

HOLES IN THE UNITED STATES’ ‘NEVER AGAIN’ PROMISE: AN ANALYSIS OF THE DOJ’S APPROACH TOWARD ATROCITY ACCOUNTABILITY

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INTRODUCTION	870
I.OVERVIEW OF THE DOJ’S HUMAN RIGHTS AND SPECIAL PROSECUTION SECTION	875
A. <i>Authority and Function</i>	876
B. <i>Legal Framework</i>	878
C. <i>Interagency Coordination</i>	882
D. <i>The HRSP’s Docket</i>	885
II.PROSECUTORIAL IMPEDIMENTS AND IMPLICATIONS OF THE CURRENT ATROCITY ACCOUNTABILITY APPROACH	888
A. <i>Impediments to Prosecutions Under Substantive Atrocity Laws</i>	888
B. <i>Implications of the Current Approach</i>	891
III.FILLING THE HOLES IN THE DOJ’S HUMAN RIGHTS AND SPECIAL PROSECUTIONS DOMESTIC SECTION’S ATROCITY ACCOUNTABILITY APPROACH	893
A. <i>Proposing Legislative Changes to the Legal Framework</i>	894
B. <i>Creating A Memoranda of Agreement Between the DOJ and the DHS</i> ..	896
C. <i>Issuing Guidance to NGOs and CSOs on Evidence Documentation</i>	897

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CONCLUSION	898
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INTRODUCTION

“There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest.”¹

—Elie Wiesel

In the aftermath of World War II (WWII) and the Holocaust,² the Allies struggled to determine the most appropriate method of accountability for the perpetrators of one of the worst atrocities known to humankind.³ The United States’ proposed solution steered the Allies towards the development of an unprecedented international judicial mechanism known as the Nuremberg Tribunal.⁴ President Harry Truman’s Executive Order 9547 appointed then-Attorney General Robert H. Jackson, head of the Department of Justice (DOJ), to serve as the chief American prosecutor of the Nuremberg Tribunal.⁵ Several other Americans affiliated with the

1. Elie Wiesel, Nobel Lecture: Hope, Despair and Memory (Dec. 11, 1986), <https://www.nobelprize.org/prizes/peace/1986/wiesel/lecture/>.

2. The United States Holocaust Museum defines the Holocaust as “the systematic, state-sponsored persecution and murder of six million Jews by the Nazi regime and its allies and collaborators.” *Introduction to the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust> (last updated Mar. 2, 2021). *But see* GENOCIDE MATTERS: ONGOING ISSUES AND EMERGING PERSPECTIVES 2 (Joyce Apse & Ernesto Verdeja eds., 2013) (“Debates about the use and meaning of the term ‘Holocaust’ have continued, with disagreements over whether to include Roma and Sinti, homosexuals, and other targeted groups under its umbrella[.]”).

3. *See* Ian Cobain, *Britain Favoured Execution Over Nuremberg Trials for Nazi Leaders*, *GUARDIAN* (Oct. 25, 2012, 19:05 EDT), <https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders>.

4. This Comment refers to the International Military Tribunal as the Nuremberg Tribunal. While there was also the International Military Tribunal for the Far East, this Comment focuses on the Nuremberg Tribunal, as it often is seen as emblematic of an international shift in atrocity accountability. *See* Charter of the International Military Tribunal art. 1, Aug. 8, 1945, as amended by protocol of Oct. 6, 1946, 59 Stat. 1544, 82 U.N.T.S. 279; *see also* Bruce J. Einhorn et al., *The Prosecution of War Criminals and Violators of Human Rights in the United States*, 19 *WHITTIER L. REV.* 281, 282 (1997) (noting that the U.S. government advocated for the most “humane and jurisprudential approach,” while the British government recommended execution).

5. *See* Exec. Order No. 9547, 10 Fed. Reg. 4961 (May 4, 1945) (“providing for [the] representation of the United States in . . . prosecuting . . . European Axis powers and their principal agents and accessories [for atrocities and war crimes]”); *see also* Samantha Power, *Never Again: The World’s Most Unfulfilled Promise*, *PUB. BROAD. SERV.*,

DOJ played critical roles in establishing this Tribunal and prosecuting German Nazis responsible for the Holocaust.⁶

By seeking accountability for these crimes at the international level, the United States—particularly personnel from the DOJ—had a role in cementing the architectural framework for international criminal law and international human rights law.⁷ Prior to the Nuremberg Tribunal, individual citizens and their rights were an issue of domestic law and not subject to international law.⁸ The work of DOJ officials at the Nuremberg Tribunal helped establish a precedent that perpetrators of atrocity crimes, such as war crimes and crimes against humanity, could be held accountable through judicial mechanisms regardless of where the acts took place.⁹

As the United States shifted from post-WWII to the Cold War, the clarion message of “never again”¹⁰ that the Nuremberg Tribunal intended to crystallize became a legacy the United States has struggled to fulfill.¹¹

<https://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html> (last visited Nov. 13, 2021) (discussing President Truman’s post-World War II (WWII) efforts for atrocity accountability).

6. See Loretta E. Lynch, At’y Gen., U.S. Dep’t of Just., Remarks at the 10th International Humanitarian Law Dialogues (Sept. 29, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-10th-international-humanitarian-law> [hereinafter Lynch Remarks] (noting that the several American staffers at the Nuremberg Tribunal came from the U.S. Department of Justice (DOJ), including attorneys Robert H. Jackson, Thomas Dodd, Francis Biddle, Sadie Arbuthnot, and Cecelia Goetz).

7. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9–10 (1982) (discussing that Nuremberg opened a new wave of possibilities for individual responsibility under international law).

8. See *id.* at 9.

9. At the time, the term “genocide” had not yet come into existence in the legal sense. In 1944, Raphael Lemkin, a Polish-Jew who escaped to the United States before the Holocaust, coined the term, and later in 1948 after lobbying the United Nations, “genocide” became a crime under international law. See *Genocide*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/genocide.shtml> (last visited Nov. 14, 2021).

10. The term “never again” first appeared after American troops liberated the Buchenwald’s concentration camp and survivors made signs stating “never again” in their respective languages. See Diana I. Popescu & Tanja Schult, *Performative Holocaust Commemoration in the 21st Century*, 26 J. CULTURE & HIST. 135, 135 (2020). Various actors, including the U.S. government, later used the expression to illicit the sentiment that the Holocaust should never transpire again. See, e.g., Statement by President Joseph R. Biden on International Holocaust Remembrance Day, 2021 WEEKLY COMP. PRES. DOC. DCPD202100097 (2021), <https://www.govinfo.gov/content/pkg/DCPD-202100097/html/DCPD-202100097.htm>.

11. Since the Nuremberg Trials, the United States has had a checkered response to intervention in atrocities occurring abroad, such as those in Cambodia, Iraq, Rwanda, and

Thus, the reverberatory effects of the Nuremberg Tribunal on domestic atrocity accountability efforts by the DOJ did not begin until the 1970s.¹²

After WWII, the United States saw a large influx of refugees from Europe, and as time passed, the United States realized it lacked the tools to hold accountable those refugees and immigrants who had associations with the German Nazi government.¹³ As public concern grew, the United States took its first steps towards atrocity accountability in the domestic context for those crimes committed during the Holocaust with the founding of the DOJ's Office of Special Investigations (OSI) in 1979.¹⁴

The OSI's purpose was to detect and investigate individuals who had affiliations with the German Nazi government.¹⁵ However, the OSI lacked the authority under the United States' legal framework to prosecute perpetrators of atrocity crimes committed during WWII for their underlying criminal offense.¹⁶ This limitation forced the OSI to use civil

Bosnia. See Power, *supra* note 5. In other cases, the United States has perpetrated its own atrocities and failed to create a culture of accountability. See Nick Turse & Deborah Nelson, *Civilian Killings Went Unpunished*, L.A. TIMES (Aug. 6, 2006, 12:00 AM), <https://www.latimes.com/news/la-na-vietnam6aug06-story.html> (noting that the U.S. military committed at least 320 atrocities in Vietnam and did not hold most perpetrators of these atrocities accountable).

12. See JUDY FEIGIN, U.S. DEP'T OF JUST., *THE OFFICE OF SPECIAL INVESTIGATION: STRIVING FOR ACCOUNTABILITY IN THE AFTERMATH OF THE HOLOCAUST* v-vi (2009), <http://storage.lib.uchicago.edu/pres/2015/pres2015-0270.pdf> (discussing that the United States did not immediately create a domestic framework for atrocities after Nuremberg, but it created the framework later when concern grew that former Nazis and their affiliates were seeking refuge in the United States).

13. See *id.* at 35 (stating that after WWII, there were millions of refugees from Europe that wanted to flee to the United States).

14. See generally *id.* (outlining the founding of the Office of Special Investigations (OSI) and its work).

15. See Eli M. Rosenbaum, *An Introduction to the Work of the Office of Special Investigations*, 54 U.S. ATT'YS BULL. 1, 2 (Jan. 2006), <https://www.justice.gov/sites/default/files/usao/legacy/2006/02/14/usab5401.pdf>.

16. The OSI could not charge Nazis for their underlying conduct in atrocities, because their mandate pertained to denaturalizing and deporting Nazis and their affiliates, and later any naturalized U.S. citizen who partook in atrocity crimes. See, e.g., *id.* at 3, 8 (stating that the OSI had jurisdiction to take "legal action to denaturalize and/or deport individuals who, in association with the Nazi Government of Germany and its allies, ordered, incited, assisted, or otherwise participated in the persecution of civilians because of race, religion, national origin, or political opinion" and later after the signing of the Intelligence Reform and Terrorism Prevention Act of 2004, the OSI's jurisdiction expanded to "any naturalized U.S. citizen who participated abroad in acts of genocide or, acting under color of foreign law, in acts of torture or extrajudicial killing.").

proceedings such as denaturalization, deportation, removal, and sometimes extradition, as a means to achieve justice.¹⁷ Therefore, the OSI's approach was merely to deny atrocity perpetrators safe haven in the United States rather than holding those who committed atrocity crimes accountable for involvement in genocide during WWII in U.S. courts.¹⁸

As the United States started accepting refugees from other conflicts involving mass atrocities, the United States again found itself in a predicament.¹⁹ There were an estimated two-thousand individuals involved in human rights violations and war crimes who began settling into U.S. diaspora communities, but there was no mechanism to hold these persons accountable domestically.²⁰ This need, in addition to an increased focus on atrocity accountability from the Obama Administration,²¹ led to the Human Rights Enforcement Act of 2009,

17. See *id.* at 1–2 (explaining that the purpose of OSI was to send suspected German Nazis to countries with jurisdiction); see also David Ian Klein, *75 Years After Nuremberg, America's Top Nazi Hunter Looks Back*, FORWARD (June 3, 2021), <https://forward.com/news/470833/nazi-hunter-eli-rosenbaum-nuremberg> (“Though the law didn’t give OSI powers of criminal prosecution, because the crimes were committed outside of the U.S., it did empower U.S. officials to deport those involved with perpetrating the Holocaust back to the countries where prosecution was possible.”); Daniel Solomon, *The Many Trials of a Nazi War Criminal*, NEW REPUBLIC (Apr. 5, 2016), <https://newrepublic.com/article/132380/many-trials-nazi-war-criminal> (noting that after seven years, the German government finally consented to receive and domestically indict John Demjanjuk, a former German Nazi who obtained citizenship in the United States in 1958).

18. See Rosenbaum, *supra* note 15, at 2–3; see also Debbie Cenziper & Justine Coleman, *‘Get the Nazi Out of New York.’ The Secret Operation to Deport the Last Living Nazi Defendant in the U.S. Was a Rare Success*, WASH. POST (Sept. 1, 2018), https://www.washingtonpost.com/national/get-the-nazi-out-of-new-york-the-secret-operation-to-deport-the-last-living-nazi-defendant-in-the-us-was-a-rare-success/2018/09/01/2ea22aca-aa32-11e8-8a0c-70b618c98d3c_story.html (“[T]he OSI prosecuted in civil court more than 130 Nazi defendants through denaturalization and deportation proceedings. More than 65 people were removed from the United States over the years, but some OSI defendants were turned away by foreign governments.”).

19. Conflicts such as armed conflict in Liberia and genocide in Rwanda led to the creation of diaspora communities in the United States, and concern grew that some perpetrators of atrocity crimes were finding “safe haven” in the United States. Annie Hylton, *How the U.S. Became a Haven for War Criminals*, NEW REPUBLIC (Apr. 29, 2019), <https://newrepublic.com/article/153416/us-became-haven-war-criminals>.

20. *Id.* (noting that many consciously decide to seek refuge in the United States given the lack of atrocity accountability efforts in U.S. courts).

21. See generally Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review, 2 PUB. PAPERS 926 (Aug. 4, 2011) (demonstrating that President Obama took major steps in directing agencies to ramp up U.S. efforts for atrocity prevention and accountability).

which merged OSI and other DOJ sections to form the Human Rights and Special Prosecution Section (HRSP).²²

In the DOJ's current structure, the HRSP serves to fulfill the United States' Nuremberg legacy for prosecuting atrocity crimes.²³ However, the HRSP's current approach towards domestic atrocity accountability—which predominately relies on immigration and denaturalization laws—is an insufficient and unsustainable means of justice that fails to live up to the United States' post-WWII “never again” promise of preventing atrocities through accountability.²⁴

To improve its domestic atrocity accountability efforts, the HRSP must charge perpetrators of atrocity crimes under substantive atrocity laws instead of resorting to immigration, naturalization, or deportation methods when domestic prosecution in the perpetrator's country of origin is unassured. Part I provides an overview of the HRSP by explaining its authority, its legal framework, its interagency coordination, and its cases previously on its docket. Part II then examines the prosecutorial impediments to the HRSP bringing charges and the broader implications of the HRSP's current approach. Finally, Part III proposes potential solutions to the DOJ's gaps in atrocity accountability. First, it recommends congressional legislative action by amending current atrocity accountability statutes and enacting a crimes against humanity statute. Second, it recommends that the HRSP clarify its interagency cooperation through a memorandum of agreement with its other U.S. agency partners. Finally, it suggests that the HRSP issue guidance for nongovernmental organizations (NGOs) and civil society organizations (CSOs) to demonstrate how these organizations can better assist the HRSP in bringing charges under

22. See 28 U.S.C. § 509B (describing how Congress established the Human Rights and Special Prosecution Section (HRSP) through merging different DOJ offices); see also John R. Crook, *U.S. Department of Justice Creates New Unit for Human Rights Violations, War Criminals*, 104 AM. J. INT'L L. 510, 510 (2010) (describing how the HRSP was founded through merging different DOJ offices).

23. See Lynch Remarks, *supra* note 6 (asserting that through the HRSP, the DOJ continues the legacy of DOJ officials who worked at the Nuremberg Tribunal). Under international standards, genocide, torture, and war crimes fall under the category of atrocity crimes. See generally UNITED NATIONS, FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES 1, 3 (2014) https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf (“The term ‘atrocity crimes’ refers to three legally defined international crimes: genocide, crimes against humanity and war crimes. . . . When part of a widespread or systematic attack against a civilian population, torture can constitute a crime against humanity.”).

24. See Hylton, *supra* note 19; see also Power, *supra* note 5 (discussing that through accountability at Nuremberg, the United States hoped to demonstrate a “moral and popular consensus . . . that genocide should ‘never again’ be perpetrated while outsiders stand idly by.”).

substantive atrocity laws. Accomplishing these recommendations could fill the holes in the HRSP's current atrocity accountability framework, bolster the United States' ability to hold perpetrators accountable, and assist in preventing future atrocities.

I. OVERVIEW OF THE DOJ'S HUMAN RIGHTS AND SPECIAL PROSECUTION SECTION

Unlike the DOJ's previous sections, such as the OSI, the HRSP has authority to extraterritorially prosecute perpetrators of human rights offenses under federal criminal laws, including genocide, torture,²⁵ war crimes, and the use or recruitment of child soldiers.²⁶ Despite possessing an arsenal of specific laws to prosecute perpetrators, the HRSP—often in coordination with the Department of Homeland Security (DHS)²⁷—continues to rely primarily on immigration and naturalization laws to address the issue of atrocity perpetrators in the United States.²⁸ While using the latter method allows the United States to assert that it is engaging in atrocity accountability efforts, the practice is inherently problematic because these charges do not equate to the graveness that is associated with committing atrocity crimes.²⁹

25. See Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340–2340A (criminalizing torture and defining it as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control”).

26. See *About the Section*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-hrsp/about-hrsp> (last updated Apr. 12, 2021); see also § 2340 (defining and criminalizing torture).

27. See *Pursuing Accountability for Atrocities: Hearing Before the U.S. H.R. Tom Lantos Hum. Rights Comm'n*, 116th Cong. 7 (2019) [hereinafter Rodi III Testimony] (statement of Louis A. Rodi III, Acting Assistant Dir., Nat'l Sec. Investigations Div., Homeland Sec. Investigations, U.S. Immigr. & Customs Enf't). See generally *About the Section*, *supra* note 26 (noting that the DOJ works closely with the Department of Homeland Security (DHS) to investigate and prosecute human rights violators and war criminals); see also *infra* Part III.C. (discussing the DOJ and the DHS's interagency relationship).

28. See Alexandra Insinga, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SEC. (Nov. 7, 2017), <https://www.justsecurity.org/46801/mohammed-jabbateh-conviction-human-rights-trial-cloaked-immigration-crimes/>; see also Nicholas P. Weiss, *Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals*, 45 CASE W. RESV. J. INT'L L. 579, 582 (2012) (asserting that the United States has abrogated its international legal obligations by either removing “suspected war criminals from the country or prosecut[ing] these individuals for naturalization or immigration fraud.”).

29. See Beth Van Schaack, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts*, in IMAGINING JUSTICE FOR SYRIA 313 (2020); accord *infra* Part II.B. (describing the broader implications of using immigration as a method of accountability).

Immigration remedies are easier to pursue in part because administrative hearings entail a lower burden of proof.³⁰ However, when deportation is used as a remedy, there is in many cases no assurance that the country of origin can or will prosecute the individual.³¹ The HRSP's current approach towards atrocity accountability raises the question of whether it actually achieves justice when using immigration and naturalization to charge individuals for atrocity crimes committed abroad.³² Addressing that core question requires an understanding of HRSP's authority, legal framework, relationship to other agencies, and the cases it pursues.

A. Authority and Function

Congress has authorized the HRSP to prosecute three types of portfolios.³³ Under the first portfolio, the HRSP prosecutes perpetrators of international violent crimes who have committed murder, sex crimes, and other offenses through various statutes including the Military Extraterritorial Jurisdiction Act, and the Special Maritime and Territorial

30. See Jamie Rowen & Rebecca Hamlin, *The Politics of a New Legal Regime: Governing International Crime Through Domestic Immigration Law*, 40 LAW & POL'Y 243, 249, 253–54 (2018) (noting that in administrative proceedings respondents are only required to meet a clear and convincing standard as opposed to the criminal beyond a reasonable doubt standard).

31. While the DOJ works with countries in the deportation or extradition process, there is no policy that mandates assurances from the foreign government that the accused will be prosecuted in their country of origin. See *Pursuing Accountability for Atrocities: Hearing Before the U.S. H.R. Tom Lantos Hum. Rights Comm'n*, 116th Cong. 9–10 (2019) [hereinafter Rybicki Testimony] (statement of David Rybicki, Deputy Assistant Att'y Gen., Crim. Div., U.S. Dep't of Just.) (stating that although the HRSP works with different governments to assure there is justice in domestic courts, there are no guarantees of prosecution); see also Weiss, *supra* note 28, at 590 (discussing how the United States' current method of deporting individuals accused of atrocity crimes without assurance of domestic prosecutions is in violation of its international legal obligations); see, e.g., Rowen & Hamlin *supra* note 30, at 255 (describing a case where a Liberian man was deported for the recruitment of child soldiers and faced no justice in his country of origin).

32. See Weiss, *supra* note 28, at 594 (“While this mass deportation of suspected war criminals is consistent with the goal of denying war criminals a safe haven, it does nothing to ensure that human rights abusers are actually brought to justice.”). But see Rowen & Hamlin *supra* note 30, at 254 (arguing that “the convergence of domestic immigration law, domestic criminal law, and international criminal law have expanded [U.S.] power to redress atrocities, and sanction individuals, through back channels.”).

33. See Joseph Rikhof, *Prosecutors on the Front Line: A Q&A with Teresa McHenry, Head of the Human Rights and Special Prosecutions Section of the U.S. Department of Justice*, PHILIPPE KIRSCH INST. (Feb. 13, 2019), <https://www.kirschinstitute.ca/prosecutors-front-line-qa-teresa-mchenry-head-human-rights-special-prosecutions-section-u-s-department-justice/>.

Jurisdiction statute.³⁴ In the second portfolio, the HRSP prosecutes individuals involved in international criminal networks that attempt to circumvent the U.S. immigration system, mainly by using organized criminal networks that engage in smuggling persons into the United States.³⁵

Finally, under the third portfolio, the HRSP pursues accountability for those human rights violators who have committed atrocity crimes abroad.³⁶ When prosecuting these cases, the HRSP can utilize U.S. civil immigration and naturalization laws to deny or revoke American citizenship and residency statuses, and it can deport the individuals if substantive statutes cannot be used.³⁷ Thus, the HRSP retains discretion over how to prosecute suspected perpetrators of atrocity crimes found in the United States.³⁸ Unless another government requests extradition³⁹ the HRSP may criminally prosecute an individual for the underlying atrocity offense; deport an individual for criminal naturalization or immigration fraud; or charge an individual with immigration or naturalization fraud potentially leading to imprisonment and subsequent deportation.⁴⁰ The HRSP presses charges for atrocity crimes in conjunction with one of the ninety-four U.S. Attorney Offices (USAOs).⁴¹ Any USAO that

34. See *id.* (noting these are “generally crimes committed by or against U.S. government employees”); *Human Rights and Special Prosecutions Section (HRSP)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-hrsp> (last visited Nov. 13, 2021) (stating “HRSP also prosecutes perpetrators of other international violent crimes, particularly those involving the Military Extraterritorial Jurisdiction Act (MEJA) or occurring within the Special Maritime & Territorial Jurisdiction of the United States (SMTJ).”); 18 U.S.C. § 3261 (criminalizing “conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States”); see also 18 U.S.C. § 7 (provides extraterritorial jurisdiction over “vessel[s],” “lands reserved or acquired for the use of the United States,” “island[s],” U.S. “aircraft[s],” and other places enumerated in the statute).

35. See *Human Rights and Special Prosecutions Section (HRSP)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-hrsp> (last visited Nov. 13, 2021).

36. See *supra* notes 23–28 and accompanying text (outlining the statutes under which HRSP can prosecute accused persons).

37. See *infra* Part II.A (describing how the HRSP is often unable to pursue prosecutions under theories related to the substantive crimes); see also *About the Section*, *supra* note 26 (providing that the HRSP can also use immigration laws as a second option).

38. See, e.g., Rybicki Testimony, *supra* note 31 (outlining different ways the HRSP has prosecuted perpetrators of an atrocity crime).

39. Extradition requires an agreement with the country, and the United States does not have these with all countries. For a list, see 18 U.S.C. § 3181.

40. See, e.g., Rybicki Testimony, *supra* note 31, at 5–8 (discussing cases the HRSP pursued that led to deportations and imprisonment terms).

41. See *Human Rights Special Prosecution Section*, U.S. DEP’T OF JUST., <https://www.justice.gov/sites/default/files/criminal-hrsp/legacy/2014/03/31/HRSP-Brochure-HRV-Rev-214.pdf> (last revised Feb. 2014).

intends to prosecute acts classified as atrocity crimes⁴² must promptly notify the HRSP prior to beginning an investigation or opening a case.⁴³ In these instances, the HRSP will work with the USAOs throughout the prosecution of an individual in its jurisdiction.⁴⁴ Furthermore, the HRSP contributes to atrocity accountability efforts abroad by assisting in other countries' investigations by providing information to foreign governments who may be investigating or prosecuting an individual.⁴⁵

B. Legal Framework

The statute prohibiting genocide is a fundamental legal apparatus for the HRSP to prosecute individuals who partook in acts of genocide abroad.⁴⁶ This statute defines genocide as violent attacks “with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group[.]”⁴⁷ The HRSP only has jurisdiction over a *genocidaire*⁴⁸ if one of the following conditions are met: the acts were committed in full or in part within the United States; the perpetrator is a U.S. citizen; the offender is stateless with habitual residence in the United States; or the offender is present in the United States.⁴⁹ This jurisdictional scope is a

42. See generally UNITED NATIONS, *supra* note 23, at 1 (defining atrocity crimes).

43. See *Offenses Involving Suspected Human Rights Violators: Prior Approval, Notification, and Consultation Requirements* (18 U.S.C. § 1425 and 18 U.S.C. § 1546), U.S. DEP'T OF JUST., <https://www.justice.gov/jm/9-121000-offenses-involving-suspected-human-rights-violators-prior-approval-notification-and> (last updated Apr. 2018) (outlining the measures U.S. Attorneys must take prior to working on these types of prosecutions).

44. See *id.*

45. See Rybicki Testimony, *supra* note 31, at 2 (stating that the HRSP “continues to take important initiatives aimed at enhancing the capacity of foreign governments to investigate and prosecute criminal cases against participants in genocide, war crimes, and crimes against humanity”). But see Lara Jakes & Michael Crowley, *U.S. to Penalize War Crimes Investigators Looking into American Troops*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html> (arguing that the United States is blocking the investigations of the International Criminal Court for atrocity crimes committed by American soldiers in Afghanistan, and thus, is not contributing to international atrocity accountability efforts).

46. See 18 U.S.C. § 1091 (applying in both times of peace and war).

47. *Id.* § 1091(a).

48. *Genocidaire* is the term for a person guilty of committing genocide. *Genocidaire*, *DICTIONARY.COM*, <https://www.dictionary.com/browse/genocidaire> (last visited Nov. 13, 2021).

49. 18 U.S.C. § 1091(e); see HUM. RTS. & SPECIAL PROSECUTIONS SECTION, CRIM. DIV., U.S. DEP'T OF JUST., *GUIDE TO HUMAN RIGHTS STATUTES* (2017), <https://www.justice.gov/criminal-hrsp/file/1002896/download> [hereinafter HUM. RTS. & SPECIAL PROSECUTIONS SECTION] (elaborating on HRSP jurisdiction over acts of genocide).

product of a 2007 amendment to the statute which provides present-in jurisdiction⁵⁰ over any individual who committed genocide in 2007 or later and is present-in the United States.⁵¹

Although there is no statute of limitations, the statute prohibiting genocide cannot be applied retroactively to crimes committed before 2007, which greatly inhibits the HRSP's ability to prosecute these crimes for past atrocities, such as Rwanda.⁵² This means that a genocidaire who committed the act before 2007 cannot be prosecuted under the grave offense of genocide.⁵³ A genocidaire can be prosecuted for conspiracy, attempt, or commission of genocide, but not for superior responsibility liability.⁵⁴ Without superior responsibility as a mode of liability, the HRSP can only prosecute those who were physically involved in perpetrating genocide, which absolves potential accountability for those who were in higher ranking positions and may have failed to act to prevent a genocide.⁵⁵

Another law available to the HRSP is the federal war crimes statute.⁵⁶ This statute is "particularly complicated" as it domestically codifies the "'grave breaches' of the Geneva Conventions and portions of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land."⁵⁷ Further, to apply the statute, the HRSP must gauge when the alleged offense occurred; which offense occurred; and whether the surrounding conflict, from which the alleged offense arises, is characterized as an armed conflict.⁵⁸ In accordance with international

50. See Beth Van Schaack & Zarko Perovic, *The Prevalence of "Present-In" Jurisdiction*, in AM. SOC'Y OF INT'L L., PROCEEDINGS OF THE 107TH ANNUAL MEETING 237, 240 (2013) (defining present-in jurisdiction as "[t]he existence of certain *nexi* to the prosecuting forum, such as present-in or habitual residence-in requirements for the defendant, the victim, or both").

51. See *Pursuing Accountability for Atrocities: Hearing Before the U.S. H.R. Tom Lantos Hum. Rights Comm'n*, 116th Cong. 12–13 (2019) (written statement of Beth Van Schaack, Leah Kaplan Visiting Professor of Human Rights, Stanford Law School) [hereinafter Van Schaack Testimony], https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf.

52. See, e.g., *id.* at 12 n.66 (noting that perpetrators of the Rwanda genocide had to be prosecuted under immigration laws because the genocide statute lacks retroactive application).

53. See *id.*

54. HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49.

55. See Michael Duttwiler, *Liability for Omission in International Criminal Law*, 6 INT'L CRIM. L. REV. 1, 2 (2006) (explaining that superior responsibility "imposes responsibility on a superior, who knew or should have known that crimes are being perpetrated by persons under his or her de facto control, but did not intervene to prevent or punish them.").

56. See generally 18 U.S.C. § 2441.

57. HUM. RTS. SPECIAL PROSECUTION SECTION, *supra* note 49.

58. See *id.*; see also AM. CIV. LIBERTIES UNION, ACCOUNTABILITY FOR TORTURE: WHY

humanitarian law,⁵⁹ the war crimes statute prohibits torture, murder, rape, and hostage-taking, among other crimes.⁶⁰

Unlike the other criminal atrocity statutes, the HRSP's jurisdiction over these crimes is triggered only when the offender or victim is a member of the U.S. Armed Forces, or if the offender or victim is a U.S. national.⁶¹ When Congress drafted the statute, the DOJ fought to alter U.S. treaty interpretation on the jurisdiction of war crimes from present-in jurisdiction—an interpretation that aligns with international customary law—to its current more limited approach.⁶² Due to the statute's limited jurisdictional scope, the HRSP cannot prosecute a person for war crimes they committed in their country's military or armed group unless the victim was American.⁶³ The HRSP is free to prosecute these cases without the restraint of statute of limitations; however, in some cases, such as rape, the HRSP interprets the statute to apply only five years from the date of the crime's commission.⁶⁴

The HRSP may also use the antitorture statute to prosecute atrocity crimes when it finds that an individual committed an act of torture outside of the United States.⁶⁵ The statute criminalizes an individual who acted under color of law and inflicted severe physical or mental pain or suffering upon another person within their custody or physical control.⁶⁶ Jurisdiction for this crime is triggered when an individual is present in the United States or a national of the United States,⁶⁷

A CRIMINAL INVESTIGATION IS NECESSARY 2 (last visited Nov.13, 2021), https://www.ac.lu.org/sites/default/files/field_document/accountabilityfortorture-whyacriminalinvestigationisnecessary.pdf (explaining that the DOJ can prosecute breaches of the Geneva Conventions under the war crimes statute).

59. See 18 U.S.C. § 2441(c)(1)–(3) (drawing from the Geneva Conventions, the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and grave breaches of Common Article 3); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 763–64 (9th Cir. 2011) (defining war crimes as the grave breaches offenses of the Geneva Conventions and violations of Common Article 3).

60. 18 U.S.C. § 2441(d).

61. *Id.* § 2441(b).

62. See Van Schaack Testimony, *supra* note 51, at 8 (noting that the DOJ cited to prosecutorial challenges to explain its opposition to extraterritorial jurisdiction over war crimes, despite this jurisdiction being commonly used to prosecute terrorism charges).

63. See *id.* (demonstrating the jurisdictional limitations of the war crime statute without present-in jurisdiction).

64. See generally HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49 (explaining the HRSP's interpretation of the war crimes statute's limitations).

65. Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340–2340A.

66. *Id.* § 2340.

67. *Id.* § 2340A; HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 4954.

but the statute only applies if the conduct occurred after 1996.⁶⁸ Thus again, the HRSP is limited to prosecuting under immigration if the individual committed the atrocity crime before 1996.⁶⁹ Similar to the other atrocity crime statutes, the HRSP can prosecute for commission, attempt, and conspiracy, but not superior responsibility liability.⁷⁰ While there is no statute of limitations if the torture resulted in death or serious bodily harm,⁷¹ in other cases of torture the HRSP must file charges within eight years of the act's commission.⁷²

Finally, with respect to atrocity crimes, the HRSP may charge an individual who knowingly recruits or conscripts children under the age of fifteen into an armed group to fight in a conflict.⁷³ Jurisdiction over these crimes only activates when the offender is a U.S. citizen present in the United States, or the offender committed the offense fully or partially within the United States.⁷⁴ HRSP must file charges against a defendant within ten years of the time when the offense was committed.⁷⁵

Beyond the substantive federal laws prohibiting atrocity crimes, the HRSP uses a variety of immigration and naturalization statutes enacted by Congress to prosecute perpetrators of atrocity crimes.⁷⁶ These include

68. HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 4954.

69. For the HRSP to use conspiracy as a mode of liability, the act must have happened after 2001, the year Congress amended the statute to include conspiracy as a mode of liability. *See* §§ 2340–2340A.

70. *See id.* *But see* HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49 (claiming that while the statutes do not have superior responsibility liability “in some instances, [superior] conduct can be reached through the application of U.S. laws on conspiracy or aiding and abetting.”).

71. AM. CIV. LIBERTIES UNION, *supra* note 58.

72. *See* HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49 (stating that there is an applicable statute of limitations period but failing to detail when it is triggered).

73. 18 U.S.C. § 2442(a)(1)–(2) (defining the criminalization of the recruitment of child soldiers as knowingly “recruit[ing], enlist[ing], or conscript[ing] a person to serve while such person is under 15 years of age in an armed force or group” or “us[ing] a person under 15 years of age to participate actively in hostilities”).

74. *See* 18 U.S.C. § 2442(c) (defining the U.S. government’s jurisdiction over the offense); HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49.

75. *See* HUM. RTS. & SPECIAL PROSECUTIONS SECTION, *supra* note 49 (stating criminal charges must be filed against someone accused of recruitment or use of child soldiers within ten years of the crime’s commission).

76. *See, e.g.*, 18 U.S.C. § 1425 (1952) (unlawful procurement of citizenship or naturalization); 18 U.S.C. § 1546 (1952) (fraud and misuse of visas, permits, and other documents); 18 U.S.C. § 1001 (1952) (falsifying statements or documents to gain entry); 18 U.S.C. § 1621 (1952) (perjury); *see also* Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18’s Blind Spots*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 341, 348 (Margaret M. deGuzman & Diane Marie Amann eds., 2018), <https://www.justsecurity.org/wp-content/uploads/2019/06/Arcs-of-Global-Justice-The-Need-for-a-US-CAH-Statute.pdf> [hereinafter Van Schaack, *Crimes Against Humanity*] (asserting that Congress has given HRSP several immigration laws to utilize).

statutes for naturalization fraud⁷⁷ and visa fraud,⁷⁸ which carry criminal penalties. Alternatively, it can pursue civil denaturalization under immigration laws, which aim to revoke citizenship and deport the individual.⁷⁹ For example, in denaturalization cases, the HRSP only has to demonstrate that defendants knowingly lied on their naturalization forms by proving that they failed to disclose their involvement in an atrocity crime within their country of origin, which would subsequently demonstrate that they gained U.S. citizenship fraudulently.⁸⁰

C. Interagency Coordination

To accomplish its prosecution, either under immigration laws or substantive atrocity laws, the HRSP relies heavily on interagency coordination.⁸¹ Interagency cooperation is an essential component of the Human Rights Enforcement Act of 2009.⁸² By itself, the HRSP has limited capacity and resources; therefore, it works closely with several agencies including the DHS, the Department of State (DoS), and the Federal Bureau of Investigations (FBI) to carry out its investigations and prosecutions domestically and abroad.⁸³ For example, the DoS facilitates the HRSP's partnerships by working with foreign governments, assisting in obtaining evidence, and identifying potential perpetrators on the ground.⁸⁴

Through its relationship with the DHS and the FBI, the HRSP can gather evidence—much of which it resources from the DHS's monitoring of incoming persons to the United States and partnerships with NGOs domestically and abroad.⁸⁵ When the HRSP does not prosecute an

77. See 18 U.S.C. § 1425 (defining naturalization fraud as knowingly asserting false claims or statements on a visa form to procure a visa).

78. See 18 U.S.C. § 1546 (defining visa fraud as an act where an individual falsely made or procured a visa by means of any false claim or statement on his or her visa form).

79. The HRSP resorts to civil actions when the statute of limitations for criminal naturalization fraud charges have expired. See Rikhof, *supra* note 33.

80. See generally Christina Giffin, Kathleen O'Connor & Christian Levesque, *Prosecuting Human Rights Violators for Naturalization Fraud: HRSP Lessons Learned*, 65 U.S. ATT'YS BULL. 29, 30 (2017) (analyzing how the HRSP prosecutes individuals suspected of atrocity crimes under naturalization laws).

81. See generally *About the Section*, *supra* note 26 (describing the HRSP's interagency relationships).

82. See 28 U.S.C. § 509B (requiring the Attorney General to confer with the Secretary of Homeland Security and the Secretary of State regarding enforcement of human rights violations).

83. See *About the Section*, *supra* note 26.

84. See *id.*

85. See Rodi III Testimony, *supra* note 27, at 6 (stating that the DHS relies heavily on nongovernmental organizations (NGOs) to identify offenders and witnesses and obtain critical evidence necessary for prosecutions to move forward); see also *Human Rights and Special*

individual for the underlying atrocity offense—and instead uses civil immigration or denaturalization laws—it must work in coordination with the DHS to remove, deport, or revoke the individual's immigration status within the United States.⁸⁶

However, on the surface, the two agencies appear to possess different standards of justice.⁸⁷ While both acknowledge the importance of denying human rights violators a safe haven in the United States, the HRSP's foremost goal is to prosecute under the federal statutes available for atrocity crimes.⁸⁸ According to the DHS, while criminal laws are important, immigration laws denying human rights violators safe haven in the United States are essential to prevent future atrocities.⁸⁹ Thus, the goals of the agencies may come into conflict since both agencies possess concurrent powers to prosecute.⁹⁰ For example, given the covert nature of administrative proceedings, it is difficult to determine if the DHS automatically seeks to deport or deny entry to potential atrocity perpetrators or if it consults the HRSP about the feasibility of charging a person under substantive criminal laws before using deportation.⁹¹

Prosecutions Section Human Rights Portfolio, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-hrsp/page/file/931511/download> (last revised Apr. 2020) [hereinafter *Human Rights Portfolio*] (noting that the HRSP coordinates with NGOs and other government agencies to protect against human rights violations, including female genital mutilation).

86. See Van Schaack, *Crimes Against Humanity*, *supra* note 76, at 347–48 n.41 (stating that the DHS's Human Rights Violators War Crimes Unit works with the HRSP when the HRSP determines it cannot move forward under substantive atrocity laws).

87. Compare Rikhof, *supra* note 33 (asserting that the HRSP's primary objective is bringing human rights violators to justice), and *About the Section*, *supra* note 26 (claiming that the HRSP's goal is to hold human rights violators accountable “under the federal criminal statutes proscribing torture, war crimes, genocide, female genital mutilation, and recruitment or use of child soldiers.”), with Rybicki Testimony, *supra* note 31, at 3 (stating that the HRSP works “in cooperation with our domestic and foreign law enforcement partners, as part of a coordinated, whole-of-government, interagency effort to deny safe haven in this country to human rights violators.”).

88. See *supra* note 85 and accompanying text.

89. Rodi III Testimony, *supra* note 27, at 5.

90. See *Human Rights Violators & War Crimes Center*, U.S. DEP'T OF HOMELAND SEC., <https://www.ice.gov/partnerships-centers/hrvcc> (last updated May 6, 2021); see also Rowen & Hamlin, *supra* note 30, at 254 (positing that the DHS may be undermining international criminal justice efforts for atrocity accountability because the denial of safe haven through “deportation is not technically a punishment” and there is usually no threat of prosecution in an accused's home country); Beth Van Schaack, *Tom Lantos Commission: Enhancing U.S. Ability to Pursue Accountability for Atrocities*, JUST SEC. (June 17, 2019), <https://www.justsecurity.org/64579/tom-lantos-commission-enhancing-u-s-ability-to-pursue-accountability-for-atrocities/> (explaining that neither the DHS nor the DOJ has veto power over the other in deciding to prosecute an individual for atrocity crimes).

91. See Glenna MacGregor & Jessica C. Morris, *Human Rights Enforcement in U.S.*

One major benefit from this interagency relationship is the DHS's existing partnerships with CSOs and NGOs.⁹² CSOs and NGOs play an essential role in documenting atrocities, both while they occur and also during the aftermath.⁹³ In its investigations and prosecutions, the DHS uses NGO partnerships to find suspects and to obtain information.⁹⁴ For example, in the prosecution of a Liberian man who engaged in the recruitment of child soldiers, the NGO Civitas Maximas assisted DHS prosecutors by collecting survivor and witness statements.⁹⁵ The HRSP also stated that during its investigation phase of atrocities crimes, NGOs fill important voids when it comes to finding witnesses and suspects and providing expertise.⁹⁶ Together, the HRSP and the DHS have previously hosted a roundtable discussion with thirty NGOs on how law enforcement can best work together with these organizations.⁹⁷ However, it is unclear whether the HRSP utilizes the DHS's existing relationships with NGOs to bolster its own investigations. Also unclear is the level of engagement the DHS and HRSP collectively have in educating organizations on the best ways to document atrocities to allow HRSP to bring prosecutions domestically.⁹⁸

Immigration Law: A Missed Opportunity for Engagement with International Law, 5 J. MARSHALL L.J. 467, 485 (2012) (explaining that the DHS's Immigration and Customs Enforcement may hand over a case to the HRSP); *see also* Rowen & Hamlin, *supra* note 30, at 253 (providing that information about the accused atrocity perpetrators deported by the DHS is not easily accessible, but as of 2018, there have been at least seventy-five deported just through the DHS's efforts).

92. *See* Rowen & Hamlin, *supra* note 30, at 252 (noting that successful investigations could not be accomplished without the assistance of partnering NGOs).

93. *See* Levy & Williams, *infra* note 98 and accompanying text.

94. *See* Rowen & Hamlin, *supra* note 30, at 254 (discussing how the DHS relies on international organizations to assist in investigations).

95. *See id.* at 255 (stating the "trial relied on evidence collected from the Global Justice and Research Project, a Liberia-based nonprofit that, working with Civitas Maximas, has been collecting evidence . . . to redress the atrocities committed in the Liberian Civil War").

96. *Strengthening Partnerships to Hold Human Rights Violators Accountable*, U.S. DEP'T OF JUST. (June 25, 2012), <https://www.justice.gov/archives/opa/blog/strengthening-partnerships-hold-human-rights-violators-accountable> (demonstrating that the HRSP has existing relationships with NGOs to educate on the crime of female genital mutilation).

97. *See id.* ("Human rights investigations and prosecutions present unique challenges for law enforcement and NGOs can play a critical role in overcoming these challenges by providing information regarding potential evidence, witnesses, suspects and area expertise.").

98. Beth Van Schaack, *Atrocities Prevention & Response: A Good Governance Blueprint 14* (Dec. 17, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3751095 [hereinafter Van Schaack, *Atrocities Prevention & Response*] (noting that public engagement is essential to interagency atrocity responses, as it "offer[s] alternative sources of information, advice, and implementing partners for addressing at-risk situations."); *see also* Jessica C. Levy & Paul R. Williams, *Documentation for Accountability*, 52 CASE W. RESRV. J.

D. *The HRSP's Docket*

In 2019, the DHS estimated that within the past twenty-five years, over one million refugees fleeing armed conflict, violent oppression, prosecution, or torture have entered the United States.⁹⁹ Further, in 2011, the DHS approximated that from this group, some two thousand perpetrators of atrocity crimes were living in the United States.¹⁰⁰ Despite these alarming statistics, the HRSP—the agency with authority to prosecute atrocity crimes—has made no charges of genocide, war crimes, or the use or recruitment of child soldiers, and the DOJ has charged only three persons for torture.¹⁰¹ While there have been few charges by the HRSP under substantive laws, the DHS prosecuted “dozens of cases” against potential atrocity perpetrators utilizing immigration penalties.¹⁰²

On the cusp of the HRSP's formation in 2009, the DOJ brought its first charge under the torture statute in *United States v. Belfast*.¹⁰³ Roy M. Belfast Jr., a dual citizen of the United States and Liberia and the son of Liberian former President Charles Taylor, commanded a Liberian security force that systematically tortured civilians.¹⁰⁴ Taylor was convicted and sentenced to ninety-seven years in prison.¹⁰⁵ In 2013, the HRSP made its first official indictment as a newly formed agency within the DOJ and its second indictment under the federal torture statute for the Bosnian platoon commander, Sulejma Mujagic.¹⁰⁶ The HRSP charged Mujagic for physical and mental torture committed during the Wars of Yugoslavian Succession;

INT'L L. 451, 455 (2020) (stating that civil society organizations (CSOs) and NGOs are vital in documenting atrocities for subsequent accountability measures).

99. See Rodi III Testimony, *supra* note 27.

100. *No Safe Haven: Law Enforcement Operations Against Human Rights Violators in the U.S.: Hearing Before the Lantos Human Rights Comm. of the H. Comm. on Foreign Affs.*, 112th Cong. (2011) (statement of John P. Woods, Deputy Assistant Director, U.S. Immigration and Customs Enforcement).

101. See generally *infra* Part I.D (detailing the cases prosecuted by the HRSP).

102. See Van Schaack Testimony, *supra* note 51, at 15.

103. See 611 F.3d 783, 814 (11th Cir. 2010) (explaining that the defendant could be charged because “a statute ancillary to a substantive offense statute is presumed to have extraterritorial [effect] if the underlying substantive offense statute is determined to have extraterritorial [effect].” (quoting *United States v. Reumayr*, 530 F. Supp. 2d 1210, 1219 (D.N.M. 2008))); see also *Human Rights Portfolio*, *supra* note 85 (discussing the case).

104. See Press Release, U.S. Dep't of Just., Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges (Jan. 9, 2009), <https://www.justice.gov/archive/opa/pr/2009/January/09-crm-021.html>.

105. *Id.*

106. Press Release, U.S. Dep't of Just., Bosnian Man Extradited to Stand on Trial for Murder and Torture (June 3, 2013), <https://www.justice.gov/opa/pr/bosnian-national-extradited-stand-trial-murder-and-torture>.

however, due to an extradition request from the Bosnian government, Mujagic was prosecuted in Bosnia for his war crimes in the former Yugoslavia.¹⁰⁷

Most recently, the HRSP indicted Michael Sang Correa, a national of The Gambia, in June 2020.¹⁰⁸ The HRSP charged Correa with “one count of conspiracy to commit torture and six counts of inflicting torture on specific individuals.”¹⁰⁹ However, his indictment came only after political pressure from U.S. Senators Patrick Leahy and Richard Durbin, who urged the DOJ and the DHS to investigate and prosecute Correa.¹¹⁰ While these examples of torture charges demonstrate the HRSP’s potential to be an effective agent for atrocity accountability, these prosecutions have unfortunately remained a rarity. This is due in part to the difficulty of obtaining evidence from foreign countries, statutory deficiencies (such as statutes of limitations), and, in some cases, a lack of political will to prosecute.¹¹¹

Despite the few cases that the HRSP has prosecuted under the substantive criminal atrocity law, the HRSP has successfully aided in pursuing cases under the theories of naturalization fraud¹¹² and visa fraud,¹¹³ which can carry criminal penalties. Additionally, it has used an immigration law on civil denaturalization, which aims to revoke citizenship.¹¹⁴ In the 2013 case *United States v. Sosa*,¹¹⁵ the HRSP, in coordination with the DHS, indicted and successfully prosecuted a U.S. citizen and former commanding officer in the Guatemalan special forces on

107. *Id.*

108. Press Release, U.S. Dep’t of Just., Gambian Man Indicted on Torture Charges (June 11, 2020), <https://www.justice.gov/opa/pr/gambian-man-indicted-torture-charges>.

109. *Id.*

110. Congress has explicitly told the DOJ to prioritize the prosecution of human rights violators. See Letter from Patrick Leahy and Richard Durbin, U.S. Sens., to Hon. William Barr, U.S. Att’y Gen. (Feb. 18, 2020), <https://www.leahy.senate.gov/imo/media/doc/Leahy%20-%20Letter%20to%20AG%20Bar%20and%20Sec.%20Wolf%20re%20Michael%20Sang%20Correa%20-%2020021820.pdf>. The DOJ could not defer to deportation—as it usually does—because CSOs and NGOs collected ample evidence. See Rando DeFalco, *Senators Call for the Prosecution of Gambian Paramilitary Fighter in U.S. Custody*, JUST SEC. (Feb. 21, 2020), <https://www.justsecurity.org/68748/senators-call-for-prosecution-of-gambian-paramilitary-fighter-in-us-custody/>.

111. See *infra* Part II.A. Despite several issues that prevent prosecutions from moving forward, the HRSP has claimed that it relies on visa fraud and naturalization fraud statutes to hold human rights violators accountable because “[the] ‘human rights’ statutes are relatively recent and cannot be applied retrospectively[.]” See Rikhof, *supra* note 33.

112. 18 U.S.C. § 1425(b).

113. 18 U.S.C. § 1546(a).

114. See Rikhof, *supra* note 33.

115. 608 F. App’x 464 (9th Cir. 2015).

charges of naturalization fraud for concealing his involvement in a massacre of at least 160 people in Dos Erres, Guatemala.¹¹⁶ Sosa was sentenced to ten years in prison and stripped of his U.S. citizenship.¹¹⁷ The HRSP and the DHS also prosecuted several of Sosa's affiliates in the massacre under immigration fraud offenses.¹¹⁸ Two were sentenced to ten years in prison, others had their citizenship revoked, and some were deported by the DHS's Immigration and Customs Enforcement to Guatemala.¹¹⁹

The HRSP has pursued several other cases involving atrocities under similar immigration theories.¹²⁰ For example, the HRSP has assisted with the deportation of over 150 persons who had various roles in the Wars of Yugoslavian Succession and revoked many of their legal statuses within the United States.¹²¹ Similarly, the HRSP assisted a USAO in immigration perjury charges against several Rwandans who took part in genocidal acts.¹²² While immigration remedies fill a gap in the HRSP's ability to pursue accountability, they should remain a "second-best option when [people/persons/leaders commit] grave international crimes"¹²³

116. *See id.* at 466.

117. Press Release, U.S. Dep't of Just., Former Guatemalan Special Forces Officer Sentenced for Covering up Involvement in 1982 Massacre (Feb. 10, 2014), <https://www.justice.gov/opa/pr/former-guatemalan-special-forces-officer-sentenced-covering-involvement-1982-massacre>.

118. Rikhof, *supra* note 33.

119. *Id.*

120. In 2013, the HRSP charged an Ethiopian immigrant who partook in torture and murder during Ethiopia's "Red Terror" for lying to U.S. immigration and naturalization officials about his prior atrocity offenses. *See* Tom Mcghee, *Ethiopian Immigrant Admits Being Guard Accused of Killing Prisoners*, DENVER POST (July 10, 2013, 11:34 AM), <https://www.denverpost.com/2013/07/10/ethiopian-immigrant-admits-being-guard-accused-of-killing-prisoners/>. In 2018, the HRSP charged Mohammed Jabbateh with two counts of immigration fraud and perjury for failing to disclose his participation in atrocities during Liberia's civil war, including murder, rape, sexual and labor enslavement, cannibalism, and the use of child soldiers. *See* Press Release, U.S. Dep't of Just., Former Liberian War Lord Known as "Jungle Jabbah" Sentenced to 30 Years in Prison for Immigration Fraud and Perjury (Apr. 19, 2018), <https://www.justice.gov/usao-edpa/pr/former-liberian-war-lord-known-jungle-jabbah-sentenced-30-years-prison-immigration>.

121. *See* Rikhof, *supra* note 33.

122. Congress invited the DOJ to speak before the Human Rights Tom Lantos Human Rights Committee on behalf of the HRSP's atrocity accountability efforts and was asked about its prosecutorial challenges to bringing charges. *See* Rybicki Testimony, *supra* note 31.

123. *See* Van Schaack Testimony, *supra* note 51, at 4; *accord* Rowen & Hamlin, *supra* note 30 (acknowledging that deportation undermines justice for atrocity accountability).

II. PROSECUTORIAL IMPEDIMENTS AND IMPLICATIONS OF THE CURRENT ATROCITY ACCOUNTABILITY APPROACH

The HRSP's lack of prosecutions for substantive atrocity crimes derives from various factors, including critical statutory deficiencies, evidentiary challenges, resource constraints, and, at times, a lack of political will to prosecute.¹²⁴ These factors create significant hurdles for the HRSP to overcome in order to bring charges under substantive atrocity law and potentially achieve justice.

A. *Impediments to Prosecutions Under Substantive Atrocity Laws*

The greatest barrier to the HRSP prosecuting atrocity crimes under their substantive laws is the current statutory framework.¹²⁵ For example, the lack of retroactive application of many of these statutes forces the HRSP to prosecute under visa fraud and naturalization fraud.¹²⁶ Notably, the lack of retroactive application of the genocide statute prohibits the HRSP from prosecuting genocidaires for many atrocities, including the Holocaust, the Rwandan genocide, the Khmer Rouge genocide, and others.¹²⁷ Additionally, for many of the laws, there are statutes of limitations that prevent the HRSP from prosecuting under substantive law in many cases, such as if the perpetrators have been in the United States for decades.¹²⁸

On top of technical statutory issues, the threshold for meeting the legal definition of genocide is extremely high; it requires proof of the perpetrator's mental intent to destroy a group in part or in whole, as well as proof that they targeted a specific group.¹²⁹ Thus, if an individual committed a massacre or an ethnic cleansing campaign, it may still be difficult for the HRSP to prosecute under the genocide statute without evidence that the perpetrator intended to destroy the group.¹³⁰ This is

124. See *infra* Part II.A.

125. See Rowen & Hamlin, *supra* note 30, at 245 (noting that deportation is a “fraught instrumentalization of law that may address gaps in the international criminal justice regime but may simultaneously undermine justice for mass atrocity.”).

126. See Rikhof, *supra* note 33.

127. See Van Schaack Testimony, *supra* note 51, at 12–13 and accompanying text (discussing the retroactive application barrier that the genocide statute poses); cf. Melissa Eddy, *Why Germany Prosecutes the Aged for Nazi Roles It Long Ignored*, N.Y. TIMES (Feb. 9, 2021) (illustrating that the United States could not prosecute German Nazis domestically).

128. See Rikhof, *supra* note 33; *supra* Part I.B and accompanying text.

129. See *supra* Part I.B (outlining the requirements for a genocide charge under the statute).

130. Intent to destroy usually requires evidence of some sort of a “[s]tate or organizational plan or policy.” See Genocide, U.N. Off. on Genocide Prevention & Resp. to Protect, <https://www.un.org/en/genocideprevention/genocide.shtml> (last visited Nov. 13, 2021); Van Schaack Testimony, *supra* note 51, at 6; Van Schaack, *Atrocities Prevention & Response*, *supra* note 98

because the HRSP currently does not have a crimes against humanity statute that would allow it to prosecute a crime without demonstrating the specific intent element.¹³¹

One of the main obstacles for the HRSP when prosecuting cases under the war crimes statute is its strict jurisdictional scope.¹³² The war crimes statute lacks present-in jurisdiction, meaning the HRSP cannot prosecute an individual who served in a foreign military and committed atrocity crimes unless the victim was American.¹³³ In addition, superior responsibility as a mode of liability is not available under the war crimes statute.¹³⁴ This is problematic because many of the perpetrators in positions of authority have sufficient financial resources to seek refuge in the United States.¹³⁵ Overall, these legislative holes 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”¹³⁶

Beyond statutory deficiencies, there are practical issues related to evidentiary collection.¹³⁷ Documentation and access to witnesses require extensive resources, staff, and expertise.¹³⁸ These cases involve complex sets of facts and may require tracking down witnesses abroad and bringing them to the United States to testify.¹³⁹ Additionally, these cases may necessitate foreign governments working with the HRSP and its interagency partners to compile evidence for cases.¹⁴⁰ Compounding on the complexity of obtaining evidence from abroad is the issue of funding, as these cases are often expensive and deportations might make more sense

(expanding on Beth Van Schaack, *Good Governance Paper No. 13: Atrocities Prevention and Response*, in *GOOD GOVERNANCE PAPERS* (Emily Berman et al. eds., 2020)).

131. See *infra* Part III.A (recommending that the HRSP advocate for Congress to enact a crimes against humanity statute).

132. See *supra* Part I.A (discussing the narrow jurisdictional scope on the war crimes statute).

133. See 18 U.S.C. § 2441; see also *supra* note 62 and accompanying text.

134. See Van Schaack Testimony, *supra* note 51, at 8.

135. See *id.* at 10.

136. Van Schaack, *Crimes Against Humanity*, *supra* note 76, at 342.

137. See Rodi III Testimony, *supra* note 27, at 3.

138. See Rikhof, *supra* note 33 (discussing that these can be “difficult, time consuming, and resource intensive” investigations).

139. See Rybicki Testimony, *supra* note 31, at 8 (“[I]nvestigations of suspected perpetrators of genocide, war crimes, or crimes against humanity [are] extremely complex, whether the investigations concern those offenses directly or instead involve immigration-related violations prosecuted criminally or civilly.”).

140. See *id.* at 2.

from the “American taxpayer” perspective.¹⁴¹ In contrast, many of these same evidentiary challenges are present in terrorism and trafficking cases, but these cases often move forward under their respective underlying charges.¹⁴²

Finally, a lack of political will may deter the HRSP from moving forward with cases under substantive atrocity laws.¹⁴³ The HRSP determines the appropriate method of accountability on a case-by-case basis¹⁴⁴ by weighing the evidence and the graveness of the crime; however, an important caveat is that a prosecution will not go forward if it does not serve a substantial federal interest.¹⁴⁵ This has raised concerns over the HRSP’s inaction to prosecute or investigate (to the public’s knowledge) cases concerning potential war crimes committed by American mercenaries¹⁴⁶ abroad.¹⁴⁷ In one particular case, a U.S. Army lieutenant colonel allegedly commanded troops in the United Arab Emirates who reportedly committed atrocities

141. Deportation is cheaper than domestically prosecuting an individual in the United States because of the difficulty of obtaining evidence; extradition is even cheaper than pursuing denaturalization or visa fraud, but few countries request extradition. See Weiss, *supra* note 28, at 594 (citing a telephone interview with Eli Rosenbaum, then-Director of the HRSP).

142. See Van Schaack Testimony, *supra* note 5151, at 17.

143. See Micah S. Myers, Note, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations*, 25 MICH. J. INT’L L. 211, 228 (2003) (noting that there are several reasons a government may not want to prosecute a foreigner, including if the prosecuting government wants to avoid looking complicit in human rights violations, or if diplomatic or economic relationships would be affected).

144. See Weiss, *supra* note 2828, at 594.

145. See Rikhof, *supra* note 3332 (adding that prosecutions will also not go forward “if the potential defendant is subject to effective prosecution in another jurisdiction, or if there is an adequate non-criminal alternative to prosecution.”).

146. In the contemporary context, the U.S. military defines mercenaries as “foreigners who took part in an armed conflict on one side or the other, primarily for high pay.” See U.S. DEP’T OF THE AIR FORCE, PAMPHLET 110–34, COMMANDER’S HANDBOOK ON THE LAW OF ARMED CONFLICT § 5-3 (1980); see also Ryan Goodman & Sarah Knuckey, *Justice Dept Must Open Criminal Investigation into Potential War Crimes by U.S. Mercenaries in Yemen*, JUST SEC. (Oct. 16, 2018), <https://www.justsecurity.org/61091/u-s-justice-department-open-criminal-investigation-potential-war-crimes-u-s-mercenaries-yemen/> (noting that American mercenaries have “attempted and completed murder of civilians in Yemen at the behest of the United Arab Emirates”—crimes within the HRSP’s jurisdiction).

147. See Prue Clarke, *‘Jungle Jabbah’ Was Accused of Cannibalism and Other Horrors in Liberia. How a U.S. Court Brought Him to Justice*, WASH. POST (Apr. 14, 2018, 7:08 PM), https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef_story.html (reporting that human rights activists say the HRSP “routinely” rejects cases, and its prosecution rates are much lower than those of European courts, which charged fifty-one cases for atrocities in 2017).

rising to the threshold of war crimes.¹⁴⁸ In cases involving U.S. mercenaries, the HRSP may lack the political will to prosecute due to the potential of exposing U.S. companies who employ mercenaries fighting in foreign conflicts.¹⁴⁹ While political will may serve as a barrier to the HRSP pursuing sensitive cases, the HRSP should demonstrate that Americans are not immune to justice for atrocities they have committed.

B. *Implications of the Current Approach*

The HRSP's current approach in deporting individuals for atrocity crimes has implications on global and national security. This policy could potentially revictimize survivor communities and diminish wider international atrocity efforts, if not supported by domestic prosecution in an offender's country of origin.¹⁵⁰ By relying on immigration remedies, which often result in deportation and only potential prosecution in the home country, the HRSP may actually be creating or perpetuating conflict.¹⁵¹ Forcible repatriation of people correlates with increased hostilities during civil wars when the individuals who have previously left are forced to return.¹⁵² For example, in Iraq and El Salvador, the forcible repatriation of people who fled has led to more conflict between both the local communities and the persons who

148. See Rebecca Hamilton & Sarah Knuckey, *Time to Dust Off the War Crimes Act?—for an American Ex-Soldier Now in Command of the UAE Forces*, JUST SEC. (May 9, 2018), <https://www.justsecurity.org/55983/time-dust-war-crimes-act-toumajan-yemen-uae-emirates/> (calling for the United States to “dust off” the War Crimes Act and pursue justice when U.S. mercenaries commit atrocities). This case is important because the United Arab Emirates “is part of the Saudi-led coalition that has been accused of serious international law violations (including war crimes) for indiscriminate and disproportionate airstrikes in Yemen, arbitrary detention, torture, [and] enforced disappearances” See *id.*

149. See *supra* notes 139–144 and accompanying text (discussing the potential domestic and foreign policy implications of pursuing cases against American mercenaries).

150. See Weiss, *supra* note 28, at 590 (“[T]he United States has largely chosen either to try them for immigration or naturalization fraud, or remove the suspects from the United States without adequate assurance that they will be prosecuted.”).

151. See Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT’L L. 745, 811 (2013) (noting that “the United States has concluded that mass killings are a threat to U.S. national security”); see also Directive on Creation, *supra* note 21 (highlighting that atrocities implicate national security interests).

152. See Stephanie Schwartz, *Sending Refugees Back Makes the World More Dangerous*, FOREIGN POL’Y (Nov. 27, 2019, 7:22 AM), <https://foreignpolicy.com/2019/11/27/sending-refugees-back-makes-the-world-more-dangerous/> (noting that when repatriation is not voluntary or a durable peace is not ensured, returning a refugee can perpetuate more conflict).

returned.¹⁵³ Conflicts that may lead to atrocities threaten not only global security, but also the United States' own national security interests.¹⁵⁴ Additionally, in many cases, deporting an offender back to a country that "lacks the legal framework, juridical capacity, or political will to prosecute for the substantive crime" leads to cases of impunity.¹⁵⁵ This impunity risks intimidating and retraumatizing the survivors for whom the HRSP asserts to seek justice.¹⁵⁶

Furthermore, the HRSP's approach of using immigration and deportation remedies is problematic because it diminishes the preventative effects of atrocity accountability and undermines the objectives of international criminal law.¹⁵⁷ Not only are immigration and deportation charges inherently unsatisfying in the fight for justice, but these convictions do not create the same kind of stigma for committing these offenses as would charges under substantive laws.¹⁵⁸ This stigma is fundamental to creating a global atrocity accountability system that takes ownership of prosecuting individuals for these crimes whenever possible.¹⁵⁹ Immigration and denaturalization merely strips an offender of their rights to remain in the United States, but it does not "address" the offender's underlying atrocity crimes.¹⁶⁰

153. *See id.* (explaining that when Iraq "encouraged internally displaced people and refugees to return home" locals reacted violently, and that U.S. deportations of Salvadorans in the 1990s led to the formation of transnational gangs); *see also* Christophe Paulussen, *Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive*, INT'L CTR. FOR COUNTER-TERRORISM—THE HAGUE (Oct. 17, 2018), <https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/> (asserting that repatriation may increase the perpetrators' feeling of alienation, resulting in additional violence in the country of origin).

154. *See* Directive on Creation, *supra* note 21.

155. *See* Van Schaack, *Crimes Against Humanity*, *supra* note 76, at 349 (explaining that resorting to deportation remedies can "exert a destabilizing effect or result in the intimidation or retraumatization of victims.").

156. *See id.*; *see also* Rybicki Testimony, *supra* note 31 ("Pursuing justice on behalf of victims of atrocity crimes is a mission of great and manifest importance.").

157. *See* Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 431 (2009) ("Norm internalization, an objective for trials for violations of international law, seeks to use the trial to demonstrate to a target audience, usually the community of the defendant, the costs of violating international law and the stigma of being a violator.").

158. *See* Van Schaack, *Crimes Against Humanity*, *supra* note 76, at 349 ("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.").

159. *See* Rowen & Hamlin, *supra* note 30, at 254 (stating that since deportation is not technically a punishment, and "there seems to be little credible threat of prosecution in their home countries, this approach may ultimately undermine the goals of international criminal law").

160. *See id.*

Exemplary of the potential implications of the HRSP's approach is the DHS and the HRSP prosecution of George Boley.¹⁶¹ Boley was a Liberian former rebel leader charged for immigration fraud despite his crimes amounting to the recruitment and use of child soldiers.¹⁶² Throughout the trial, there was little focus by the government as to the specific acts that Boley committed or the inclusion of survivors' narratives.¹⁶³ Because the goal of the trial was to rid the country of Boley rather than try him for the underlying acts, the extensiveness of the atrocity crimes committed is still unknown and the survivors have yet to see what they perceive as justice.¹⁶⁴ Survivors of Boley's atrocities in Liberia were outraged that the United States chose to deport Boley back to Liberia where he would face no justice.¹⁶⁵ After Boley was deported back to Liberia, he became an official member of the Liberian House of Representatives in 2017, and he has yet to face a domestic trial.¹⁶⁶ Thus, if justice and reconciliation are the goals of these prosecutions, then the HRSP must become more survivor-centered in its pursuit of justice.

III. FILLING THE HOLES IN THE DOJ'S HUMAN RIGHTS AND SPECIAL PROSECUTIONS DOMESTIC SECTION'S ATROCITY ACCOUNTABILITY APPROACH

To improve its atrocity accountability approach—and ensure the United States holds perpetrators of atrocity crimes liable for their underlying offenses—the HRSP must prompt internal and congressional action. First, Congress needs to fill the current holes in the HRSP's legal framework. Second, the DOJ must form a memorandum of agreement (MOA) with the DHS to clarify the role of each agency when prosecuting individuals for crimes falling under atrocity crime statutes. Third, the HRSP should issue guidance

161. See Clarke, *supra* note 148 (noting the DOJ has stated “deportation is a severe penalty and that, ideally, those accused of crimes against humanity will be tried in their home countries.”).

162. NICOLAS COOK, CONG. RSCH. SERV., R45195, LIBERIA: POLITICAL TRANSITION AND U.S. RELATIONS 13 (2018) (noting that the HRSP aided in this prosecution); Press Release, U.S. Dep't of Homeland Sec., Immigration Judge orders Liberian human rights violator removed based on his use of child soldiers (Feb. 6, 2012), <https://www.ice.gov/news/releases/immigration-judge-orders-liberian-human-rights-violator-removed-based-his-use-child>.

163. See Rowen & Hamlin, *supra* note 30, at 255.

164. *Id.* (“Boley's actions and his victims[] never came to light in the way they would have if the trial had been focused on the underlying acts.”).

165. Reports from local Liberian newspapers demonstrate that the surrounding population was upset that Boley did not face justice in the United States. See, e.g., *Liberia: War Survivors Angry Boley Not Jailed in America*, FRONT PAGE AFRICA (Sept. 19, 2019), <https://frontpageafricaonline.com/liberia-war-crimes-trial/liberia-war-survivors-angry-boley-not-jailed-in-america/>.

166. See Hylton, *supra* note 19.

for best practices of documenting atrocities for CSOs and NGOs to assist in overcoming evidentiary challenges that serve as hurdles to prosecution.

A. Proposing Legislative Changes to the Legal Framework

For the HRSP to bring more charges for perpetrators of atrocity crimes under substantive atrocity laws, Congress must amend the existing legal framework. To prompt this action, the HRSP should communicate with Congress through platforms such as the Tom Lantos Human Rights Commission, where Congress has previously inquired into the HRSP's prosecutorial impediments, and the HRSP should request legislative changes to the DOJ's Office of Policy and Legislation, which has the ability to "develop policy options and recommendations" for Congress.¹⁶⁷ The necessary legislative changes include amending the atrocity crime statutes to incorporate superior responsibility as a form of liability, expanding the jurisdiction for the war crimes statute, providing for retroactive application in the genocide statute, and enacting a crimes against humanity statute.¹⁶⁸

Currently, superior responsibility is not explicitly codified in the federal criminal statutes addressing atrocity crimes.¹⁶⁹ Therefore, to hold responsible an offender who served in a superior role, the HRSP must use immigration laws, which have previously been interpreted to include superior responsibility as a mode of liability.¹⁷⁰ Congress could amend this by expressly including superior responsibility in each federal statute addressing atrocity crimes. Bolstering the feasibility of this amendment is the existence of superior responsibility liability throughout the various sectors of U.S. law, including: "military, tort, and immigration law."¹⁷¹ By Congress amending the existing statutes to include the commission of a crime through superior responsibility, the HRSP would be able to prosecute not only the foot soldiers who perpetrated the crimes, but also those who had a duty to prevent or punish but failed to do so.¹⁷²

167. *Office of Policy and Legislation*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal/opl> (last visited Nov. 13, 2021). See generally Rybicki Testimony, *supra* note 31 (talking with Congress about the HRSP's role in the Criminal Division).

168. See *supra* Part I.A.

169. Van Schaack Testimony, *supra* note 51, at 2.

170. See, e.g., 8 U.S.C. § 1182(a)(3)(E)(iii) (barring admission to the United States to those "who, outside the United States, [have] committed, ordered, incited, assisted, or otherwise participated in . . . any act of torture . . . or . . . any extrajudicial killing").

171. See Van Schaack Testimony, *supra* note 51, at 8.

172. See *id.* at 8–10 (explaining that persons who can afford to flee to the United States are usually higher ranked).

Additionally, Congress could strengthen the HRSP's ability to prosecute atrocities under substantive laws by amending the war crimes statute to include present-in jurisdiction. Currently, the war crimes statute offers a restricted jurisdictional reach; unlike the other atrocity crime statutes, the war crimes statute only provides for the exercise of jurisdiction over an individual when the victim or perpetrator is a U.S. national or a member of the U.S. Armed Forces.¹⁷³ To assist in this legislative change, the DOJ can publicly reverse its previous stance on a more limited jurisdictional scope,¹⁷⁴ which would align the United States with its obligations under international law.¹⁷⁵

Further, Congress should amend the genocide statute, with its present-in jurisdiction, to apply retroactively. Currently, the HRSP cannot prosecute a genocidaire that committed genocide on the territory of another country if the offense occurred prior to 2009 because Congress amended the statute that year to provide present-in jurisdiction.¹⁷⁶ However, since the original genocide statute was enacted in 1988, Congress's amendment would not infringe on the constitutional right against ex post facto application of laws.¹⁷⁷ Crimes against humanity are largely recognized as acts carried out in a systematic or widespread manner directed at a civilian population, "including . . . murder, extermination, enslavement, deportation, torture, rape, and disappearance."¹⁷⁸ Additionally, given the war crimes statute's complexity and high threshold for genocide, a crimes against humanity statute would end impunity for those acts that lack a nexus to conflict as currently required, or those who do not evidence the genocide statute's specific intent to destroy.¹⁷⁹

In the civil context, the United States has on several occasions recognized the existence of crimes against humanity as a charge under international law.¹⁸⁰ Further, Congress has previously introduced a crimes

173. See *supra* Part I.B (discussing the limitations of prosecuting individuals for war crimes).

174. See Van Schaack Testimony, *supra* note 51, at 8.

175. See *id.* (noting that present-in jurisdiction is obligated under the 1949 Geneva Conventions and international law).

176. See *id.* at 12.

177. See *id.* at 13 ("Because the crime of genocide was already on the books in 1988, Congress could render the new jurisdictional provisions retroactive without running afoul of the U.S. Constitution's ex post facto clause."); see also U.S. CONST. art 1 § 9. cl. 3 ("No . . . ex post facto Law shall be passed.")

178. See U.S. INST. OF PEACE, CONFRONTING CRIMES AGAINST HUMANITY 4 (2008), <https://www.usip.org/sites/default/files/file/09sg.pdf>.

179. See *supra* Part I.B (discussing the current atrocity statutes and their restrictions).

180. See, e.g., *United States v. Sosa*, 608 F. App'x 464, 466–67 (9th Cir. 2015) (holding that international law allows universal jurisdiction over crimes such as torture, genocide, crimes against humanity, and war crimes).

against humanity bill.¹⁸¹ Strengthening the feasibility of this bill is the widespread international acknowledgement of crimes against humanity as “a central pillar of international criminal law” which was utilized in the Nuremberg Tribunal to find German Nazis accountable for atrocities.¹⁸²

While it is up to Congress to enact these amendments, the HRSP has the ability to advocate for these changes through various platforms and in interagency reviews.¹⁸³ For example, the HRSP has had the opportunity to provide testimony before the Congressional Tom Lantos Human Rights Commission on the prosecutorial impediments it faces in holding perpetrators of atrocities accountable.¹⁸⁴ While scholars during this hearing advocated for these legislative changes, the HRSP should communicate openly about its limited authority to prompt external legislative action.¹⁸⁵

B. *Creating A Memoranda of Agreement Between the DOJ and the DHS*

To clarify its interagency relationship and ensure that persons entering the United States are prosecuted under substantive atrocity laws as opposed to automatically deported, the DOJ and the DHS should create a MOA.¹⁸⁶ Formulating a MOA would flesh out overlapping authority that the HRSP and the DHS have to prosecute individuals for atrocity crimes, and ensure that the HRSP is prosecuting all potential cases under substantive atrocity laws.¹⁸⁷ Given that the DHS is usually the first to flag these individuals

181. See Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. (2009). Senator Richard Durbin, then the Senate Majority Whip and a member of the Senate Judiciary Committee, introduced a crimes against humanity bill on June 24, 2009. *Id.*

182. See Van Schaack Testimony, *supra* note 51, at 4.

183. See, e.g., Exec. Order No. 13,729, 81 Fed. Reg. 32,611, 32,614 (May 18, 2016) (noting that the DHS, the DOJ, and the Department of State (DoS) “develop proposals for legislative, regulatory, or administrative amendments . . . that would permit the more effective use and enforcement of immigration and other laws to deny impunity to perpetrators of mass atrocities and . . . enhance our ability to prosecute such perpetrators . . . and remove those who are not citizens”). See generally *Pursuing Accountability for Atrocities: Hearing Before the U.S. H.R. Tom Lantos Hum. Rights Comm’n*, 116th Cong. (2019) (demonstrating that the HRSP has the ability to advocate for statutory changes through testimony before Congress).

184. See Rybicki Testimony, *supra* note 31, at 1–2.

185. See Van Schaack Testimony, *supra* note 51, at 17.

186. FREDERICK M. KAISER, CONG. RSCH. SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 7 (2011), <https://fas.org/sgp/crs/misc/R41803.pdf> (defining a memorandum of agreement as a “common agreement of two departments, spelling out each one’s specific responsibilities, obligations, and benefits”).

187. See *supra* Part I.C (discussing the interagency coordination between the DHS and the HRSP, including shared prosecutorial authority).

upon entry, through a MOA, the HRSP could establish a set method of ensuring that persons associated with atrocity crimes are concurrently investigated by both the HRSP and the DHS to determine if a charge under substantive laws is feasible. The MOA would assure that when the legal framework permits, the HRSP should have the power to pursue justice under substantive atrocity laws and that immigration and naturalization remedies are truly a last resort.

While these agencies have an existing working relationship, a MOA would further provide a more standardized approach that allows for full transparency in the United States' pursuit of justice over atrocity crimes. The HRSP's agreement with the DHS could involve routine consultations with the DoS to assess the likelihood of domestic prosecutions in the offender's country of origin. By determining this with the DoS, the HRSP could make a more informed decision—one that considers the potential of impunity for an offender in their country of origin—before it relies on immigration and deportation.

C. *Issuing Guidance to NGOs and CSOs on Evidence Documentation*

To counter the evidentiary challenges that interfere with the HRSP's ability to prosecute individuals under substantive atrocity laws, the HRSP must tap into the existing network of NGOs and CSOs—both abroad and domestically—and issue guidance to these organizations on the best documentation practices and the type of evidence required for criminal indictments. The HRSP can propagate this relationship in coordination with the DHS and the DoS, which have existing relationships with these organizations.¹⁸⁸

To issue guidance under the Administrative Procedure Act,¹⁸⁹ the broader DOJ may release a document “to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations.”¹⁹⁰ Through this guidance, the HRSP could begin to approach a survivor-centered lens by directly engaging with communities who interact with survivors.¹⁹¹ Moreover, NGOs could use this guidance in

188. See Van Schaack, Atrocities Prevention & Response, *supra* note 98.

189. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 561–570a, 701–706.

190. Memorandum from Jeff Sessions, Att’y Gen., U.S. Dep’t of Just., Prohibition on Improper Guidance Documents 1 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.

191. When handling cases which involve atrocity survivors the most important components for survivor-centered justice includes “using gender-sensitive mechanisms that empower women in the society; incorporating cultural sensitivities that allow ethnic, racial,

U.S. diaspora communities to educate survivors on their rights to report individuals, thus leading to more prosecutions. Finally, this guidance should also inform NGOs and CSOs of the legal challenges that the HRSP faces, so that they can have a better understanding of why certain charges have not been brought under substantive laws. This way, NGOs and CSOs can play a more active role in advocating for the legislative changes needed for more HRSP prosecutions to go forward.

While this guidance would have no binding legal effect, it could bridge the gap between the present evidentiary challenges that inhibit the HRSP from bringing charges under substantive laws and the ongoing work of organizations engaged in documenting atrocities. This guidance could also provide NGOs and CSOs with a clearer understanding of the information needed to secure criminal indictments and allow them to work more closely with the HRSP during prosecutions.¹⁹² By issuing clear and transparent guidance on the role of NGOs and CSOs on how best to document atrocities, the HRSP could work in unison with these groups that, like the HRSP, hope to find justice for “victims of atrocity crimes.”¹⁹³

CONCLUSION

“Somehow we failed ourselves to learn the lessons we undertook to teach at Nuremberg, and that failure is today’s American tragedy.”¹⁹⁴ Since Nuremberg, the United States has failed to implement a domestic framework that allows for comprehensive atrocity accountability to fulfill its “never again” promise.¹⁹⁵ With its current approach, veterans of ISIS or the Myanmar military could live in the United States without fear of

and religious minorities to meaningfully participate in the system; guaranteeing reparations to survivors of conflict; providing social, medical, psychological, and other rehabilitative services; and ensuring access to effective legal representation.” Marie Soueid, Ann Marie Willhoite, & Annie E. Sovcik, *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony Is a Necessary Component*, 50 GEO. WASH. INT’L L. REV. 125, 131 (2017).

192. See Levy & Williams, *supra* note 98, at 455 (demonstrating the importance of CSOs and NGOs in documenting atrocities for subsequent accountability measures); see also Van Schaack, *Atrocities Prevention & Response*, *supra* note 98 (discussing the importance of public participation in atrocity responses).

193. See Rybicki Testimony, *supra* note 31.

194. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 207 (1970). Telford Taylor was a U.S. Chief Counsel at the Nuremberg Tribunal discussing the American role in Vietnam.

195. See *supra* notes 10, 11 (defining the “never again” promise and tracking the number of atrocities since it was made).

prosecution from the HRSP.¹⁹⁶ The United States—and specifically the HRSP—must recognize that a state-centric model which relies on immigration and naturalization laws to hold perpetrators of atrocities accountable does not create the impact or preventative effect that charges under substantive atrocity laws create. This is especially true when deportation of perpetrators occurs without the assurance of domestic prosecutions in a perpetrator's country of origin. Therefore, the HRSP must address the challenges associated with prosecutions under atrocity laws by advocating for legislative action, working more effectively with other U.S. agencies, and finding allies in domestic and foreign NGOs and CSOs. Without these changes, the United States' historical role in the Nuremberg Tribunal will continue to fade into history as a long-lost legacy.

196. See Clarke, *supra* note 147 (quoting David Scheffer, former U.S. Ambassador at Large for War Crimes Issues); see also *Current Alerts*, GENOCIDE WATCH, <https://www.genocidewatch.com/countries-at-risk> (last visited Nov. 13, 2021) (reporting that ISIS and the Myanmar military are currently committing atrocities).