegation to the Geneva Convention drafting conference).

38. *Ibid.*

39. *Legislative History of the War Crimes Act of 1996*, Department of Justice, www.justice.gov/jmd/ls/legislative_histories/pl104-192/pl104-192.html (18 August 2017).

40. Statement by William J Clinton, former President of the United States, on Signing the War Crimes Act of 1996 (21 August 1996), www.justice.gov/sites/default/files/jmd/legacy/2014/03/23/clintonpresstatement-1482-1996.pdf.

41. The United States has special units dedicated to enforcing these statutes. The Department of Justice's Human Rights & Special Prosecutions (HRSP) section investigates and prosecutes Title

are legal barriers to entry into the United States for such individuals,⁴² these filters are imperfect. Indeed, in 2011, DHS estimated that there were almost 2,000 perpetrators in the United States.⁴³ Collectively, US immigration authorities allow the US government to denaturalize,⁴⁴ deport,⁴⁵ remove, or pursue related remedies against⁴⁶ individuals who committed fraud during an immigration proceeding or process, including while completing visa forms⁴⁷ to come to the United States.⁴⁸ The United States invokes these statutes when it is impossible to prosecute a person for the

18 cases. See www.justice.gov/criminal/hrsp/about/; www.justice.gov/criminal/hrsp/additional-resources/2014/HRSP-Brochure-LawEnforcement-Rev-314.pdf. The HRSP office was formed in 2010 when the Office of Special Investigations (OSI) (which managed the surviving Nazi portfolio) merged with the Domestic Security Section (which handled other contemporary human rights crimes) within the Criminal Division of the DOJ. See Press Release by US Department of Justice, 'Assistant Attorney General Lanny A Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division' (30 March 2010), www.justice.gov/opa/pr/assistant-attorney-general-lanny-breuer-announces-new-human-rights-and-special-prosecutions. HRSP is headed by former International Criminal Tribunal for the former Yugoslavia (ICTY) Senior Trial Counsel, Teresa McHenry, and is staffed by several other international criminal lawyers, including Eli Rosenbaum, who has worked for years to identify, denaturalize, and deport Nazi war criminals within the United States. With local US attorneys as well as the Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) Human Rights Violators and War Crime Unit (HRVWCU), HRSP coordinates the prosecution of individuals accused of committing a host of atrocity crimes. HRSP and HRVWCU also jointly handle legal proceedings under the immigration statutes when prosecution for the substantive crime is foreclosed. See www.ice.gov/human-rights-violators-war-crimes-unit.

42. See 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 (4 August 2011).

43. Statement of John P Woods, Deputy Assistant Director, National Security Investigations Division, Homeland Security Investigations, US 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 (12 October 2011).

44. 18 USC § 1425 (1948) (Procurement of Citizenship or Naturalization Unlawfully).

45. See eg 'ICE Deports Former Bosnian-Serb Police Commander Tied to Srebrenica Genocide' (24 May 2012), www.ice.gov/news/releases/ice-deports-former-bosnian-serb-police-commander-tied-srebrenica-genocide.

46. See eg 'Former Guatemalan Special Forces Officer Sentenced for Covering up Involvement in 1982 Massacre' (2 February 2014), www.ice.gov/news/releases/former-guatemalan-special-forces-officer-sentenced-covering-involvement-1982-massacre. Jorge Sosa was convicted of covering up his involvement in the 1982 Dos Erres massacre in Guatemala when he applied for lawful permanent residence in 1997 and sought naturalization in 2007. He fled to Canada, but was extradited to California in 2012 to stand trial. Nadia Moharib, 'Accused Guatemalan War Butcher Jorge Sosa Extradited to U.S.', *Toronto Sun*, 22 September 2012, <http://www.torontosun.com/2012/09/22/accused-guatemalan-war-butcher-jorge-sosa-extradited-to-us>.

47. 18 U.S.C. § 1546 (1948) (Fraud and Misuse of Visas, Permits, and Other Documents); 18 USC § 1001 (1948) (false statements); 18 USC § 1621 (1948) (perjury).

48. For a list of such statutes, see www.justice.gov/criminal/hrsp/statutes/immigration.html.

underlying substantive crime due to a deficiency in substantive law (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 universal jurisdiction over the offense), a constitutional infirmity (such as the prohibition against *ex post facto* prosecutions), evidentiary deficits, or other impediment. 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 justice⁴⁹ because the genocide in Rwanda predated the 2007 amendment to the genocide statute extending universal jurisdiction over the crime.⁵⁰ Likewise, although 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 committed against Bosnian prisoners of war during the war in Bosnia-Herzegovina than could be prosecuted here.⁵¹ In 2011 congressional testimony, DHS catalogued dozens of cases of human rights violators being dealt with through immigration and related remedies for lack of more robust penal options.⁵²

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 crimes against humanity. 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. These statutes also have short statutes of limitation, which may hinder their utility in the atrocity crimes context given that perpetrators may live undercover for years before being recognized.⁵³ 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. Enacting a crimes against humanity statute will help reduce these instances of impunity (or imperfect

49. Tina Susman, 'Rwandan Convicted of Lying about Genocide Link to get U.S. Entry' *LA Times*, 8 May 2012, <http://articles.latimes.com/2012/may/08/nation/la-na-nn-genocide-trial-20120508>. The charges reflect the fact that the defendant provided false information about her role in the Rwandan genocide to US officials when she completed a background questionnaire for immigration purposes.

50. See 18 USC § 1091 (1988) (n 24).

51. 'Bosnian National Extradited to Stand Trial for Murder and Torture' *Department of Justice* (3 June 2013), www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture. See also 'Vermont Man Charged with Obtaining U.S. Citizenship by Failing to Disclose Violent Crimes Committed during Bosnian Conflict' (26 July 2013), www.justice.gov/opa/pr/vermont-man-charged-obtaining-us-citizenship-failing-disclose-violent-crimes-committed-during.

52. Woods statement (n 43).

53. See 18 USC § 3282(a) (2006) (five-year statute of limitations for noncapital offenses); 18 USC § 3291 (1994) (ten-year limitation for crimes involving nationality, citizenship, and passports).

accountability) for the next wave of perpetrators who manage to make their way to the United States.

IV. PREVIOUS EFFORTS TO DRAFT A CAH STATUTE

In 2008, Senator Dick Durbin (D-IL) held the first congressional hearing devoted to CAH (entitled ‘From Nuremberg to Darfur: Accountability for Crimes Against Humanity’), which identified the CAH ‘loophole’ in US law.⁵⁴ Accordingly, with Senators Patrick Leahy (D-VT) and Russ Feingold (D-WI) as cosponsors, Durbin introduced legislation in 2009 (S.1346) that would have allowed for the exercise of present-in jurisdiction over many of the crimes against humanity recognized by international criminal law.⁵⁵ In introducing his draft legislation, Durbin invoked the role played by the United States in the first prosecutions for CAH following World War II.⁵⁶

As discussed in more detail below, rather than define CAH identically to the way in which it is defined in most international court statutes, Durbin’s bill incorporated existing federal crimes contained within Title 18 alongside some predicate acts without ready analogs within Title 18.⁵⁷ The draft statute granted extraterritorial jurisdiction over these crimes when certain conditions were met. These conditions mirrored the so-called chapeau elements that distinguish CAH from ordinary crimes under international law, namely: the knowing commission of such acts within the context of a wider attack against a civilian population. Although this borrowing approach differed from the way other nations have incorporated international crimes within their penal codes⁵⁸ (usually following their ratification of the ICC Statute), it had the benefit of relying on extant US law and not hewing too closely to the definition operative before the International Criminal Court, which—at the time—continued to receive an ambivalent reception from some members of Congress.

Under the original version of this bill, CAH were subject to ‘present-in’ jurisdiction in addition to nationality and territoriality jurisdiction. However, in a subsequent amendment, also co-sponsored by Dianne Feinstein (D-CA) and Benjamin Cardin (D-MD), this basis of jurisdiction was struck along with the crime of arbitrary detention. The amended version also required the attorney general to certify—after consultation with the secretaries of state and homeland security—that there was no foreign state that was prepared to prosecute the underlying conduct (under

54. ‘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, US Senate (24 June 2008), www.gpo.gov/fdsys/pkg/CHRG-110shrg48219/html/CHRG-110shrg48219.htm.

55. S 1346 (111th): Crimes Against Humanity Act of 2010, www.govtrack.us/congress/bills/111/s1346.

56. ‘Durbin, Leahy, and Feingold Introduce Legislation Making Crimes against Humanity a Violation of US Law’ (24 June 2009), www.durbin.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=f46c9bff-261a-4b41-a14c-383379c05364.

57. Noticeably absent were the CAH of deportation or forced transfer of population, enforced prostitution, persecution, enforced disappearances, apartheid, and the catch-all ‘other inhumane acts’.

58. Scheffer (n 6) 40.

any jurisdictional principle) and that a prosecution by the United States would be 'in the public interest and necessary to secure substantial justice'.⁵⁹ The coup de grâce from the perspective of many prior supporters of the bill, including members of DOJ who treasure the concept of prosecutorial discretion, was that the revised version also gave the secretary of state, the secretary of defense, and the director of national intelligence what amounted to a veto on charges going forward.⁶⁰ The bill died after being reported out of the Judiciary Committee in 2010, largely because of lack of support from the human rights community.

V. ELEMENTS OF A CRIMES AGAINST HUMANITY STATUTE

If prior efforts are any guide, a CAH statute would contain several components: material and circumstantial elements of the crime, a definitional section, penalties, a jurisdictional regime, applicable forms of responsibility, and—potentially—certain additional procedural requirements. The Durbin draft serves as a useful guide, although some changes would be necessary—as discussed below—to ensure that any CAH statute will provide a robust preventative and accountability tool to deal with the most egregious crimes known to humankind. The remainder of this chapter discusses the elements of a CAH statute with reference to existing international criminal law, various US interagency equities at play, and the feasibility of enactment.

A. Constitutive Acts

Starting with substance, prior drafts of the proposed CAH statute contained a long list of constitutive acts, most of which were drawn from elsewhere within Title 18⁶¹ (e.g., rape, murder, enslavement, and torture). To these were added other federal crimes, such as hostage taking/kidnapping and trafficking, which are not generally included in international formulations of CAH but which find affinity with the more standard constitutive acts. In addition, certain crimes from the US War Crimes Act—such as performing biological experiments, mutilation, and cruel treatment—could easily be incorporated by reference into a CAH statute to enable the prosecution of additional forms of mistreatment as CAH.⁶² Many of these individual crimes do not find expression in standard international enumerations of CAH, but no matter.⁶³

59. § 519(e)(1)(A) (2010).

60. § 519(1)(B) (2010) (allowing suit only if 'the Secretary of State, the Secretary of Defense, and the Director of National Intelligence do not object to the prosecution'). It also included a clause directed at the International Criminal Court. § 519(h) ('Nothing in this section shall be construed as support for ratification of, or participation by the United States in, the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002, or to repeal or limit the applicability of the American Service-Members' Protection Act of 2002 (22 USC § 7421 et seq.)').

61. See S 1346 (n 55).

62. See 18 USC § 2441(d) (1996).

63. The Statute of the ICTY lists the following CAH: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. Statute of the

The original Durbin legislation also listed four discrete crimes that were defined by the proposed CAH legislation itself: extermination, arbitrary detention, ethnic and other forms of discriminatory cleansing, and the imposition of measures to prevent births. Pragmatic, expressive, and historical arguments exist for retaining arbitrary detention, deportation, and extermination in any new legislation, namely that these crimes best capture certain forms of violent conduct that have been listed as CAH since that concept's inception and may not fall within the four corners of other enumerated acts. Indeed, the crime of extermination—which in many respects captures the very essence of CAH—was central to the Nuremberg judgment and, accordingly, to all modern definitions of CAH. It offers a powerful charge in response to episodes of mass killing or severe mistreatment that do not amount to genocide because of a lack of evidence of specific intent or because the victims do not comprise a protected group. There is no crime of extermination within US law, however. In the original Durbin legislation, the crime against humanity of extermination was defined⁶⁴ similarly to the way it is formulated in the Rome Statute,⁶⁵ which in turn invokes the *actus reus* of genocide in the Genocide Convention.⁶⁶ Extermination has also been defined by the *ad hoc* international criminal courts,⁶⁷ so this jurisprudence offers another definitional source. All that said, acts of extermination could be addressed through multiple murder counts if a consensus definition proved to be elusive for whatever reason.

Including some notion of deportation or discriminatory 'cleansing' of parts of the civilian population is fitting not only to reflect the historical significance of mass deportations during the WWII period, but also because such acts often serve as a precursor to the commission of more violent acts against the civilian population (e.g., arbitrary detention, torture, or even extermination). The federal crime of 'kidnapping' is no substitute given that it contains a ransom/reward requirement that will not be satisfied by most forms of ethnic cleansing.⁶⁸ The unlawful deportation

International Criminal Tribunal for the Former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex [hereinafter ICTY Statute] art. 5, www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

64. The bill defined extermination as: 'subjecting a civilian population to conditions of life that are intended to cause the physical destruction of the group in whole or in part'.

65. The Rome Statute defines extermination at Article 7(2)(b) as including: 'the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 7.

66. 'Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' can constitute genocide. Art. II(c) Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

67. See eg *Prosecutor v Krstić* (Judgment) ICTY IT-98-33-T (19 April 2004) para 503 (finding that to prove extermination 'there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population').

68. 18 USC § 1201(a) (1948).

or forced transfer of protected persons constitutes a war crime within the Fourth Geneva Convention⁶⁹ and the US War Crimes Act⁷⁰ when committed within the context of an international armed conflict. As such, it should be uncontroversial to designate the forced transfer of individuals as a punishable crime against humanity so long as the CAH statute's gravity thresholds would prevent the quotidian exercise of immigration law from being challenged under the statute.⁷¹

One crime against humanity that has not been incorporated into prior iterations of the draft CAH statute is the crime of persecution,⁷² notwithstanding that it has been listed in all definitions of CAH since World War II. History reveals that acts of persecution are often a prelude to, or accompany, more violent acts. Various genocide watch lists of countries-at-risk rely on acts of persecution as critical harbingers of future violence.⁷³ Including persecution as a prosecutable offense would enable the CAH statute to serve an atrocities prevention function, given that charges could be brought before a situation has devolved into full-scale lethal violence or a campaign of extermination. At the same time, persecution is an expansive term of art under immigration and refugee law, which may render it difficult to translate into the US penal context.

In fact, there may be resistance to including any constitutive act that does not have a ready analog in Title 18 because this conduct may implicate US immigration or national security policies and thus open the United States up to CAH claims (e.g., under the Federal Tort Claims Act⁷⁴). It is not clear, however, that plaintiffs would allege (and a fortiori that judges would find liability for) the commission of CAH with respect to any immigration policy or other practice because it would be near impossible to prove the threshold predicate of a widespread or systematic attack against the civilian population. The Supreme Court has in recent years raised the pleading standard in such a way that suggests that few CAH claims would survive

69. Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva (12 August 1949) art. 147.

70. 18 USC § 2441(c)(1) (1996) (incorporating the Geneva Conventions' enumerated grave breaches).

71. The amended version of the Durbin bill included a *lex specialis* provision prioritizing international humanitarian law in the event of a conflict. Specifically, § 519(f) read: 'Nothing in this section shall be construed to make unlawful conduct pursuant to the laws of war.'

72. Persecution has been defined in Article 7(2)(g) of the ICC Statute as: 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'. The ICC Statute at Article 7(1)(h) allows for charges of persecution for acts taken against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'.

73. See Barbara Harff and Ted Robert Gurr, 'Hazard Assessments 2015: Potential State Perpetrators of Genocide and Politicide', www.gpanet.org/node/567 (last accessed 18 August 2017).

74. 28 USC § 1346.

a Federal Rule of Civil Procedure 12(b)(6) motion under these scenarios.⁷⁵ As such, fears of opening the United States up to expanded liability are unrealistic. It is also not clear that adding crimes against humanity that do not already appear within Title 18 will generate *more* litigation than the United States is already engaged in when it comes to its policies in these contexts; the creation of a CAH statute might just create new arguments for litigants.

The Durbin model of incorporating other federal crimes by reference into the definition of CAH is obviously not consistent with the formulation of the crime under international criminal law (ICL) and other national statutes around the globe. This could generate criticism that the United States is furthering US exceptionalism or endeavoring to truncate the reach of CAH by not adhering to extant international law.⁷⁶ Indeed, it will be difficult for the United States to justify departing too far from the standard list of CAH as the US government was instrumental in drafting those international definitions in the first place—in Nuremberg and Tokyo after WWII, as a permanent member of the Security Council (which promulgated the statutes of the ICTY and the International Criminal Tribunal for Rwanda), and also as an active participant in the Rome Conference, which produced the ICC Statute and a definition of the crime that enjoys a broad international consensus. At the same time, relying on preexisting crimes within Title 18 will ease application of the new statute, because any prosecution for CAH will be able to rely on established jurisprudence and avoid legality or vagueness challenges. This approach may also offer some comfort to US actors more cautious about a wholesale incorporation of international law—in terms of penal definitions and related jurisprudence—into US law. Although the bulk of the ICC's CAH jurisprudence is unobjectionable so far, subsequent judgments could conceivably depart from bounds that are acceptable to elements of the US government. This Title 18 incorporation approach also guards against an overreliance on customary international law. Various US government actors are wary of creating a vector for customary international law-based arguments that can be exploited by litigants (and judges) to expand liability. For example, it is the Civil Division of the DOJ that must defend US officials in actions brought against them; it no doubt prefers litigating under established US legal standards rather than international law.

B. Gravity Threshold

Under international criminal law, CAH are distinguished from ordinary crimes in that they are committed in the context of a widespread or systematic attack against a civilian population and the defendant acts with knowledge that his or her actions are part of that attack. Both of these modifiers (widespread and systematic) enjoy

75. See eg *Bell Atlantic Corporation v Twombly* 550 US 544, 570 (2007) (requiring plaintiffs to allege 'enough facts to state a claim to relief that is plausible on its face'); *Ashcroft v Iqbal* 556 US 662 (2009).

76. Because some of the constitutive crimes are subject to the death penalty, this may be a source of criticism as well given the global trend toward abolishing the death penalty, even for serious international crimes. Presumably, any CAH statute would either incorporate extant penalties by reference or allow for imprisonment 'for any term of years or life' like other serious crimes within Title 18. See eg 18 USC § 2241 (1986) (aggravated sexual assault).

relatively stable definitions in ICL. 'Widespread' generally 'refers to the large-scale nature of the attack and the number of targeted persons'⁷⁷ (although there is no consensus on the numbers of victims required). 'Systematic' in turn 'has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts, or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis"'.⁷⁸

The original Durbin legislation actually employed a conjunctive formulation, requiring a showing of the existence of a widespread *and* systematic attack against a civilian population. This runs counter to the compromise that was reached during the drafting of the Rome Statute, which resulted in the 'or' formulation coupled with a definition of 'attack' that requires a showing of a state or organizational policy.⁷⁹ The optics of this potential departure from established law in the Durbin bill would have stoked claims of US exceptionalism while only marginally raising the bar for prosecution. Simply mirroring the ICC formulation for this chapeau element would avoid these criticisms.

C. Personal Jurisdiction

Assuming these definitional matters can be resolved, the real challenge is likely to concern the jurisdictional reach of the future legislation. Having the statute allow for the exercise of jurisdiction over US nationals, lawful permanent residents (LPRs), CAH committed in United States, and CAH committed against US nationals or service members is uncontroversial.⁸⁰ And yet, these jurisdictional grounds are unlikely to enable many actual cases. It will be rare that CAH will be committed on US territory (the attacks of September 11th being a tragic exception), although it may be more likely that a US citizen (or LPR) is accused of committing CAH somewhere abroad (and dual national Chuckie Taylor offers a regrettable example).⁸¹ For the proposed statute to have a tangible impact on the United States' atrocities prevention and response capacity, however, it will be crucial for it to authorize prosecutions under principles of universal jurisdiction, in keeping with other atrocity crimes statutes within Title 18. Allowing for some form of present-in jurisdiction over non-nationals who commit CAH abroad would ensure that the CAH statute

77. Decision on the Prosecution Application under Article 58(7) of the Statute, *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, ICC-02/05-01/07, Pre-Trial Chamber I, ICC, 27 April 2007, para 62; see also Decision on the Confirmation of Charges, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Pre-Trial Chamber I, ICC, 30 September 2008, para 394.

78. *Katanga and Chui* (n 77) para 397.

79. Beth Van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence' (1999) 37 *Columbia J Intl L* 844–45, fn 279 (recounting negotiations).

80. *Wilson v Girard* 354 US 524, 529 (1957) ('A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction').

81. *United States v Charles Emmanuel* 2007 US Dist LEXIS 48510 (SD Fl 2007) (upholding the constitutionality of the federal torture statute).

is not a dead letter upon passage. In fact, Congress could use the occasion of enacting the CAH statute to extend universal jurisdiction over war crimes as well with an amendment to the War Crimes Act.⁸² The most compelling rationale for this latter proposal is that the United States is at present out of compliance with the 1949 Geneva Conventions—an important multilateral treaty regime that enjoys universal ratification. As noted, at various points in time, all key executive agencies—the Departments of State, Defense, and Justice—are on record in acknowledging this treaty obligation and advocating for US compliance thereto.⁸³

The United States can already exercise present-in jurisdiction (and other forms of extraterritorial jurisdiction) over a number of international crimes—including crimes of terrorism (e.g., the provision of material support to terrorism, receiving terrorist training, and engaging in terrorist bombings), genocide, the recruitment and use of child soldiers, torture, trafficking, piracy, peonage, and other modern-day forms of slavery, such as the use of forced labor. 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 Torture Convention.⁸⁴ 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 Genocide Convention.⁸⁵ This policy choice no doubt reflects the gravity of the crime, the perceived utility of present-in jurisdiction, a permissive customary international law rule,⁸⁶ and modern expectations that states should enact robust penal regimes for atrocity crimes. If the proposed CAH statute were limited to territoriality or nationality jurisdiction, it would raise questions about the United States' commitment to repress a crime that is arguably more serious than certain acts of terrorism or the use of child soldiers, which are subject to more expansive

82. For example, language in the form of a conforming amendment to the War Crimes Act could be included in the CAH statute to ensure that the jurisdictional regimes are consistent.

83. See text accompanying note 35. Although the Geneva Conventions do not mandate the exercise of universal 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 US courts to engage in complex conflict classification exercises.

84. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res 39/46 (10 December 1984) Annex 39, Supp No 51, UN Doc A/39/51, 197. See also The Torture Victim Protection Act of 1991, Sen Rep No 102-249 (26 November 1991) ('according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over "offenses of universal interest."') (citations removed).

85. Art. VII Genocide Convention (n 66).

86. The Restatement (Third) of Foreign Relations Law indicates at § 404 that: 'A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 [i.e., territoriality, nationality] is present'. This is confirmed by International Court of Justice Judges Buergenthal, Kooijmas, and Higgins, who noted: 'universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful'. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (2002) para 46.

jurisdictional regimes under current US law. Extending such present-in jurisdiction to both war crimes and CAH would bring greater coherence to the US penal code, and eliminate the current patchwork approach, while at the same time signaling a US commitment to enable its courts to prosecute all atrocity crimes in equal measure. It would also be in keeping with many foreign statutes and would signal a US willingness to play its part in ensuring that those who commit the worst international crimes are brought to justice.

To be sure, it may be argued that allowing for the exercise of jurisdiction on some basis other than nationality or territoriality may hinder the United States' ability to make principled arguments against other states' exercise of expansive forms of jurisdiction against US citizens, or even increase the risk of reciprocal litigation against US persons abroad, including the advancement of charges that may be frivolous or politicized. Reciprocity arguments may be animated by two distinct, but not unrelated, perceived threats: (1) suits against principal-level personnel who are temporarily present in a foreign jurisdiction on official or unofficial business or whose essential travel to foreign jurisdictions would be hampered by the existence, or threat, of an arrest warrant for alleged crimes committed elsewhere; and (2) suits against personnel who are deployed for extended periods of time in a foreign jurisdiction.

In many respects, these concerns exaggerate the impact that the United States' enactment of a present-in statute would have on other states' legislative and prosecutorial choices. The latter risk of prosecution of the rank-and-file will be mitigated in many cases by the existence of a comprehensive web of Status of Forces Agreements (SOFAs) that regulate penal jurisdiction.⁸⁷ For example, the NATO SOFA governs all NATO members—many of which have robust universal jurisdiction regimes—as well as those countries participating in the NATO Partnership for Peace program.⁸⁸ There are another sixty or so bilateral SOFAs in force. These SOFAs generally create shared jurisdiction between the United States and the other signatories,⁸⁹ although

87. See R Chuck Mason, 'Status of Forces Agreement (SOFA): What It Is, and How Has It Been Utilized?' (15 March 2012), <http://fas.org/sgp/crs/natsec/RL34531.pdf>; Department of Defense Directive 5525.1 (7 August 1979), www.dtic.mil/whs/directives/corres/pdf/552501p.pdf (noting DOD policy to 'protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons').

88. See Mason (n 87) 21 (cataloging SOFAs).

89. For example, the NATO SOFA provides at Article VII:

3. In case where the right to exercise jurisdiction is concurrent the following rules shall apply: (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent; (ii) offences arising out of any act or omission done in the performance of official duty.

Except, this provision does not apply where the sending state cannot punish the underlying criminal offense per Article VII(2)(b): 'The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable

some grant exclusive penal jurisdiction to the United States.⁹⁰ Many SOFAs, including the one entered into with Afghanistan in 2002, provide that Department of Defense (DOD) military and civilian personnel enjoy the same status as the administrative and technical staff of US embassies under the 1961 Vienna Convention on Diplomatic Relations,⁹¹ which would render such personnel immune from criminal prosecution except with respect to acts performed outside the course of their duties.⁹²

To be sure, a SOFA is not a panacea, as seen in the *Romano* case in Italy (which involved the classic exercise of territorial jurisdiction as opposed to any form of extraordinary jurisdiction). Notwithstanding the NATO SOFA, Joseph L. Romano, a lieutenant colonel of the US Air Force, was prosecuted in absentia in connection with an extraordinary rendition that led to the torture of the individual abducted.⁹³ If properly asserted and adhered to,⁹⁴ however, SOFAs should provide a strong measure of protection against suits involving DOD personnel deployed to a foreign jurisdiction. At the same time, some SOFAs, including the NATO SOFA, grant exclusive jurisdiction to the receiving state over offenses ‘punishable by its law but not by the law of the sending state.’⁹⁵ Where these clauses are in force, the enactment of a CAH statute would actually *enhance* the United States’ ability to assert a SOFA in defense of covered personnel who might be prosecuted for CAH elsewhere since this version of ‘double criminality’ would exist.

by its law but not by the law of the sending state.’ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (London, 19 June 1951), www.nato.int/cps/en/natohq/official_texts_17265.htm.

90. Mason (n 87) 4.

91. Vienna Convention on Consular Relations, art. 37(2), 18 April 1961, 23 UST 3227 (‘Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties’).

92. Mason (n 87) 8.

93. Romano was prosecuted along with Central Intelligence Agency personnel who did not benefit from the SOFA. See Chris Jenks and Eric Talbot Jensen, ‘All Human Rights Are Equal, But Some Are More Equal than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights’ (2010) 1 *Harvard National Security J* 171. LTC Romano was pardoned, likely due to his entitlement to the terms of the SOFA. The Italian government later pardoned or reduced the sentences of some of the CIA personnel involved in the rendition. See Crispian Balmer, ‘Italian President Offers Pardons in CIA Rendition Convictions’, *Reuters*, 23 December 2015. A Portuguese court recently ruled that it could extradite ex-CIA agent Sabrina De Sousa to Italy to serve her six-year sentence. ‘Portuguese Court Rules to Extradite Ex-CIA Agent to Italy’, *NewsMaxWorld*, 16 January 2016. However, on the day before she was to be extradited, the Italian President partially pardoned her and reduced her sentence.

94. See *De Sousa v Department of State* 840 F Supp 2d 92 (DDC 2012) (originally arguing that the Department of State failed to assert a SOFA in a timely manner).

95. See NATO SOFA (n 89).

When it comes to the perceived threat against high-ranking US personnel, it is not clear how the United States' enactment of a CAH statute would increase the risk of suit abroad. A significant number of states, from all regions of the world, have already enacted domestic legislation premised on universal jurisdiction⁹⁶ in compliance with treaty obligations, upon ratification of the ICC Statute, or to further national policies dedicated to the prevention of, or accountability for, atrocity crimes. This cohort is likely to increase as more states join the ICC⁹⁷ and ratify the myriad penal treaties mandating the exercise of universal jurisdiction over international crimes. Indeed, the Commonwealth Expert Group has issued a model law for domestic implementation of the Rome Statute that provides for expansive jurisdiction, either through present-in jurisdiction or through pure universal jurisdiction without any nexus requirements.⁹⁸ As such, the risk to US personnel already exists to a certain degree and is unlikely to increase if the United States enacts its own CAH statute with present-in jurisdiction. To be sure, a handful of cases have already been brought against US persons abroad under theories of universal jurisdiction;⁹⁹ however, the United States has always successfully defended against these suits on complementarity grounds and through diplomatic action, resulting in the suits' dismissal at early procedural stages.¹⁰⁰ Indeed, as revealed in a monumental study of the practice of universal jurisdiction, the vast majority of prosecutions have been against non-US persons.¹⁰¹ Other states no doubt will continue to recognize the high costs

96. See eg 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World,' *Amnesty International*, 2011, 13 (noting that 'at least 90 (approximately 46.6%) UN member states have included at least one crime against humanity as a crime under national law and at least 78 (approximately 40.4%) UN member states have provided for universal jurisdiction over such crimes'). The Library of Congress has compiled many of these statutes here: www.loc.gov/law/help/crimes-against-humanity/index.php.

97. The Rome Statute does not require parties to enact domestic legislation criminalizing ICC crimes. However, its preamble suggests that states have an obligation to prosecute atrocity crimes by recalling 'that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.' Rome Statute (n 65) Preamble. The principle of complementarity offers an incentive to states (both parties and non-parties) to enact such statutes so that they can prosecute their own nationals for ICC crimes and pre-empt ICC action. In November 2012, the ICC Assembly of State's Parties adopted a resolution on complementarity noting that 'the proper functioning of the principle of complementarity entails that States incorporate the crimes set out in articles 6, 7 and 8 of the Rome Statute as punishable offences under their national laws, to establish jurisdiction for these crimes and to ensure effective enforcement of these laws, and calls on States to do so'. See Resolution ICC-ASP/11/Res.6, Complementarity, 21 November 2012, para 6.

98. Model Law to Implement the Rome Statute of the International Criminal Court, art. 13, www.iccnw.org/documents/ModelLawToImplementRomeStatute_31Aug06.pdf.

99. See Beth Van Schaack and Zarko Perovic, 'The Prevalence of "Present-In" Jurisdiction' (2013) *ASIL Proceedings* 237 (cataloguing efforts), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705551.

100. *Ibid* 242.

101. Maximo Langer, 'The Diplomacy of Universal Jurisdiction' (2011) 105 *AJIL* 1, 2 ('universal-jurisdiction-prosecuting states have strong incentives to concentrate on defendants who impose

associated with bringing suit against US principals, regardless of the US statutory framework for prosecuting international crimes.

In fact, drafting a present-in statute with appropriate safeguards and limiting principles could bolster the United States' ability to oppose the exercise of more extraordinary, and problematic, forms of extraterritorial jurisdiction while at the same time shaping international practice in a manner beneficial to long-term US interests. Such a statute will also generate broad-based praise from US allies, civil society, international human rights bodies, and other observers who might offer the United States a margin of appreciation in other areas in which it is subject to criticism.

D. Forms of Responsibility

Turning to forms of responsibility, under US federal law, individuals may be prosecuted as principals and accomplices,¹⁰² as accessories after-the-fact,¹⁰³ under theories of attempt,¹⁰⁴ and when they commit crimes as part of a conspiracy.¹⁰⁵ 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 the proposed CAH statute could fill. Because the doctrine of superior responsibility already finds expression in other areas of US law—including US military, tort, and immigration law—devising an appropriate standard for CAH, which could also apply to other atrocity crimes within Title 18, should be straightforward. This would better rationalize the US legal framework addressed to atrocity crimes.

The clearest articulation of the doctrine 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.¹⁰⁶ This definition could simply be incorporated by reference to apply to CAH and other atrocity crimes litigation.¹⁰⁷ The federal courts have also adjudicated

low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs'; *ibid.* (noting that most defendants are 'the type of defendants that the international community has most clearly agreed should be prosecuted and punished and that their own states of nationality have not defended').

102. 18 USC § 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').

103. 18 USC § 3 (1948).

104. See eg 18 U.S.C. § 1113 (1948) (Attempt to commit murder or manslaughter).

105. 18 USC § 371 (1948).

106. 10 USC § 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').

107. For example, chapeau language could read: 'It shall be unlawful for any person to commit, order, aid or abet, or otherwise participate, including through superior responsibility, in any of the following acts'. Later, the statute could define superior responsibility with reference to the Military Commission Act.

superior responsibility cases in the context of suits under the Alien Tort Statute and the Torture Victim Protection Act.¹⁰⁸ And, under 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.¹⁰⁹ The doctrine is also well established in international criminal law (and is prosecutable before all the international criminal tribunals), international humanitarian law,¹¹⁰ customary international law,¹¹¹ and foreign law, including the codes of our closest allies.¹¹² Including superior responsibility as a punishable form of responsibility would extend the reach of US 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.

108. See eg *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).

109. Presidential Proclamation 8697 (n 42) (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'). Section 212(a)(3)(E) of the INA bars 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—formulation that has been interpreted to include superior responsibility. For example, in *In re D-R-*, 25 I. & N. Dec. 445 (BIA 2011), 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.

110. Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts, arts 86–87 (8 June 1977). 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 (29 January 1987), www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf. Indeed, the Army Field Manual & Regulations incorporated a parallel formulation of superior responsibility. See *US Army Field Manuals and Regulations*, FM 27-10, § 501. See also Department of Defense, *Law of War Manual*, June 2015 § 18.23.3.2.

111. The International Committee of the Red Cross, *Customary International Humanitarian Law*, Rule 153, www.icrc.org/customary-ihl/eng/docs/v2_rul_rule153:

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.

112. 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.

E. Circumscribing Prosecutorial Discretion

Beyond the substance of the proposed legislation, the Durbin draft legislation contained some limiting principles to satisfy concerns about US prosecutors bringing cases on the basis of universal jurisdiction that might embroil the United States in international disputes and undermine other international justice initiatives.¹¹³ Such preconditions would be unnecessary for prosecutions with a connection to the United States—such as when the crime was committed in the United States, by a US defendant, or against a US victim—but might be appropriate for a case in which the sole nexus to the United States is the presence of the defendant. For example, to cabin prosecutorial discretion, any prosecution for CAH against such a present-in-defendant could require the advanced approval of a high-ranking Department of Justice official. In order to ensure high-level and focused attention, such an approval authority could be rendered non-delegable. The United States Attorneys' Manual ('Manual') already states that no prosecution for torture, war crimes, the recruitment of child soldiers, or genocide can go forward without the approval of the assistant attorney general for the Criminal Division.¹¹⁴ This provision could easily be amended to list the new CAH statute. Theoretically, this lock-and-key requirement would not be subject to judicial review, as is the case with similar provisions in other related US statutes.¹¹⁵ Many foreign universal jurisdiction statutes have similar safeguards against overreaching, such as some sort of prior approval by a Chief of Public Prosecution.¹¹⁶

As an additional political safeguard, and to ensure that the DOJ is aware of any interagency equities (i.e., interests) that might be impacted upon by a particular CAH prosecution, the statute, implementing regulations, or Manual could include some requirement that the approving official inform or consult with elements of the interagency before allowing a universal-jurisdiction CAH prosecution to go forward. A consultation requirement in the Manual could ensure that potential adverse impacts are fully aired and considered before a universal jurisdiction prosecution is commenced, but it could not realistically grant a veto power to any other agency

113. It should be noted, however, that some (or even all) of these options, if applied to grave breaches of the Geneva Conventions, could leave the United States out of compliance with its treaty obligations, which suggest an absolute duty to prosecute grave breaches of the treaties.

114. See Department of Justice, *US Attorneys' Manual*, § 9-2.139 ('Notification, Consultation, and Approval Requirements for Torture, War Crimes, Genocide, and Child Soldiers Matters').

115. As an example, see 18 USC § 2332(d) (1986): 'No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate or retaliate against a government or a civilian population.'

116. The Commonwealth model law includes language to this effect. (n 98) For example, Uganda's CAH statute provides that no prosecution can proceed without the consent of the Director of Public Prosecutions. The International Criminal Court Act, art. 17, <https://www.ulii.org/ug/legislation/act/2010/11/International%20Criminal%20Court%20Act,%202010.pdf> (last accessed 18 August 2017)

in light of the elemental principles of prosecutorial independence and discretion.¹¹⁷ Because the Manual would be more easily amended than the CAH statute itself, it would make sense to render this requirement sub-statutory in case adjustments are necessary. In any case, prosecutorial agencies would likely resist efforts by Congress to interfere in law enforcement decisions and the exercise of prosecutorial discretion by mandating any particular certification in the CAH statute itself.

The exercise of prosecutorial discretion over universal jurisdiction CAH cases could also be guided by a set of factors either identified in the Manual or developed through practice. These could include such questions as whether the underlying conduct is criminal in the territorial state¹¹⁸ (borrowing from the concept of double criminality)¹¹⁹ or whether the crime in question had been, or is being, prosecuted elsewhere.¹²⁰ The former factor would provide a notice function vis-à-vis the defendant and also a form of implied or constructive consent, that is, to confirm that the state with the tightest nexus to the deleterious conduct agrees to its criminality.¹²¹ The latter provision would operate as a soft inter-jurisdictional complementarity or double jeopardy provision (*ne bis in idem*).¹²² It would also avoid the foreign policy implications of the United States repeating a prosecution that has already gone forward elsewhere, and ensure the efficient deployment of prosecutorial resources. Focusing on complementarity (or subsidiarity) would promote prosecution in the

117. An amended version of the Durbin legislation contained what amounted to a veto, a provision that garnered widespread criticism from human rights groups as well as the DOJ. (n 55)

118. Several states have adapted this concept to the jurisdictional inquiry to bar the extraterritorial prosecution of a non-national accused of international crimes unless the conduct in question was also criminal in the state of nationality or the place of commission. See eg Código Penal Federal, Art. 4(III) (14 July 2014) (Mex), www.diputados.gob.mx/LeyesBiblio/pdf/9.pdf (allowing for extraterritorial jurisdiction so long as the infraction was criminal in the *locus delicti*).

119. By way of example, the Extradition Agreement with the European Union, Art. 4(1), provides that 'An offense shall be an extraditable offense if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty'.

120. For example, the Military Extraterritorial Jurisdiction Act (MEJA) provides: 'No prosecution may be commenced . . . if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the attorney General or the Deputy Attorney General . . . whose function of approval may not be delegated'. 18 USC § 3261(b) (2000).

121. See *Memorandum for the United States as Amicus Curiae, Filártiga v Pena-Irala*, reprinted in 19 ILM 585, 605 (1980) (noting that the tort of torture was unlawful under Paraguayan law: 'the compatibility of international law and Paraguayan law significantly reduces the likelihood that court enforcement would cause undesirable international consequences').

122. This is the approach Congress adopted in 18 USC § 1119 (1994) (Foreign Murder of United States Nationals):

(c)(1) No prosecution may be instituted against any person under this section except upon the written approval of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated. No prosecution shall be approved if prosecution has been previously undertaken by a foreign country for the same conduct.

forum with the closest nexus to the crime. Any such factor, however, should be premised on the other state showing substantial and bone fide prosecutorial progress, and should allow a US case to go forward in the event that the other proceedings are not credible, expeditious, or fair.¹²³ To the extent that any complementarity determination is made in consultation with the Department of State, it should be with the Legal Adviser's office, as this is a legal, rather than a foreign policy, question. In the event that the DOJ decides to stay its hand, extradition to the prosecuting state should follow so that the suspect is transferred to the foreign prosecuting authorities to avoid impunity. In this regard, the CAH statute could also include a provision on extradition, given that the United States ordinarily will not extradite a suspect absent an extradition treaty or other authority.¹²⁴

Other potential factors to guide prosecutorial discretion could include consideration of whether (1) the conduct took place in a country in which the person is no longer present, and (2) the country lacks the ability to lawfully secure the person's return. These determinations might be undertaken in consultation with the Department of State to reflect the fact that this inquiry involves country conditions and extradition practice.¹²⁵ There should be no objection to the United States going forward with a prosecution when the state with the most obvious nexus to the crime—the territorial state—is disempowered to proceed as the suspect has departed and there are no prospects of his or her extradition. Allowing a US case to go forward under these circumstances would prevent impunity for the crime. This weighing of factors should be a gestalt process to avoid the possibility of death by a thousand certifications. Such determinations would not be made public or subject to judicial review. In any case, any requirement that the DOJ make such findings should be necessary only for cases involving the exercise of 'present in' jurisdiction on the theory that the United States should be entitled to exercise jurisdiction over CAH without limits on the basis of territorial and nationality (active and passive) principles.

To be sure, many human rights groups will advocate for more unfettered prosecutions. It is unlikely, however, that Congress would enact a CAH statute that would not address concerns within the interagency about reciprocity and prosecutorial overreaching. Some of the legislative devices discussed above find expression in the statutes of other nations; as such, the United States' following suit is not likely to be perceived as a major anomaly. Moreover, many of these options are in keeping with an ethos of jurisdiction by necessity—allowing for the exercise of extraterritorial

123. The ICC employs a same person/substantially the same conduct test to ascertain whether the state has taken concrete steps to determine whether the same individual is responsible for the same conduct as alleged in the case before the ICC. See *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, The Prosecutor v Francis Kirimi Muthaura et al.*, ICC-01/09-02/11 OA, ICC, 30 Aug 2011.

124. See Manual (n 114) § 9-15.100.

125. 18 USC § 1119(c)(2) (1994) offers such a model: 'No prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return.'

jurisdiction where there is no other forum genuinely investigating or prosecuting the crimes in question.

VI. SECOND ORDER BENEFITS

In addition to contributing to the United States' atrocity prevention and response agenda, enacting a CAH statute, including the doctrine of superior responsibility, will redound to the United States' benefit in other ways. For one, being able to demonstrate the capacity to prosecute the full range of international crimes will enhance the United States' ability to invoke the principle of complementarity in the face of prosecutions against US nationals (and allied personnel) abroad—so-called horizontal complementarity.¹²⁶ Indeed, when foreign authorities have initiated prosecutions against US personnel, the United States in its defensive submissions has consistently invoked complementarity as its primary argument in opposition to such proceedings (and has never legally challenged the foreign statute or its jurisdictional provisions).¹²⁷ In addition, given that the ICC is focused on a situation in which US nationals may be at risk of prosecution,¹²⁸ having such a statute on our books will better position the United States to invoke vertical complementarity at the admissibility stage vis-à-vis the ICC.¹²⁹ Although the principle of complementarity arguably only requires a domestic prosecution for the underlying criminal *conduct*, regardless of how such conduct is *legally characterized* in the charging instrument,¹³⁰ it cannot be gainsaid that complementarity arguments will be more compelling—and the US government will be more able to protect U.S. nationals from prosecution—if it is possible for potential domestic charges to match those of the international or foreign

126. David Scheffer, the first Ambassador-at-Large for War Crimes Issues testified, to this effect before Congress in support of Senator Durban's Crimes Against Humanity Act:

The United States stands at a comparative disadvantage with many of its major allies that have modernized their national criminal codes in recent years with incorporation of the atrocity crimes, in part so as to shield their nationals from investigation and prosecution by the International Criminal Court ("ICC") by demonstrating national ability to prosecute such crimes and thus invoke the ICC's principle of complementarity, which defers to national investigations and prosecutions. Paradoxically, even as a non-party to the Rome Statute of the ICC (the "Rome Statute"), the United States today essentially stands more exposed to its jurisdiction than do American allies that have modernized their criminal codes.

Scheffer (n 6) 32 (citations removed).

127. See Letter from DOJ, Criminal Division to Ms. Paula Mongé Royo, 1 March 2011, <http://warisacrime.org/sites/afterdowningstreet.org/files/dodspain.pdf>; Van Schaack and Perovic (n 99) 237.

128. See Report on Preliminary Examination Activities 18, 14 November 2016 (Office of the Prosecutor), www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (discussing Afghanistan situation).

129. See Rome Statute (n 64) Arts 17–19.

130. Darryl Robinson, 'In Defense of the "Same Conduct" Test for Admissibility' (*Opinio Juris* 24 January 2012), http://opiniojuris.org/2012/01/24/hilj_robinson-response-to-heller/.

tribunal. More generally, the domestication of this well-established international crime will signal a commitment to the principle of complementarity writ large (i.e., that national authorities have a duty to, and should accordingly take the lead on, prosecuting atrocity crimes committed by their citizens). Strengthening the complementarity norm presents the prospect of interest convergence between those US agencies seeking to strengthen US prosecutorial authorities and those agencies that are more circumspect about advancing the global exercise of universal jurisdiction.

By enacting a CAH statute, the United States could also establish a model legal framework that other states may be encouraged to emulate, contribute to the development of CAH jurisprudence, and place itself in a stronger position to influence the International Law Commission (ILC) as it drafts a multilateral CAH Convention.¹³¹ According to Sean Murphy's study in connection with the ILC's CAH effort, approximately half of all states have some form of a CAH statute.¹³² This includes close US allies, many of who have incorporated CAH into their domestic codes in connection with their ratification of the ICC Statute.¹³³ There is, however, a high degree of variation in these statutes: some reproduce Article 7 of the Rome Statute verbatim (including the definitional section), some incorporate just the chapeau and enumerated acts of that article, some pick and choose elements of the Rome Statute, and others incorporate idiosyncratic definitions of the crime altogether.¹³⁴ Some are premised on pure universal jurisdiction, meaning a case can go forward absent any nexus to the forum; others contain some limiting principles. Some allow victims to initiate suits as *parties civiles*; others require some formal governmental approval. Modeling a 'responsible' international criminal law regime through our own penal code and concomitant jurisprudence will preserve—if not strengthen—the United States' ability to exert effective diplomatic pressure in the face of exercises of jurisdiction over international crimes against US or allied personnel and to encourage other states to adopt similar limiting principles in their own domestic legislation.¹³⁵

Finally, by enacting a CAH statute, the United States will more firmly situate itself within established international law, signaling that it takes seriously potential

131. ILC, 'Report of the Work of its 66th Session' (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10, 265 (adding CAH Convention to the ILC's programme of work and appointing Prof. Sean Murphy as rapporteur), <http://legal.un.org/ilc/reports/2014/2014report.htm>. Although the United States might not join such a treaty immediately, having a CAH statute on the books would facilitate ratification in the future if so desired given that the United States historically brings its law into compliance before joining treaty regimes.

132. ILC, 'Report of the Work of its 65th Session' (6 May–7 June and 8 July–9 August 2013) UN Doc A/68/10, Annex B, 143 fn 17, <http://legal.un.org/ilc/reports/2013/2013report.htm>.

133. By way of example, four-fifths of the members of the NATO-led International Security Assistance Force (ISAF) in Afghanistan have on the books a CAH statute authorizing universal jurisdiction.

134. See Mahmoud Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press 2011) 640 (surveying national legislation).

135. In this regard, these proposals also implicate a PSD-10 recommendation aimed at building the domestic capacity of countries that have endured mass atrocities to bring perpetrators to justice in their own courts.

customary international law obligations to prosecute atrocity crimes and avoiding the impression that it is excluding itself from the global system of international criminal justice. This stance will better inoculate the United States against criticisms premised on presumed US exceptionalism. Even if the number of actual prosecutions under US law is ultimately small, the expressive functions of a CAH statute are of great value. And, a single case can produce far-reaching reverberations in terms of messaging a commitment to end impunity and refusing to provide a haven for perpetrators of international crimes.

VII. PROSPECTS FOR PASSAGE

Even with a Republican-controlled Congress and a new presidential administration, a CAH statute is within reach. Over the years, atrocity crime statutes have enjoyed consistent bipartisan support. For example, Senators Dick Durbin (D-IL) and Tom Coburn (R-OK) introduced the bills that became the Genocide Accountability Act, the Child Soldiers Accountability Act, and the Trafficking in Persons Accountability Act,¹³⁶ all of which were unanimously passed by Congress and signed into law by President George W. Bush. A whole range of other human rights statutes have earned bipartisan support as well. The Magnitsky Act—named for the Russian corruption whistleblower Sergei Magnitsky who died in Russian custody in 2009—was also authored by Senator Cardin and passed in 2012 with unprecedented bipartisan support (365-43 in the House and 92-4 in the Senate).¹³⁷ The Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 passed by unanimous consent and was signed into law by President Obama in 2010.¹³⁸

Although the United States lacks a substantive crimes against humanity statute, all branches of the government have endorsed the concepts of CAH and present-in-jurisdiction. For example, Congress, with strong bipartisan support, created the United States' War Crimes Reward Program (WCRP) to pay rewards leading to the arrest or capture of individuals indicted for crimes against humanity and other international crimes by the Yugoslav, Rwandan, or Sierra Leone tribunals. Following the success of the Program in securing the arrest of indictees, Congress amended the Program in 2013 to extend it to individuals indicted by any international or hybrid criminal tribunal, including the International Criminal Court.¹³⁹ Specifically, the Program allows the United States to pay a reward to an informant

for information leading to the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal (including a hybrid or

136. Kevin J Heller, 'U.S. Jurisdiction over Genocide, Human Trafficking, and Child Soldiers' *Opinio Juris* (19 November 2007), <http://opiniojuris.org/2007/11/19/us-jurisdiction-over-genocide-human-trafficking-and-child-soldiers/>.

137. Sergei Magnitsky Rule of Law Accountability Act of 2012, 126 Stat § 1496 (2012). No one was ever prosecuted for Magnitsky's death and, in fact, Magnitsky himself was posthumously convicted of tax evasion.

138. Public Law 108-283.

139. Department of State Rewards Program Update and Technical Corrections Act of 2012, Pub Law 112-283 (2013).

mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide.¹⁴⁰

Soon after, Secretary Kerry designated the members of the Lord's Resistance Army and two rebel leaders active in the Democratic Republic of the Congo who are the subject of ICC arrest warrants into the Program.¹⁴¹

CAH appear elsewhere in the US Code. Most important, Congress has directed the president, with the assistance of the secretary of state and the Ambassador-at-Large for War Crimes Issues, to 'collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law' with an eye toward ensuring accountability.¹⁴² In particular:

The President shall consider what actions can be taken to ensure that any government of a country or the leaders or senior officials of such government who are responsible for crimes against humanity, genocide, slavery, or other violations of international humanitarian law . . . are brought to account for such crimes in an appropriately constituted tribunal.

Although the American Service-Members Protection Act of 2002 (ASPA) bars many forms of generalized cooperation with the International Criminal Court,¹⁴³ the so-called Dodd Amendment provides an important case-by-case exception:

Nothing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.¹⁴⁴

The United States can thus assist the International Criminal Court with prosecutions of foreign nationals accused of committing CAH notwithstanding other elements of ASPA.

Turning now to the executive branch, the United States has been instrumental in standing up and supporting—financially, diplomatically, and logistically—the ad hoc international tribunals,¹⁴⁵ almost all of which exercise jurisdiction over crimes

140. 22 USC § 2708(B)(10) (2013).

141. Department of State, 'Secretary Kerry on Bringing War Criminals to Justice through Expansion of the War Crimes Rewards Program' (3 April 2013), www.state.gov/r/pa/prs/ps/2013/04/207033.htm.

142. Investigations of Violations of International Humanitarian Law, 22 USC § 8213 (2007).

143. 22 USC § 7421 (2002).

144. 22 USC § 7433 (2002).

145. See eg Cambodian Genocide Justice Act, 22, USC § 2656, Pub L 103-236 (1994), stating that 'it is the policy of the United States to support efforts to bring to justice members of the Khmer

against humanity.¹⁴⁶ Indeed, in a submission in the *Tadić* case before the ICTY, the United States noted that

the relevant law and precedents for the offenses in question here—genocide, war crimes, and crimes against humanity . . . clearly contemplates international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states.¹⁴⁷

The United States has also politically endorsed the Responsibility to Protect doctrine, which is triggered by the commission, threat, or incitement of crimes against humanity, among other international offenses.¹⁴⁸ This support finds expression in the United States' National Action Plan on Women, Peace, and Security, called for by Security Council Resolution 1325 (2000) and its progeny.¹⁴⁹

Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979'. See Stuart Ford, 'How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts' (2011) 55 *St. Louis U L J* 953.

146. See eg ICTY Statute, Art. 5 (n 64). The Special Tribunal for Lebanon has jurisdiction only over terrorism as defined by Lebanese law.

147. *Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of the Prosecutor of the Tribunal v Dusan Tadić* (17 July 1995) 20.

148. See National Security Strategy 48 (May 2010). See Office of the Special Adviser on the Prevention of Genocide, *The Responsibility to Protect*, www.un.org/en/preventgenocide/adviser/responsibility.shtml. This doctrine contains three pillars:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

Ibid.

149. EO 13595, *Instituting a National Action Plan on Women, Peace, and Security* (19 December 2011), 76 FR 80205. The Executive Order at Sec. 1(b) notes:

The United States recognizes the responsibility of all nations to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, including when implemented by means of sexual violence. The United States further recognizes that sexual violence, when used or commissioned as a tactic of war or as a part of a widespread or systematic attack against civilians, can exacerbate and prolong armed conflict and impede the restoration of peace and security.

In an effort to improve the filters barring perpetrators from entering the United States,¹⁵⁰ President Obama issued Presidential Proclamation 8697 on August 4, 2011, under the authority of section 212(f) of the INA.¹⁵¹ The proclamation suspends the entry of

- (a) Any 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 based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin; ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.
- (b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.¹⁵²

Prior to the issuance of the Proclamation, the INA only deemed participants in genocide, torture, extrajudicial killing, and certain violations of religious freedom to be inadmissible.¹⁵³ Furthermore, development assistance is barred from any government that engages in a:

consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person unless it can be shown that such assistance will directly benefit the people in such country.¹⁵⁴

150. See White House, *Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators* (4 August 2011), www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and.

151. 8 USC § 1182(f) (1952). Section 212(f) of the INA authorizes the president to suspend entry into the United States of any class of aliens (eg based on affiliation or conduct) upon determining that their entry 'would be detrimental to the interests of the United States'.

152. Proclamation 8697 (n 42). The US Department of State's Foreign Affairs Manual, which provides guidance to foreign service officers and other Departmental staff, defines crimes against humanity with reference to the international criminal law definition. 9 FAM 40.8 (27 February 2014).

153. See eg 8 USC §§ 1182(a)(2)(G) (violations of religious freedom), (H) (trafficking in persons); §§ 1182(a)(3)(B) (terrorist activities), (E) (Nazi persecution, genocide, torture, and extrajudicial killing). The Intelligence Reform and Terrorism Prevention Act, Pub. Law 108-458 (17 December 2004), amended the INA to expand the grounds of inadmissibility and deportability. Likewise, pursuant to the Child Soldiers Accountability Act of 2008, Pub; L 110-340, individuals who have recruited or used child soldiers may also be removed from the United States.

154. 22 USC § 2151n (1961) (Human Rights and Development Assistance). In addition, the secretary of state is to report to Congress on the status of human rights in the countries that receive

The provision of security assistance triggers similar scrutiny premised on conduct that would encompass CAH.¹⁵⁵ CAH have also found a home in the Bankruptcy Code, which excludes payment to victims of war crimes, crimes against humanity, and terrorism from the definition of 'current monthly income'.¹⁵⁶ Having a US CAH statute would add ready content to all these statutory references.

The federal courts are no stranger to the concept of CAH having adjudicated many cases involving CAH claims under customary international law.¹⁵⁷ A number of human rights civil suits brought in federal courts under the Alien Tort Statute (ATS) have alleged the commission of CAH (or conduct that would amount to CAH). A good number of these cases involve allegations that may not be criminally prosecutable in the United States at present (statutes of limitation aside) because plaintiffs are seeking redress for international crimes that are not part of the US Code: acts of summary execution, the deliberate targeting of civilians in an armed conflict, sexual violence (which could potentially be charged as torture but only if the requisite specific intent could be proven), ethnic cleansing, massacres, pillage, or disappearances. For example, *Cabello v. Fernández Larios* involved the Chilean Caravan of Death, which traveled through the country immediately after the 1973 coup executing political leaders associated with the Allende regime, and resulted in a plaintiffs' judgment for CAH.¹⁵⁸ Other such cases include *Kadić v. Karadžić* (concerning CAH and genocide in the former Yugoslavia),¹⁵⁹ *Mehinovic v. Vuckovic* (ethnic cleansing in Bosnia),¹⁶⁰ *Doe v. Saravia* (concerning the assassination of Archbishop Romero in El Salvador),¹⁶¹ *Jean v. Dorélien* (ascribing liability for the Raboteau massacre in Haiti),¹⁶² *Xuncax v. Gramajo* (concerning massacres in

assistance, across a range of dimensions including by providing information on the commission of war crimes, crimes against humanity, and genocide in such countries. *Ibid.* § (d)(9).

155. See 22 USC § 2304 (1974).

156. 11 USC § 101(10A(B)) (1978).

157. See eg *Bowoto v Chevron Corporation* No C 99-02506 SI, 2007 WL 2349343, at *2 (ND Cal 2007) (extensively analyzing and applying chapeau elements of CAH to Nigerian military attacks on environmental activists); *Mujica v Occidental Petroleum Corporation* 381 F Supp 2d 1164, 1180 (CD Cal 2005) *aff'd sub nom. Mujica v AirScan Inc* 771 F 3d 580 (9th Cir 2014) (holding 'that there is a customary international law norm against crimes against humanity' but dismissing under political question doctrine CAH claims against alleged corporate accomplice to Colombian air force raid on civilians).

158. *Cabello v Fernández Larios* 402 F 3d 1148 (11th Cir 2005).

159. *Kadić v. Karadžić* 70 F 3d 232, 236 (2d Cir 1995) ('[W]e hold that subject-matter jurisdiction exists, that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor').

160. *Mehinovic v Vuckovic* 198 F Supp 2d 1322, 1353 (ND Ga 2002).

161. *Doe v Saravia* 348 F Supp 2d 1112, 1154 (ED Cal 2004) ('The prohibition of crimes against humanity has been defined with an ever greater degree of specificity than the three 18th-century offenses identified by the Supreme Court and that are designed to serve as benchmarks for gauging the acceptability of individual claims under the ATCA').

162. *Jean v Dorélien* 431 F 3d 776 (11th Cir 2005).

Guatemala),¹⁶³ *Todd v. Panjaitan* (civilian massacres in Indonesia),¹⁶⁴ and *Yousef v. Samantar* (the deliberate targeting of civilians in Somalia).¹⁶⁵ Arguably, some of these civil suits would not have been filed if there were robust criminal penalties available in the form of a crimes against humanity statute. Providing appropriate criminal penalties may satisfy felt needs for justice, especially given that civil claims rarely result in actual money damages because the defendants flee and default.

The courts have also indicated that CAH are subject to universal jurisdiction, paving the way for a penal statute with present-in jurisdiction.¹⁶⁶ Most prominently, in *Sosa v. Alvarez-Machain*, Justice Breyer noted that international law permits the exercise of universal jurisdiction given that there is ‘not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute . . . torture, genocide, crimes against humanity, and war crimes.’¹⁶⁷ Likewise, in *United States v. Yousef*, the Second Circuit wrote, ‘[i]n modern times, the class of crimes over which States can exercise universal jurisdiction has been extended to include war crimes and acts identified after the Second World War as “crimes against humanity”.’¹⁶⁸ In light of the fact that the Supreme Court has limited the reach of the ATS over extraterritorial conduct and thus foreclosed many civil claims,¹⁶⁹ it is all the more important that criminal remedies be available to pursue perpetrators within the reach of US courts.

VIII. CONCLUSION

These legislative proposals present an opportunity for 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 extraordinary bases of jurisdiction should entail, taking US treaty obligations seriously through conforming implementing legislation, and promoting the complementarity norm by enabling US courts to prosecute the core international crimes. The proposed CAH statute and amendments to existing law would remedy long-standing gaps in US law, protect against impunity, enable US courts to enjoy the privilege of complementarity vis-à-vis the ICC, and prevent the immediate return of a perpetrator to the *locus delicti*. Congress and the relevant agencies can devise careful procedural safeguards and political controls to protect against overzealous prosecutions or politicized

163. *Xuncax v Gramajo* 886 F Supp 162 (1995).

164. *Todd v Panjaitan* No 92-12255, 1994 WL 827111, D Mass (26 October 1994).

165. *Yousuf v Samantar* 699 F 3d 763 (4th Cir 2012).

166. *United States v Yousef* 327 F 3d 56, 105 & fn 40 (2d Cir 2003) (dicta) (‘Following the Second World War, the United States and other nations recognized “war crimes” and “crimes against humanity,” including “genocide,” as crimes for which international law permits the exercise of universal jurisdiction’).

167. *Sosa v Alvarez-Machain* 542 US 692, 762 (2004) (Breyer, J., concurring).

168. *United States v Yousef* 327 F 3d 56, 104 (2d Cir 2003).

169. *Kiobel v Royal Dutch Petroleum Company* 133 S Ct 1659 (2013).

proceedings. Updating the War Crimes Act in connection with the CAH statute would respond to the strongly and commonly held view that the Geneva Conventions require implementing legislation to enable the prosecution of grave breaches regardless of the nationality of the perpetrator—a position that the Department of State and the DOD took in 1996 and have not since repudiated.

Rectifying these gaps in Title 18 will not come at the expense of jeopardizing US personnel or service members in the field for two reasons. First, any fears of reciprocity are overblown given that there is little indication that having a US CAH statute premised on universal or present-in jurisdiction will increase the possibility of CAH charges being brought against US personnel abroad. In any case, the United States has crossed that Rubicon already in a number of related statutes that allow for the exercise of present-in jurisdiction. A high percentage of states already have such statutes on the books; others will continue to enact them pursuant to their treaty obligations and the international crimes incorporation movement occasioned by the promulgation of the ICC Statute. In any case, other states are unlikely to refrain from pursuing cases because the United States does not have an analogous statute. (In fact, the opposite may in fact be true with respect to CAH: other states might bring cases precisely because the United States cannot). By exercising leadership in this way, the United States will actually enhance its ability to deploy all available legal and diplomatic tools to protect against frivolous or unfounded exercises of jurisdiction against US personnel in domestic or international courts. For all these reasons, enacting a CAH statute is a worthy endeavor, and one that is consistent with Bill Schabas's vision for a robust international justice system premised on international and domestic institutions working in harmony on behalf of victims and in pursuit of justice.

