

**U.S. Department of State, Office of Global Criminal Justice**  
**Ambassador-at-Large Van Schaack**  
**Testimony for the Record**  
**Senate Judiciary Committee Hearing**  
**“From Nuremberg to Ukraine: Accountability for War Crimes and Crimes**  
**Against Humanity”**  
**September 28, 2022**

**Introduction**

Mr. Chairman, Ranking Member Grassley, and distinguished members of the Senate Judiciary Committee, thank you for accepting the State Department’s written submission in connection with the hearing “From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity,” which took place on September 28, 2022. We greatly appreciate the bipartisan efforts of many on this Committee to put forward, and to support, a range of bills to help ensure that the United States can more robustly address serious atrocities being committed in Ukraine, China, Venezuela, Syria, Burma, Iran, and other countries around the world, particularly when perpetrators are within our jurisdictional reach. We stand ready to work collaboratively with all members of this Committee to support our Department of Justice and Department of Homeland Security colleagues and help these legislative initiatives move forward expeditiously. Doing so will strengthen the United States’ role as a global leader in support of justice and accountability for the world’s worst crimes, answer survivors’ legitimate calls for justice, and ensure that those responsible for such crimes do not find safe haven in the United States.

**The State Department’s Role in Promoting Justice and Accountability for Atrocity Crimes**

As the United States Ambassador-at-Large for Global Criminal Justice, I am tasked with leading the State Department’s initiatives to prevent, mitigate, and redress horrific atrocities—including genocide, crimes against humanity, and war crimes—through justice and accountability measures. It is an enormous honor for me to take on this role at this critical time in human history. I feel fortunate to be able to engage this Committee in the knowledge that each of you shares the goal of making sure that those responsible for atrocities—whether in Ukraine, China, Venezuela, Syria, Burma, Iran, or elsewhere—are held to account and that the United States plays its part in advancing the imperative of justice on behalf of victims and survivors.

The State Department works closely with our colleagues across the executive branch—including in the Departments of Justice, Homeland Security, Defense, and Treasury as well as the intelligence community and the White House—to promote justice and accountability for the most horrendous international crimes wherever they are committed across the globe. This involves sharing information across Departments on the commission of such crimes and the location of fugitives; engaging in outreach to survivor communities and other civil society actors

who can provide evidence and testimony for such cases; and coordinating with allies and partners that are similarly engaged to support each other's efforts, including legal proceedings. The State Department is statutorily mandated to collect information on abuses<sup>1</sup> and provides diplomatic support to our law enforcement colleagues as they pursue their investigations around the world. The Office of Global Criminal Justice (GCJ) in particular manages the State Department's War Crimes Rewards Program, which offers rewards for information leading to the arrest, transfer, or conviction of foreign nationals accused of committing war crimes, crimes against humanity, or genocide.<sup>2</sup>

This work supporting atrocity crimes prosecutions often requires close coordination with our international allies and partners. As we have seen as far back as Nuremberg, providing justice and accountability for atrocities often requires cooperation and coordination across borders. Indeed, my position—originally entitled the Ambassador-at-Large for War Crimes Issues—was created by the late Secretary of State Madeleine Albright in 1997 to be the United States' main interlocutor with the International Criminal Tribunals for the Former Yugoslavia and Rwanda—two *ad hoc* international criminal tribunals established, with strong U.S. Government backing, to ensure justice for war crimes, crimes against humanity, and genocide committed in those conflict situations. Since that time, the office that supports this work at the State Department, the Office of Global Criminal Justice, has grown to be the U.S. government's main interlocutor with the International Criminal Court (ICC); hybrid courts addressing international crimes committed in Cambodia, Sierra Leone, Timor Leste, Bosnia-Herzegovina, Central African Republic, Senegal, and Kosovo; and the international investigative mechanisms devoted to investigating crimes committed in Syria, Iraq, and Myanmar/Burma.

GCJ also interfaces with national authorities and victims' lawyers who are investigating and prosecuting war crimes, crimes against humanity, and genocide cases, complementing work that the Department of Justice does with these partners in Ukraine pursuant to mutual legal assistance treaties and other mechanisms of direct law enforcement engagement to ensure accountability for human rights abuses. These cases may involve individuals who stand accused of committing these crimes within the prosecutorial state's own territory—as in Guatemala, Colombia, or Iraq—or abroad when the alleged perpetrator is present in the prosecutorial state, or the prosecutorial state otherwise has the legal authority to open an investigation into extraterritorial conduct—as in Germany, Sweden, Argentina, or France. We also now lead the U.S. government's engagement with a broader range of transitional justice processes, including truth commissions and other institutions that seek to address victims needs for restorative and reparative justice in relation to atrocities. Later this month, GCJ will co-sponsor with the United States Military Academy at West Point a workshop that will bring together war crimes prosecutors from around the world to share best practices and strategies for successfully investigating and prosecuting cases.

The United States boasts a long history of being a global leader in support of efforts across the world to ensure justice and accountability for war crimes, crimes against humanity, and genocide

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<sup>1</sup> 22 U.S.C. § 8213.

<sup>2</sup> 22 U.S.C. § 2708(b)(10).

and instantiate the rule of law more broadly. This tradition reflects the recognition that impunity is corrosive; it undermines the rule of law in all sectors and sends the message that individuals who break the law will face no consequences for their actions. When those who commit atrocities enjoy impunity, others who may break the law—whether through grand corruption or petty crimes—are emboldened. When perpetrators of these serious international crimes are allowed to roam free, they may continue to terrorize victim communities, and the lack of justice may encourage acts of vengeance.

Moreover, with the growing great power competition, U.S. values in support of justice, human dignity, the rule of law, and human rights will continue to be a critical feature that differentiates us from countries like Russia and China that are themselves responsible for atrocities in places like Ukraine and Xinjiang. Consistent U.S. support for justice for atrocities does not just differentiate us from our geopolitical competitors, it is also critical to cementing our relationships with our allies. Being able to do our part to promote justice for war crimes, crimes against humanity, and genocide in relevant international fora, and within our own domestic legal framework, demonstrates allied unity and shared core values. As discussed below, the fact that many of our allies and partners, including nearly every member of NATO except the United States, have already enacted domestic legislation criminalizing crimes against humanity and most allow for the exercise of some form of present-in jurisdiction over war crimes or other atrocity crimes, makes it all the more important that the United States address these gaps in our own laws. This will not only bring the United States in line with our like-minded allies but also signal that we are prepared to appropriately share the burden to help ensure that those responsible for such atrocities are held criminally accountable, in our own national courts if need be.

### **The Urgency of The Present Efforts to Strengthen Title 18**

The timing of this hearing, and the urgency of the need to address gaps in current U.S. law to enhance the United States' ability to help ensure that those responsible for war crimes, crimes against humanity, and torture can and will be held accountable, cannot be overstated. Every day, new evidence of Russia's atrocities in Ukraine comes to light. Due to the expanding number of perpetrators and victims, justice for Russia's horrific atrocities will require a comprehensive approach that will likely include domestic trials in Ukraine, international trials at the International Criminal Court (ICC), and trials in foreign courts in countries where perpetrators can be found and charged.

My office, and others in the State Department and across the administration, are working tirelessly to support all these efforts. In the context of the multilateral Atrocity Crimes Advisory Group, we are working to build the capacity of Ukrainian investigators, prosecutors, and other juridical actors to fairly and effectively investigate and prosecute those responsible for atrocities in Ukrainian courts. The State Department is looking for ways to support the ICC in accordance with U.S. law and policy to ensure that the ICC is able to operate effectively and fairly and that its prosecutors can level charges against foreign nationals who bear significant responsibility for atrocity crimes committed in Ukraine. We are engaging with multilateral processes (such as a U.N. Commission of Inquiry), in partnership with our allies, to collect, preserve, share, and

analyze evidence of atrocities. The United States is supporting efforts by our allies and partners to lay the groundwork for prosecutions in their own courts for Russia's atrocities in Ukraine. And we are engaging in this legislative process with members of Congress to explore how the United States can ensure that it has the authorities it needs to be able to investigate and prosecute in U.S. courts anyone implicated in Russia's atrocities in Ukraine should such suspects ever be found on U.S. soil.

Expanding U.S. law now will help strengthen the signal to all those serving in the Russian military and government that there will be no escaping justice for those implicated in war crimes or other atrocities. As noted during the hearing, the deterrent power of this message can exert a tangible effect on the battlefield, particularly as the morale of the Russian military is waning and the Russian government has been forced to conscript new troops to fight in Ukraine.

Demonstrating that the international community stands ready to prosecute perpetrators wherever they may be found makes it clear to new conscripts and junior officers—and those commanding them—that there will be enduring consequences if they perpetrate violations or implement unlawful orders emanating from the Russian leadership to commit abuses.

Addressing these legislative gaps will not only allow the United States to hold some of those responsible for Russia's atrocity crimes accountable in U.S. courts if they travel here, but could also strengthen the United States' ability to provide accountability for China's atrocities against the Uyghurs; the Burmese military's atrocities against Rohingya and others across Burma (for example, the military's recent use of gunship helicopters that killed civilians, including more than eleven children, at an elementary school); ISIS atrocities in Syria and Iraq; and other abuses being committed in places like Venezuela, the Democratic People's Republic of Korea, and Iran.

### **Expanding the Ability to Prosecute Atrocity Crimes**

With that background, I will focus on three prominent gaps in the federal penal code that prevent the United States from holding to account those who are responsible for some of the world's worst international crimes:

- First, the United States lacks a statute specifically penalizing crimes against humanity, a core international crime;
- Second, the war crimes statute has only a limited jurisdictional reach, calling into question its conformity with U.S. obligations under the 1949 Geneva Conventions; and
- Third, the torture statute does not provide U.S. prosecutors a basis upon which to begin prosecutions and seek the extradition of non-U.S. nationals who have tortured U.S. citizens abroad.

There is agreement across the Departments of Justice, Homeland Security, State, and Defense that the United States should expand U.S. criminal law to rectify past jurisdictional constraints that have been consequential in preventing the United States from being able to hold some perpetrators found within our borders responsible for their involvement in the commission of international crimes. While U.S. prosecutors have been incredibly successful in invoking available tools under U.S. criminal and immigration human rights enforcement laws to address the presence of perpetrators here, criminal jurisdiction is severely limited (especially in that

present-in jurisdiction is unavailable under the war crimes statute and there is no crimes against humanity offense in the federal criminal code) and charges of immigration or naturalization fraud do not capture the full horror of the conduct alleged or enable a complete presentation of survivor testimony.

### **Enacting a New Crimes Against Humanity Statute**

U.S. federal authorities can prosecute war crimes, genocide, torture, the unlawful recruitment and use of child soldiers, a comprehensive array of terrorist acts, piracy, and many manifestations of human trafficking. They cannot, however, prosecute crimes against humanity as such—a central pillar of international criminal law since Nuremberg and arguably one of the gravest crimes known to humankind.<sup>3</sup> Crimes against humanity are a constellation of acts made criminal under international law when they are committed as part of a widespread or systematic attack directed against any civilian population and pursuant to or in furtherance of a state or organization policy to commit such an attack. They can take place in an armed conflict but can also take place in other settings, such as when an authoritarian or oppressive regime or military has killed, tortured, or arbitrarily detained its own people, as has been alleged in places like China or Burma.

Indeed, since Nuremberg, the statutes of the modern international criminal tribunals, which the United States was instrumental in establishing and capacitating, all contain provisions allowing for the prosecution of crimes against humanity. In addition, a majority of countries already have laws criminalizing crimes against humanity, and the trend lines suggest these numbers are increasing. In this regard, the United States is out of step with our major allies and, indeed, much of the globe. A survey conducted by Amnesty International in 2012 found that at least 92 countries had national laws criminalizing crimes against humanity.<sup>4</sup> By 2016, a report by the U.N. International Law Commission's Special Rapporteur on Crimes Against Humanity noted that 104 countries had enacted such legislation.<sup>5</sup>

Perhaps as important as the sheer numbers of states empowered to prosecute this crime is the observation that nearly all our NATO allies have enacted laws criminalizing crimes against humanity.<sup>6</sup> Even outside of NATO, the majority of U.S. allies and partners, in every region of

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<sup>3</sup> See Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, in *ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS* (Margaret M. deGuzman & Diane Marie Amann eds., Oxford Univ. Press 2018).

<sup>4</sup> AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD – 2012 UPDATE*, at Annex 1: Country Legislation Profile Chart (2012), <https://www.amnesty.org/en/documents/ior53/019/2012/en>.

<sup>5</sup> Special Rapporteur on Crimes against Humanity, *Second Report on Crimes Against Humanity*, Int'l L. Comm'n, U.N. Doc. A/CN.4/690, ¶ 18 (Jan. 21, 2016) (by Sean D. Murphy), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/013/95/PDF/N1601395.pdf>.

<sup>6</sup> See LAW LIB. CONG., *GENOCIDE, CRIMES AGAINST HUMANITY, AND WAR CRIMES JURISDICTION* (Nov. 2016) (providing information and links to current NATO members' crimes against humanity laws, except Iceland and Portugal), <https://tile.loc.gov/storage-services/service/ll/lglrd/2016590022/2016590022.pdf>. The International Committee of the Red Cross also publishes this information and includes the statutes of Iceland and Portugal. See Int'l Comm. Red Cross, *National Implementation of IHL Database, by State*, <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCountry.xsp>. See *Law on the punishment of genocide, crimes against humanity, war crimes, and*



the world, have enacted laws criminalizing crimes against humanity, including Argentina, Australia, Bangladesh, Canada, Chile, Colombia, Finland, Indonesia, Ireland, Japan, Jordan, Kenya, Republic of Korea, Mexico, New Zealand, Peru, the Philippines, Senegal, Sierra Leone, South Africa, and many more.<sup>7</sup>

In fact, many of our NATO and other allies and partners are actively bringing crimes against humanity cases in their national courts. In this past year alone, Germany, France, the United Kingdom, Sweden, Austria, Hungary, Finland, Switzerland, and Argentina have held trials in their national courts for crimes against humanity committed by ISIS in Iraq and Syria, as well as by perpetrators in The Gambia and elsewhere.<sup>8</sup>

The absence of a crimes against humanity statute is significant because it means that a foreign national responsible for a massacre of civilians abroad outside of the context of an armed conflict, who makes his or her way to United States, could likely not be criminally prosecuted for that act in the United States. This horrific crime would not constitute a war crime because it is not committed in the context of an armed conflict (a necessary predicate for a war crimes prosecution). Likewise, this atrocity could only be prosecuted as an act of genocide if the victims were targeted based on their membership in a national, ethnic, racial or religious group and the perpetrator acted with the specific intent to destroy that group in whole or substantial part—an element with a high evidentiary bar that has prevented our genocide statute from ever being invoked.

Moreover, because crimes against humanity are, by definition, part of a widespread or systematic attack directed against any civilian population and pursuant to or in furtherance of a state or organization policy to commit such an attack, the crime itself is aimed at bringing to account individuals who commit atrocities that are in accordance with a design or plan that is orchestrated and coordinated by a State's or an organization's forces. At base, most crimes against humanity implicate the conduct of senior leaders, since they are often instrumental in the design and execution of the state or organizational policy through which mass atrocities are committed. This is part of what differentiates crimes against humanity from ordinary crimes, like murder and rape. As a result, a U.S. law criminalizing crimes against humanity will be critical for promoting accountability for those leaders who designed and implemented any Russian policy to commit atrocities in Ukraine.

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crimes against peace, as of Dec. 29, 2018 (Iceland), [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E9B27B4650FB70E0C12583CF004E1085&action=openDocument&xp\\_countrySelected=IS&xp\\_topicSelected=GVAL-992BU6&from=state](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E9B27B4650FB70E0C12583CF004E1085&action=openDocument&xp_countrySelected=IS&xp_topicSelected=GVAL-992BU6&from=state); Lei orgânica no. 31/2004, de 22 de Julho (Act. No. 31/2004, of 22 July) (Port.) (implementing the Statute of the International Criminal Court), <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/707612F7DF8B029BC1256EF5003F6C48>).

<sup>7</sup> See also Beth Van Schaack & Zarko Perovic, *The Prevalence of "Present-In" Jurisdiction*, 107 AM. SOC'Y INT'L L. PROC. 237 (April 2013).

<sup>8</sup> See TRIAL INTERNATIONAL, UNIVERSAL JURISDICTION ANNUAL REVIEW 2022: UNIVERSAL JURISDICTION, AN OVERLOOKED TOOL TO FIGHT CONFLICT-RELATED SEXUAL VIOLENCE (2022), [https://trialinternational.org/wp-content/uploads/2022/03/TRIAL\\_International\\_UJAR-2022.pdf](https://trialinternational.org/wp-content/uploads/2022/03/TRIAL_International_UJAR-2022.pdf). See also Maximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779 (2019) (noting the expansion and prevalence of trials involving extraterritorial conduct under various versions of universal jurisdiction).

Under extant law, federal authorities must often turn to immigration law as a basis to prosecute foreign individuals who commit crimes against humanity. If it can be shown that the perpetrator received an immigration benefit on the basis of a fraudulent statement, they can be prosecuted for fraud. Otherwise, all we can usually do is deport them back to the country where they committed their depredations, and where they may remain free to commit future atrocities (especially if the government that directed the commission of the crimes is still in power), thus entrenching impunity, insecurity, and instability. If the United States enacts a crimes against humanity statute with present-in jurisdiction, the perpetrators of these types of atrocities could be prosecuted here in the United States when they are found within our borders. In addition, a crimes against humanity statute would have the benefit of making punishable such crimes committed pursuant to the organizational policies of non-state actors—such as members of *al-Qa'ida*, the Lord's Resistance Army (LRA), and ISIS.

A crimes against humanity statute should include an array of jurisdictional grounds targeting cases in which U.S. interests are most seriously implicated—including “present-in” jurisdiction when perpetrators are on U.S. soil. The statute would thus mirror our genocide, child soldier, torture, trafficking in persons, and terrorism laws. This will strengthen the ability of U.S. law enforcement agencies to ensure those responsible for crimes against humanity committed anywhere in the world who are found in the United States can be prosecuted—either through extradition to stand trial abroad or, when extradition is not a viable option (such as when the United States does not have an extradition treaty in force with the prosecuting country or when the regime that perpetrated the crimes is still in power), through prosecution in our own courts.

From a diplomatic perspective, the fact that the United States lacks a crimes against humanity statute as compared to our closest allies and partners weakens our ability to lead on international criminal justice and undermines our commitment to supporting justice and accountability for atrocity crimes. This, in turn, may make the United States a more appealing destination for those implicated in these terrible abuses.

### **Expanding U.S. Jurisdiction over War Crimes**

Turning to U.S. war crimes jurisdiction, most of the United States' existing international crime statutes authorize the exercise of jurisdiction over a perpetrator who is found or present in the United States. As mentioned, such “present-in” jurisdiction exists over a range of terrorism crimes (e.g., the provision of material support to terrorism, receiving terrorist training, and engaging in terrorist bombings), genocide, recruitment and use of child soldiers, torture, various forms of trafficking in persons and other modern forms of slavery, and the crime of piracy.

In some instances, this form of “present-in” jurisdiction is in keeping with the provisions of an international treaty to which the United States is a party, such as the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. However, Congress has constitutional authority to extend U.S. jurisdiction beyond what is required by treaty obligations to make punishable, at a minimum, conduct that is universally proscribed by international law, such as crimes against humanity and serious violations of the law of armed conflict. For example, the United States can exercise present-in jurisdiction over genocide, which is universally understood to violate international law, although this domestic-law prohibition is not

specifically mandated by the Convention on the Prevention and Prosecution of the Crime of Genocide.

This suite of extant statutes—which reflects the gravity of the crimes in question, the perceived utility of present-in jurisdiction, and modern expectations that states should enact robust penal regimes for atrocity crimes—stands in stark contrast to the U.S. War Crimes Act, which allows for the exercise of nationality jurisdiction only when the victim or perpetrator is a U.S. national (as defined by the Immigration and Nationality Act of 1952 (INA)) or a member of the U.S. armed forces.<sup>9</sup> When Congress was considering the enactment of the War Crimes Act in 1996, the Departments of Defense<sup>10</sup> and State<sup>11</sup> testified that the inclusion of present-in jurisdiction would ensure U.S. compliance with our international legal obligations under the 1949 Geneva Conventions and these Departments continue to support such inclusion today.<sup>12</sup> This understanding was articulated by members of the United States’ negotiating team, writing in their personal capacity, at the time the treaties were opened for signature.<sup>13</sup>

In addition to this jurisdictional fix, Congress should also amend the War Crimes Act to eliminate the distinction in the current statute between conduct that constitutes a war crime in international armed conflicts versus non-international conflicts. This would reflect the fact that

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<sup>9</sup> See 8 U.S.C. § 1101 (1952); 18 U.S.C. § 2441 (1996). See also Beth Van Schaack, *Animating the U.S. War Crimes Act*, 97 INT’L L. STUD. 1541 (2021).

<sup>10</sup> 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) (Testimony of John H McNeill, Senior Deputy General Counsel) [hereinafter Hearing on H.R. 2597]; Letter from General Counsel Judith Miller, War Crimes Act of 1996, House of Representatives, Committee on the Judiciary, H. Rep.104-698 (July 24, 1996) (accompanying H.R. 3630), [www.pegc.us/LAW\\_/hr.104-698.pdf](http://www.pegc.us/LAW_/hr.104-698.pdf) [hereinafter Report 104-698].

<sup>11</sup> Hearing on H.R. 2597 (testimony of Michael J. Matheson, Principal Deputy Legal Adviser); Report No. 104-698 (Letter from 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, 46 I.L.M. 514 (2007) (letter by State Legal Adviser and DOD General Counsel noting that “Article 146 of the Fourth Geneva Convention requires all States Parties to extradite or prosecute an individual suspected of a grave breach, even when a State lacks a direct connection to the crime”).

<sup>12</sup> See, e.g., Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 146-47, Aug. 12, 1949, 75 U.N.T.S. 287 (obliging states parties to codify the prohibition against grave breaches of the treaties and prosecute all offenders, regardless of nationality). INT’L COMM. RED CROSS, UNIVERSAL JURISDICTION OVER WAR CRIMES – FACTSHEET (2021) (noting that “States are required to establish universal jurisdiction for war crimes in their national legislation”), <https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet>; INT’L COMM. RED CROSS, ICRC EXPLAINER: WHAT DOES INTERNATIONAL LAW SAY ABOUT UNIVERSAL JURISDICTION FOR WAR CRIMES COMMITTED IN NON-INTERNATIONAL ARMED CONFLICTS? (2022).

<sup>13</sup> Members of the U.S. delegation to the Geneva Conventions drafting conference representing the Departments of State and Justice wrote this in a contemporaneous article:

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

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



the enumerated war crimes describe conduct that international law prohibits regardless of conflict classification.<sup>14</sup> Removing this arbitrary distinction for those enumerated crimes would obviate the need for U.S. courts to engage in complex conflict classification exercises (which may require access to classified information) and recognize that today's conflicts increasingly involve non-state actors and transnational dimensions. Doing so would ensure that all perpetrators who travel to the United States may be held accountable, regardless of the character of the conflict. This could prove to be instrumental in situations such as Syria, where a broad range of actors are engaged in atrocities, complicating conflict classification.

Extending present-in jurisdiction to war crimes and enacting a crimes against humanity criminal statute with present-in jurisdiction would bring greater coherence to the U.S. penal code, eliminating the current patchwork approach. At the same time, it would signal a U.S. commitment to enable its judicial system to prosecute all atrocity crimes in equal measure and be in keeping with the legal frameworks of our international partners.<sup>15</sup>

### **Expanding the Ability to Seek the Extradition of, and to Prosecute, Those Who Torture U.S. Citizens Abroad**

Existing federal jurisdiction to prosecute acts of torture that occur outside the United States is limited to situations in which the offender is a U.S. national or is present in the United States. This means that the Department of Justice cannot indict, and then seek the extradition of, foreign nationals who commit acts of torture against Americans abroad; as such, these perpetrators are beyond the reach of the U.S. justice system unless and until they are found in the United States. This could include, for example, a situation in which a U.S. national is tortured by Russian government officials who later travel to a country with which we have a bilateral extradition treaty. Perpetrators of such serious crimes against U.S. nationals should not be able to evade justice in U.S. courts.

Expanding the law in this way would make it possible for the United States to request the extradition of, and then prosecute, anyone who tortures a U.S. national, "under color of law," anywhere in the world.<sup>16</sup> All this would require is for the torture statute to be surgically amended to allow for jurisdiction over acts of torture abroad committed *against* U.S. citizens, in addition to acts of torture committed abroad *by* U.S. citizens. This simple addition would bring the torture statute in line with other similar statutes, including the War Crimes Act, which already permits prosecution of all war crimes against U.S. nationals.

### **Conclusion**

Many interlocutors are quite surprised to learn that the United States, which led the international prosecutions at Nuremberg and has been so instrumental in constructing the contemporary rules-

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<sup>14</sup> See INT'L COMM. RED CROSS, CUSTOMARY IHL DATABASE, at r. 156, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

<sup>15</sup> See American University War Crimes Research Office, Universal Jurisdiction Project, <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/universal-jurisdiction-project/>.

<sup>16</sup> The amendment would cover acts of torture committed by foreign governments and potentially others (such as ISIS). Counterterrorism laws in the federal criminal code also can reach acts of torture committed against Americans by terrorists.

based international order, may not be able to prosecute those responsible for torturing U.S. citizens overseas, war criminals who commit crimes against non-U.S. nationals, or those responsible for crimes against humanity when they are found in the United States.

Remedying these gaps in our legal framework to cover these situations will help ensure those most responsible for Russia's ongoing atrocities in Ukraine—as well as perpetrators in China, Burma, and elsewhere—can be held to account. It could help to deter future crimes by sending a powerful message to Russia's soldiers in Ukraine (and other would-be perpetrators) that there will be enduring consequences for committing international crimes. It will also enable U.S. investigators, prosecutors, and courts to do their part, as members of a global system of international justice, to pursue those responsible for the worst crimes known to humankind and uphold the United States' leadership in the global system of international justice.

Strengthening our legal framework will also make our own citizens safer. It will deter crimes against U.S. citizens abroad, discourage war criminals and perpetrators of crimes against humanity from seeking refuge here in the United States after they wreak havoc overseas, and provide an avenue for justice for U.S. persons who are victims of these horrific crimes abroad. Moreover, expanding U.S. criminal jurisdiction would in no way change longstanding U.S. policy to oppose foreign or international efforts to prosecute U.S. personnel and could even help protect U.S. personnel from such efforts brought in other countries or jurisdictions by modeling responsible implementation of these laws. In this regard, the Department of State supports the inclusion of additional provisions that would help model to other countries responsible implementation of expanded jurisdiction over war crimes and crimes against humanity. Lastly, from a foreign policy perspective, ensuring that the United States has at its disposal potent legal tools will send a strong global signal that the United States intends to continue its leadership role responding to and preventing, and respond to, the world's worst atrocities.

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