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# WHITE SUPREMACY, POLICE BRUTALITY, AND FAMILY SEPARATION: PREVENTING CRIMES AGAINST HUMANITY WITHIN THE UNITED STATES

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*The United States tends to treat crimes against humanity as a danger that exists only in authoritarian or war-torn states, but in fact, there is a real risk of crimes against humanity occurring within the United States. This risk is illustrated by well-known events such as systemic police brutality against Black Americans, the federal family separation policy that took thousands of immigrant children from their parents at the southern border, and the dramatic escalation of White supremacist and extremist violence culminating in the January 6, 2021 attack on the U.S. Capitol. In spite of this risk, the United States does not have a federal law prohibiting crimes against humanity. This Article first applies international law to define crimes against humanity and assess the risk of crimes against humanity occurring within the United States. It then turns to U.S. law to evaluate the potential for a federal law or other federal measures to protect against crimes against humanity, including the political obstacles, the likelihood that any future legislation will depart significantly from international law, and the implications for effectiveness.*

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## I. INTRODUCTION

The United States has long acted as though it is safe from crimes against humanity occurring within its borders. Confident in its democratic traditions, constitutional norms, and commitment to the rule of law, it has treated mass atrocities as a danger that arises elsewhere, under authoritarian regimes or in war-torn states. Indeed, the United States considers itself a world leader in opposing crimes against humanity, genocide, and war crimes, regularly condemning these atrocities when committed by foreign governments and non-state actors.

But in fact, there is a real and growing risk of crimes against humanity within the United States, as illustrated by several paradigmatic events:

*White supremacist and extremist violence:* White supremacist and other extremist groups have escalated their hate speech, threats, and public displays of force from a deadly rally in Charlottesville in 2017 to an insurrectionist attack on the U.S. Capitol in 2021, in which the attackers carried Confederate flags,

assaulted and killed police officers, and planned to murder the Vice President and Members of Congress;<sup>1</sup>

*Family separation policy:* U.S. Customs and Border Patrol officers took thousands of immigrant children from their parents at the southern border of the United States in 2018, without tracking their family identities or locations, leaving many of these children still separated from their families today;<sup>2</sup>

*Sexual assaults against detainees:* There have been thousands of allegations of sexual assaults by U.S. Department of Homeland Security (“DHS”) officers against immigrants in custody and detention that have gone uninvestigated by DHS;<sup>3</sup> and

*Racist police brutality:* Systemic police brutality against Black Americans has persisted despite massive, nationwide, public protests, leaving Black Americans more than twice as likely as White Americans to be killed by police, regardless of the surrounding circumstances or any other relevant factors.<sup>4</sup>

Furthermore, these developments are not momentary aberrations. Rather, they are the result of intensifying structural and contextual risk factors that are embedded in U.S. society and government institutions, like systemic racism, insufficient oversight in government agencies, and political movements that feed on nationalism and xenophobia. In addition, while the United States has a robust domestic legal system with ample constitutional protections and a complex administrative state with a high capacity for self-regulation, these existing protections have not controlled this escalating risk.

Although the risk of crimes against humanity is substantial, the United States does not have a federal law prohibiting crimes against humanity, nor any other protective mechanisms directly aimed at preventing crimes against humanity within its borders. In principle, a federal law could provide a comprehensive legal framework for protecting against crimes against humanity within the United States. Such a law might address gaps in existing criminal and constitutional law and afford a backstop against misuse of political authority. It could also serve an expressive function, furnishing a mechanism for condemning the concerned acts in the strongest possible terms. But the long history of treating mass atrocities as an international rather than a domestic issue and the well-

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1. See, e.g., Andrew Katz, *Unrest in Virginia: Clashes over a Show of White Nationalism in Charlottesville Turn Deadly*, TIME, <https://time.com/charlottesville-white-nationalist-rally-clashes/> (last visited June 1, 2022) [<https://perma.cc/EJ9Q-Q3XP>]; Jaclyn Diaz & Rachel Treisman, *Members of Right-Wing Militias, Extremist Groups Are Latest Charged in Capitol Siege*, NPR (Jan. 19, 2021, 5:54 AM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/19/958240531/members-of-right-wing-militias-extremist-groups-are-latest-charged-in-capitol-si> [<https://perma.cc/6C68-XSVE>].

2. MAGGIE JO BUCHANAN, PHILIP E. WOLGIN & CLAUDIA FLORES, *THE TRUMP ADMINISTRATION’S FAMILY SEPARATION POLICY IS OVER: WHAT COMES NEXT?*, CTR. FOR AM. PROGRESS 6–7 (Apr. 2021).

3. See, e.g., Lomi Kriel, *ICE Guards “Systematically” Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020, 12:00 PM), <https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say> [<https://perma.cc/WJJ9-BSWK>].

4. See, e.g., *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> (July 29, 2022) [<https://perma.cc/8QVQ-JY2F>].

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known U.S. resistance to domesticating international law have made it difficult to garner support for a federal crimes against humanity law; a past, failed attempt to pass crimes against humanity legislation produced a problematic bill that deviated in crucial ways from international law. Once instigated, crimes against humanity are difficult to interrupt and impossible to fully redress. Accordingly, it is vital to establish systemic legal and institutional safeguards in advance, while the risk of crimes against humanity is foreseeable but not inevitable.

This Article engages with these issues at the intersection of international and domestic law. It first applies international law to define crimes against humanity and assess the risk of crimes against humanity occurring within the United States. It then turns to domestic law to evaluate the potential for a federal law or other federal measures to protect against crimes against humanity, including the political obstacles, the likelihood that any future legislation will depart significantly from international law, and the implications for effectiveness.<sup>5</sup>

This Article contributes to the legal scholarship in these areas in several ways. It is the first to systematically and comprehensively assess the risk of crimes against humanity occurring within the United States, using the United Nations Framework of Analysis for Assessing Atrocity Crimes (“UN Framework”)<sup>6</sup> to identify and appraise overarching factors affecting the level of risk in the United States today. This Article is also the first to examine the role that a federal law could play in preventing crimes against humanity within the United States. In principle, such a law could be transformative, providing for culpability for government actors who are currently shielded from liability, offering an additional bulwark against violence by powerful non-state actors, and presenting a basis for comprehensive safeguards throughout government agencies with the authority to detain and use force. In reality, crimes against humanity legislation would face significant political resistance and might deviate from international legal norms in ways that would render it less effective, or even counterproductive. Finally, this Article contributes to the understanding of several evolving concepts in international criminal law, such as the scope of the policy element of crimes against humanity.

Part II begins with an overview of the purpose and definition of crimes against humanity under international law. The Article then evaluates the risk of crimes against humanity in the United States in Part III, first assessing several representative events under the international law definition of crimes against humanity, and then applying the UN Framework to evaluate the overarching structural and contextual factors contributing to a risk of crimes against humanity. Part IV assesses the potential for a federal law on crimes against

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5. This article focuses on federal law and institutions, not on state and local laws and institutions. Thus, while it discusses systemic brutality against Black Americans by state and local police departments as an important example of a possible crime against humanity, it will not address state and local laws and policies; rather, it will only consider the potential impact of federal law and policy. The involved state and local institutions are too numerous and various to be addressed in a single article along with other examples.

6. See generally U.N. Secretary-General, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (July 2014) [hereinafter UN Framework].

humanity. It describes what a federal crimes against humanity law comporting with international standards could accomplish, explores the reasons that the United States has not adopted such a law, including its international orientation toward mass atrocities and its exceptionalism in its relationship to international law, and assesses a previous attempt to pass crimes against humanity legislation and its limitations. Finally, Part V explores several mitigation strategies, focusing on the U.S. military's approach to preventing war crimes as a possible model, as well as considering non-legislative tools that could institutionalize prevention mechanisms within the federal bureaucracy.

## II. CRIMES AGAINST HUMANITY

### A. Purpose and Role

Seventy-five years after the establishment of the Nuremberg Tribunal, there is now what William Schabas has, somewhat aspirationally, called a “relatively seamless body of ‘atrocities law’ covering all serious violations of human rights.”<sup>7</sup> This includes three atrocity crimes that have come to be universally recognized as nonderogable peremptory or *jus cogens* norms: the prohibitions on genocide, war crimes, and crimes against humanity.<sup>8</sup> The prohibition on crimes against humanity is potentially applicable in contexts like that of the United States, as it prohibits atrocities committed in peacetime as well as during war and does not require genocidal intent.<sup>9</sup>

Within atrocity law, the particular role of crimes against humanity is to protect civilian populations against atrocities committed by the state or powerful non-state actors, even during times of peace, and even if those actions are shielded by the state's domestic law and policy:

A crime against humanity is an *international* crime that can be committed by an individual whether or not the national law of the territory in which the act was committed has criminalized the conduct. The crime is directed against a civilian population and hence has a certain *scale or systematic nature* that generally extends beyond isolated incidents of violence or crimes committed for purely private purposes. The crime concerns the *most*

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7. See William A. Schabas, *Semantics or Substance? David Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities*, 2/1 GENOCIDE STUD. & PREVENTION: AN INT'L J. 31, 34 (2007).

8. Dire Tladi (Special Rapporteur), Int'l Law Comm'n, *Fourth Rep. on Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc. A/CN.4/727, at 26, 38–42 (2019); see also *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 110 (E.D.N.Y. 2005); Cherif Bassiouni, *Crimes Against Humanity*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 107, 107–08 (Roy Gutman & David Rieff eds., 1999).

9. Int'l Law Comm'n, Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, U.N. Doc. A/74/10, at 22 (2019) [hereinafter Draft Articles]; Bassiouni, *supra* note 8, at 107–08. In the case of genocide, the perpetrator must have the intent to destroy a racial, religious, or other designated group, and, in the case of war crimes, the harm must occur in the context of an armed conflict. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions].

*heinous acts of violence and persecution* known to humankind. The crime may be connected with an armed conflict, but that need not be the case; crimes against humanity *can occur in peacetime*. The crime can be committed *within* the territory of a single State or can be committed *across* borders. Finally, the crime can be committed by a *government*, but can also be committed by *other actors*, including rebel movements, militias, or terrorist organizations.<sup>10</sup>

In particular, while many of the modern prosecutions for crimes against humanity have concerned failing states in times of conflict, crimes against humanity address acts that can all too readily be committed by a highly functional, bureaucratically efficient, and politically ruthless government:

The leitmotif binding together all the legal features [of crimes against humanity] is that of politics gone horribly wrong. The crimes are committed by organized political groups against other groups, typically within the same society. Rivalry and antagonism is normal among groups in virtually every society, but crimes against humanity occur when normal rivalry and antagonism “go supernova” and explode into violence and extraordinary persecution.<sup>11</sup>

Thus, examples of crimes against humanity include not only attacks on civilians during the conflicts in the former Yugoslavia and Sierra Leone,<sup>12</sup> the genocide in Rwanda,<sup>13</sup> and the paradigmatic example of the Nazi state.<sup>14</sup> They also include acts carried out systematically by state officials against their own citizens outside of a war context: for example, the torture and murder of political opponents by Alfredo Astiz and Jorge Eduardo Acosta, who were part of the junta governing Argentina in the 1970s;<sup>15</sup> the arrest, torture, rape and murder of political opponents ordered by Hissène Habré, the former President of Chad;<sup>16</sup> and the torture, enslavement, murder, and other abuse of its own citizens by the Democratic People’s Republic of Korea.<sup>17</sup>

The individual acts required for crimes against humanity are generally recognized as crimes or severe human rights abuses themselves, so the function of crimes against humanity as a separate international offense is not typically to criminalize those individual acts. Rather, the prohibition on crimes against humanity serves several additional roles.

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10. Sean D. Murphy, *The International Law Commission’s Proposal for a Convention on the Prevention and Punishment of Crimes Against Humanity*, 50 CASE W. RESV. J. INT’L L. 249, 253 (2018) (emphasis in original).

11. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 108–09 (2004).

12. *Id.* at 96, 159.

13. *Id.* at 94.

14. *Id.* at 95.

15. *Argentina: Former Military Officials Convicted for Crimes Against Humanity*, BBC NEWS, (Nov. 30, 2017), <https://www.bbc.com/news/world-latin-america-42175752> [<https://perma.cc/A73N-NFGW>].

16. Ruth Maclean, *Chad’s Hissène Habré Found Guilty of Crimes Against Humanity*, GUARDIAN (May 30, 2016, 1:22 PM), <https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal> [<https://perma.cc/27XC-UU4N>].

17. U.N. Hum. Rts. Council, Rep. of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, ¶¶ 76–79, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014).

First, it identifies for international condemnation, prevention, and punishment certain mass crimes that are so horrific that they constitute offenses against all of humanity that are of concern to the entire international community.<sup>18</sup> It thereby legitimizes the involvement of international courts and other international institutions in identifying, punishing, and preventing crimes against humanity.<sup>19</sup> This also serves an expressive function: characterizing certain acts as crimes against humanity is a way of condemning them in the strongest possible terms as utterly abhorrent to all of humanity.<sup>20</sup>

Another core function of crimes against humanity is to safeguard against a state targeting or failing to protect its own citizens. Because it concerns severe human rights violations that are widespread or systematic or both, crimes against humanity identify the kinds of crimes that are rarely committed independently by individual actors in contradiction of state policies or in the absence of organizational support. Rather, widespread or systematic atrocities often happen under the authority of a state that is directing the acts itself or has delegated power to agents who use that power to commit the attacks. In addition, these crimes also frequently occur under the direction of a powerful militia or other non-state actor that the concerned state is unable to control. In such circumstances, ordinary domestic law and policy are unlikely to effectively address these abuses and indeed may be weaponized against victims.<sup>21</sup>

In keeping with this function, crimes against humanity have special legal characteristics that are distinct from ordinary crimes. Because these crimes are so severe, because state officials are often involved, and because the involvement or incapacity of the state often prevents their immediate prosecution within the concerned state, certain legal defenses and immunities do not apply in this context. For example, crimes against humanity are not subject to a statute of limitations, and neither legality under domestic law, superior orders, nor the defendant's official position are substantive defenses.<sup>22</sup> In addition, there is a developing norm against any form of official immunity for crimes against humanity or other atrocity crimes.<sup>23</sup>

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18. Luban, *supra* note 11, at 86.

19. For example, the preamble of the Rome Statute refers to the International Criminal Court's "jurisdiction over the most serious crimes of concern to the international community as a whole." Rome Statute of the International Criminal Court, Preamble, 2187 U.N.T.S. 90, *entered into force* July 1, 2002 [hereinafter Rome Statute]. While important, the role of international courts and institutions is mostly outside the scope of this Article, which focuses on the risk of crimes against humanity within the United States and the potential for a U.S. domestic law prohibiting crimes against humanity to ameliorate that risk. An intersection with this Article's topic is the significance of U.S. concerns about international prosecution of its citizens, discussed in Subsection IV.B.2 below.

20. Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1670–71 (2015); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312–14 (2012); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 117–24 (2002).

21. Luban, *supra* note 11, at 93–98.

22. Draft Articles, *supra* note 9, arts. 6(4), 6(5) & 6(6) and associated commentaries, at 66.

23. Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18, 57–58 (2012); Dapo Akande & Sangeeta Shah,

Most importantly for this Article, the purpose of prohibiting crimes against humanity is not only to enable prosecutions. Rather, the purpose is more immediately to trigger an obligation for states to take preventative measures to prevent crimes against humanity from occurring at all. In considering what kinds of measures this might entail, Sean Murphy has identified six forms of protective action that are consistently included in multilateral treaties concerning major crimes or human rights violations and that were thus incorporated in the International Law Commission's Draft Articles for the Prevention and Prosecution of Crimes Against Humanity (discussed below).<sup>24</sup> Of course, states are obligated under such treaties not to commit the relevant human rights violations or crimes themselves; they are also required to take action to prevent these harms from occurring, and to punish them when they do occur.<sup>25</sup> Particularly relevant for the issues addressed in this paper is the requirement that states "take legislative or other measures that assist in preventing crimes against humanity[.]"<sup>26</sup> including adopting domestic laws, policies, and implementation mechanisms aimed at prevention.

All in all, the prohibition on crimes against humanity addresses situations in which the state is unlikely, once events have been set in motion, to be able to effectively protect its citizens. The state itself is often culpable; domestic law and policy have often been co-opted in service of the atrocities; non-state actors may be beyond the functional control of the state. It also addresses situations in which the crimes involved are so horrific as to be universally condemned. Thus, it is vitally important for the state to establish safeguards against such atrocities—and especially safeguards against itself—before atrocities occur.

### B. Definition

Unlike the other two atrocity crimes, genocide and war crimes, the international crime of crimes against humanity does not yet have its own treaty defining its elements.<sup>27</sup> Instead, the elements of crimes against humanity have evolved over time in customary international law since the crime was first prosecuted at the Nuremberg Tribunal.<sup>28</sup> Since 1993, the requirements of crimes against humanity have been further developed in the statutes and jurisprudence of the modern international and hybrid criminal tribunals, including the

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*Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 840 (2010).

24. In addition to the four requirements listed in the text, states also have two additional protective obligations of non-refoulement and cooperation with intergovernmental organizations, nongovernmental organizations, and other states. Sean D. Murphy, *Codifying the Obligations of States Relating to the Prevention of Atrocities*, 52 CASE W. RESV. J. INT'L L. 27, 35–51 (2020).

25. *Id.* at 35–39, 51–52.

26. *Id.* at 39.

27. See Genocide Convention, *supra* note 9; Geneva Conventions, *supra* note 9.

28. Christopher Roberts, *On the Definition of Crimes Against Humanity*, 20 U. PA. J.L. & SOC. CHANGE 1, 27 (2017).

International Criminal Court (“ICC”).<sup>29</sup> Others have carefully traced this historical development, which I will not reiterate in detail here.<sup>30</sup>

While the prohibition on crimes against humanity is a peremptory norm, as Leila Sadat has observed, “the absence of a consistent definition and uniform interpretation of crimes against humanity has made it difficult to establish the theory underlying such crimes and to prosecute them in particular cases.”<sup>31</sup> For exactly this reason, the International Law Commission has recently developed Draft Articles on Prevention and Punishment of Crimes Against Humanity (“Draft Articles”),<sup>32</sup> which could form the basis for a convention on crimes against humanity. A primary purpose of developing the Draft Articles was to produce for crimes against humanity a definitive set of elements and related rules, as genocide and war crimes have, so as to enable international consensus on and consistent application of this norm to an extent that it is not possible by relying entirely on customary international law.<sup>33</sup> The Draft Articles draw heavily on the Rome Statute of the ICC (“Rome Statute”),<sup>34</sup> which has been ratified by more than 120 states,<sup>35</sup> as well as on customary international law and the statutes and jurisprudence of other international tribunals; in particular, the Draft Articles adopt the Rome Statute’s definition of the elements of crimes against humanity in all relevant respects.<sup>36</sup>

This Article will refer primarily to the definition of crimes against humanity in the Draft Articles (and accordingly also the Rome Statute), with discussion in the text and footnotes of aspects that are not identical with articulations in other instruments or might diverge with customary international law. The Draft Articles represent broad international political and legal consensus among a large number of states and legal experts that take account of and contribute to customary international law but are not coextensive with it; they do not constitute a codification of customary international law.<sup>37</sup> As discussed in detail in Part IV, the United States has not yet adopted this or any other definition of crimes against humanity; I note in the footnotes whether the United States has provided any commentary on the relevant provisions.

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29. *Id.* at 2.

30. *Id.* at 27; Draft Articles, *supra* note 9, at 29–30.

31. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 334 (2013).

32. Draft Articles, *supra* note 9, at 22.

33. *Id.*; see also Michael Wood, *The General Assembly and the International Law Commission: What Happens to the Commission’s Work and Why?*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 373, 384 (Isabelle Buffard et al. eds., 2008).

34. Rome Statute, *supra* note 19.

35. *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited May 29, 2022) [<https://perma.cc/44CN-J9WB>].

36. Draft Articles, *supra* note 9.

37. While the Draft Articles are still under consideration, the definition comes from the Rome Statute, which has the agreement of 120 states, and the articles were developed by the expert scholars and practitioners who comprise the International Law Commission. *Id.* at 23; see also Yudan Tan, *The Rome Statute as Evidence of Customary International Law* (Apr. 9, 2019) (Ph.D. thesis, Leiden Law School), <https://openaccess.leidenuniv.nl/handle/1887/71143> [<https://perma.cc/8XFR-XQKD>]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. L. INST. 1987).

In the Draft Articles, as in customary international law, crimes against humanity consist of two major components: an underlying act or acts, and several contextual or *chapeau* elements. The Draft Articles list ten underlying acts, all of which constitute severe human rights violations on their own, as well as “other inhumane acts of a similar character”:

(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>38</sup>

Of particular importance for analysis of the risks recently arising in the United States are the prohibitions on acts of murder, rape, enforced disappearance of persons, deportation, and torture, as discussed below.<sup>39</sup>

The listed acts constitute a crime against humanity when committed in the context of the *chapeau* or contextual elements, that is, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>40</sup> Of significance to the U.S. context is that,

38. Draft Articles, *supra* note 9, at 27–29; Rome Statute, *supra* note 19, art. 7. The United States argued in its comments on the Draft Articles that the definition of deportation should not be interpreted to interfere with its sovereign right to control its borders and limit immigration. It has also urged clarification of the scope of “other inhumane acts.” Int’l Law Comm’n, Crimes Against Humanity, Additional Comments and Observations Received from Governments, International Organizations and Others on Draft Articles on Crimes Against Humanity, U.N. Doc. A/CN.4/726/Add.2 (May 2, 2019) [hereinafter U.S. Comments].

39. Other characterizations of these underlying acts have included some but not all of these crimes; for example, among the statutes of four of the ad hoc hybrid criminal courts, all included murder, deportation, extermination, rape, and torture; three included imprisonment and persecution; two included slavery; and apartheid, enforced disappearance of persons, and enforced sterilization were each included in only one. S.C. Res. 1315 (Aug. 14, 2000); Statute of the Special Court for Sierra Leone, art. 2, 2000 [hereinafter SCSL Statute], <http://www.rscsl.org/Documents/scsl-statute.pdf> [https://perma.cc/B8XF-B7MC]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 5, Aug. 26, 2007 [hereinafter ECCC Law], [https://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf) [https://perma.cc/UTW6-YDTR]; Republic of Kosovo, Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office, art. 13, Aug. 3, 2015, [https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo\\_Law\\_on\\_Specialist\\_Chambers.pdf](https://balkaninsight.com/wp-content/uploads/2019/01/Kosovo_Law_on_Specialist_Chambers.pdf) [https://perma.cc/35ZQ-36YZ]; Statut des chambres africaines extraordinaires [Statute of the Extraordinary African Chambers], art. 6, Jan. 30, 2013 [hereinafter EAC Statute], <https://www.hrw.org/fr/news/2013/01/30/statut-des-chambres-africaines-extraordinaires#> [https://perma.cc/YM37-DMY4].

40. Draft Articles, *supra* note 9, at 27; Rome Statute, *supra* note 19, art. 7. The United States did not provide any comments on these elements. See U.S. Comments, *supra* note 38. The International Law Commission’s commentary on the Draft Articles reviews the prior evolution of these contextual elements. To summarize, the formulation “widespread or systematic attack on a civilian population” has become well-accepted over time in international and hybrid courts’ statutes and jurisprudence and in the Commission’s work. Past

according to the Draft Articles, the “attack” need not be a military attack, but rather, requires “a course of conduct involving the multiple commission of [the listed underlying] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>41</sup> This definition has the effect of creating several additional requirements to meet the contextual element of an “attack”: “multiple commissions” and “a State or organizational policy” that those commissions must be “pursuant to or in furtherance of.”<sup>42</sup>

This definition of attack is significant for a couple of reasons. First, it includes actions that are not part of a single violent assault in the colloquial sense of “attack”<sup>43</sup> and thereby encompasses actions that take place in an orderly, controlled, and gradual manner. It also excludes actions that take place in the absence of a state or organizational policy, and thereby rejects actions taken by individuals of their own accord.<sup>44</sup>

The questions of what constitutes such a policy and how it can be proven are thus particularly significant to the scope of crimes against humanity as applied.<sup>45</sup> A narrow definition of such a policy might require an affirmative, expressly stated plan of action, but the history of atrocities tells us that this would be inapropos, as most states are not as forthcoming as Nazi Germany in recording

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contestation over the use of the conjunction “or” rather than “and” has now been consistently resolved in favor of the “or” formulation. Draft Articles, *supra* note 9, at 29, 32–35. The jurisprudence of the ICC and the ad hoc international tribunals indicates that “civilian population” includes everyone except combatants and members of armed groups, militias, and military forces. It encompasses both foreigners and citizens of the concerned state. The entirety of a civilian population need not be affected; rather, the attack must merely have some collective nature rather than being solely against individuals. *Id.* at 35–38. As discussed below, some argue that the policy requirement is not required by customary international law. Previously, additional contextual requirements were inconsistently included in the statutes of some of the earlier ad hoc tribunals, for example, the International Criminal Tribunal for Rwanda and the Extraordinary Chambers in the Courts of Cambodia required that the attack have been committed on a discriminatory basis, while the Special Court for Sierra Leone and the Extraordinary African Chambers did not impose any additional requirements. *Id.* at 29–35.

41. Draft Articles, *supra* note 9, at 8; Rome Statute, *supra* note 19, art. 7. The United States did not provide any comments on this definition. U.S. Comments, *supra* note 38.

42. See Draft Articles, *supra* note 9, at 28.

43. The first definition of the noun is “the act of attacking with physical force or with unfriendly words: [assault,]” and of the verb is “to set upon or work against forcefully.” *Attack*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/attack> (last visited May 29, 2022) [<https://perma.cc/SG2W-YN8M>].

44. While there has been some debate about whether this provision applies to non-state actors, the use of the term “organization,” ICC jurisprudence, and the application of crimes against humanity to non-state actors in the ad hoc tribunals, all indicate that it does. Draft Articles, *supra* note 9, at 41–43; Sadat, *supra* note 31, at 347, 354. *But see* M. Cherif Bassiouni, *Crimes Against Humanity: The Case for a Specialized Convention*, 9 WASH. U. GLOB. STUD. L. REV. 575, 589 (2010). In its comments, the United States asserted that non-state actors like ISIS are properly included as organizations, but that criminal gangs are not. U.S. Comments, *supra* note 38, at 6–7.

45. The policy requirement has been the subject of considerable academic debate. See Guénaël Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142–43 (Leila Nadya Sadat ed., 2011); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 50–51 (1999). The United States did not provide any comments on this requirement. See generally U.S. Comments, *supra* note 38.

their planned crimes for posterity.<sup>46</sup> According to the ICC's Elements of Crimes, the policy requirement entails that "the State or organization actively promote or encourage such an attack against a civilian population."<sup>47</sup> But the Elements then qualify this requirement by affirming that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack."<sup>48</sup> As further elaborated by ICC jurisprudence, a policy need not be explicitly stated, but rather, can be implied from patterns of actions, preparatory activities, and other behaviors.<sup>49</sup> It also need not be formulated entirely in advance, but rather, can develop over time.<sup>50</sup> Furthermore, a policy need not be established at the highest level of the state, but can instead be developed at a local or regional level.<sup>51</sup>

Thus, while the parameters of the policy requirement are still evolving, both local and national policies, both explicit and de facto policies, and both advance-planned and evolving policies can qualify. Furthermore, willful blindness to an attack can constitute a policy if it is deliberately meant to encourage the attack. The inclusion of this policy requirement in the definition of "attack" was introduced for the first time in the Rome Statute and is now carried forward in the Draft Articles; it is debated whether it is part of customary international law.<sup>52</sup>

### III. RISK

While I am focusing this paper primarily on current and future risk, any consideration of the possibility of crimes against humanity occurring within the United States today must begin with the reality that the federal and state governments have, throughout their history, both committed and permitted crimes against humanity. Although, as discussed in Part IV, the federal government's approach to laws and policies opposing crimes against humanity seems to presume that crimes against humanity occur only in other places and are committed only by other governments, any such presumption is unfounded.

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46. Press Release, General Assembly, Condemning Holocaust Denial, General Assembly Adopts Resolution Urging Development of Educational Programmes to Prevent Genocide Acts Among Future Generations, U.N. Press Release GA/12400 (Jan. 20, 2022), <https://www.un.org/press/en/2021/ga12400.doc.htm> [<https://perma.cc/475P-C63G>] ("[D]ue to the Nazi documentation of their crimes, '[the holocaust was] the most meticulously documented genocide in history.'").

47. Rep. of the Preparatory Commission for the International Criminal Court, Addendum to the Finalized Draft Text of the Elements of Crimes, at 5, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes*]; see also Sean D. Murphy (Special Rapporteur), Int'l Law Comm'n, *First Report on Crimes Against Humanity*, at 68, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) [hereinafter *First Report*].

48. *Elements of Crimes*, *supra* note 47, at 5; Murphy, *First Report*, *supra* note 47, at 68.

49. Draft Articles, *supra* note 9, at 39.

50. *Id.*

51. See Murphy, *First Report*, *supra* note 47, at 68.

52. Sadat, *supra* note 31, at 370–71; William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 962–63 (2008) [hereinafter *State Policy*]; Luban, *supra* note 11, at 96–97; Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 278–79 (2002).

By way of highlighting several significant examples, and without attempting to be comprehensive: there have been numerous instances of actions amounting to crimes against humanity against Native Americans, including enslavement, forced removal to reservations, extermination of civilians, forced abduction of children to boarding schools continuing into the 1970s, and forced sterilizations continuing into the 1970s, among other atrocities.<sup>53</sup> Black Americans have also notoriously been subjected to atrocities constituting crimes against humanity, including enslavement, murder, torture, persecution on the basis of race, and a system of legal segregation enforced by violent action amounting to apartheid, among other atrocities; as discussed below, widespread police brutality against Black Americans today might also be cognizable as a crime against humanity.<sup>54</sup> Historically, interrogation methods and detention conditions comprising torture and possibly also constituting crimes against humanity have been systematically used against suspected and convicted criminals in U.S. police custody and in prison.<sup>55</sup> Under the auspices of the War on Terror, the United States has systematically abused known and suspected terrorists, using methods that constitute torture under international law; those methods were approved as U.S. policy in a Presidential Memo in 2002.<sup>56</sup> The widespread and systematic nature of the torture of terrorists, in furtherance of U.S. policy, indicates such torture is also likely a crime against humanity.

As discussed in Sections III.A and III.B below, there are risk factors prevalent within the United States now that have given rise to particular paradigmatic events signaling a risk of current and future crimes against humanity. But while these events and risks are produced by the conditions of this current moment, they are also inextricably linked to this national history of crimes against humanity. In particular, many of the historical situations of crimes

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53. Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017, 1045–49 (2001). Many of these acts also constitute genocide. *Id.* at 1045; Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 140 (2013).

54. Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 3 COLUM. J. RACE & L. 147, 180–81 (2013).

55. See generally John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001 (2009).

56. Memorandum from President George W. Bush to the Vice President, the Sec'y of State, the Sec'y of Def., the Att'y Gen., Chief of Staff to the President, Dir. of Cent. Intel., Assistant to the President for Nat'l Sec. Affs., & Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020207-2.pdf> [<https://perma.cc/G8TM-79UN>] (discussing humane treatment of al Qaeda and Taliban detainees); see Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 100–01 (2007); Louise Mallinder, *Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States*, 14 OR. REV. INT'L L. 307, 315–16 (2012). This Memo was based on advice from the Office of Legal Counsel that those methods did not constitute torture under U.S. law and that U.S. obligations under domestic law did not extend overseas, neither of which are defenses to the international crimes of torture or crimes against humanity. Memorandum from Alberto Gonzales, White House Couns., to President George W. Bush (Jan. 25, 2002), <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020125.pdf> [<https://perma.cc/2ESG-XFWY>]. For prior examples, including systematic CIA torture, see Mayerfeld, *supra*, note 56 at 94–99, as well as numerous historical examples of torture in military interventions overseas and in Chinese immigrant and Japanese American detention centers within the United States. Parry, *supra* note 55, at 1029.

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against humanity within the United States have been based in racism; likewise, the representative situations discussed below concern Black Americans, predominantly Hispanic and Latino immigrants, and White supremacist groups. Crimes against humanity have been directed at known and suspected terrorists and criminals, and there has been considerable public rhetoric characterizing immigrants and Black Americans as such.

Section III.A first evaluates whether particular representative events might constitute crimes against humanity or suggest a risk of crimes against humanity occurring. Section III.B uses the UN Framework<sup>57</sup> to identify the structural and contextual factors affecting the risk of crimes against humanity in the United States today.

#### A. *Representative Situations*

In considering whether these particular events might constitute crimes against humanity, it is important to note two aspects of this assessment that differ from an evaluation of individual culpability of the sort that would take place in a prosecution for crimes against humanity. First, this is only a limited appraisal of whether crimes against humanity may have occurred in a general sense. When looking at an event as a whole without focusing on a particular defendant, it is impossible to assess some of the key elements of the crime, such as the defendant's intent and knowledge, or the relationship between a defendant's individual acts and a broader course of conduct or plan. Further, whereas a prosecutor would have access to government documents, witness testimony, and other sources of information that typically form the evidentiary basis of a judicial determination of culpability, this evaluation is based only on the information that has been publicly reported.

Thus, this analysis is by its nature limited to considering, not whether crimes against humanity *did* occur, but whether they *might have* occurred. In particular, I consider below whether any of the underlying acts are claimed to have taken place, whether those acts seem to have been widespread or systematic, whether there are indications of a course of conduct comprising the multiple commission of those acts, whether the acts were committed against a civilian population, and whether there may have been a government or organizational policy to commit the course of conduct. Due to the general nature of this inquiry, I do not consider particular individuals' actions nor whether particular actions were undertaken with knowledge of an attack.

While this kind of evaluation is limited, it is nonetheless a type of assessment that is undertaken all the time, as commissions, courts, and other bodies make preliminary determinations about whether there is sufficient indication of an atrocity crime to justify further investigation. For example, the U.N. Commission of Inquiry tasked with assessing whether atrocity crimes might have occurred in the Democratic People's Republic of Korea described its approach as such:

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57. See discussion *infra* Section III.B.

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In accordance with Human Rights Council resolution 22/13, the commission carried out its inquiry with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity. The commission is neither a judicial body nor a prosecutor. It cannot make final determinations of individual criminal responsibility. It can, however, determine whether its findings constitute reasonable grounds establishing that crimes against humanity have been committed so as to merit a criminal investigation by a competent national or international organ of justice.<sup>58</sup>

Second, my ultimate purpose, unlike the Commission's or a court's, is not to lay the groundwork for a prosecution. Rather, I am concerned with whether there is a risk of crimes against humanity that calls for preventative measures. Thus, in addition to assessing whether crimes against humanity may have occurred, I also consider whether and how the characteristics of these situations suggest a risk of crimes against humanity occurring within the United States in the future, as a step toward a systematic analysis of risk in Section III.B.<sup>59</sup>

With this analytic framework in mind, several situations have raised concerns about crimes against humanity occurring in the United States. Of these, the one most fully demonstrable as a crime against humanity is the family separations undertaken under the Zero Tolerance Policy, because there was an explicit government policy to undertake the separations, and because the government's own statements and investigations indicate that the officials approving the policy were aware of the harm it would cause.<sup>60</sup> Accordingly, I discuss this situation first, and with the most thorough analysis. These acts illustrate the kind of official government policy that may well constitute a crime against humanity in a peacetime context, as well as the failure of internal institutional processes to safeguard against them.

Two other situations, police brutality against Black Americans and alleged sexual assaults against detained immigrants, illustrate two synergistic types of risk. First, particularly in a highly legalistic environment like the United States, law and official policy typically prohibit the underlying acts for crimes against humanity. In this context, a pattern of persistent, frequent, widespread incidents constituting the underlying acts is a warning signal suggesting the possibility of willful blindness or an alternative, *de facto* policy. Second, there is inherent risk associated with delegating extensive authority to detain and to use force. If oversight and intervention mechanisms are not robust, there is a likelihood that abuses of this power will develop, and such abuses may in turn interact

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58. U.N. Hum. Rts. Council, Rep. of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63, ¶ 74 (Feb. 7, 2014).

59. Furthermore, even if none of the discussed acts are found to constitute crimes against humanity, this does not legitimize them. Rather, regardless of their crimes against humanity status, they are serious human rights violations, and are deserving of moral and legal condemnation on that basis. Most are also violations of U.S. criminal law and constitutional law.

60. Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 439, 482 (2020); *see infra* notes 63–75 and accompanying text.

synergistically with willful blindness or de facto policies to enable crimes against humanity.

The last example, the risk from White supremacist and other extremist groups, has not yet eventuated into widespread or systematic acts of violence that would constitute the underlying acts, although the January 6, 2021 attack on the U.S. Capitol was a significant step in that direction.<sup>61</sup> This example illustrates that there is a risk from non-state actors as well as the government, as extremist groups are increasing their level of organization and their capacity to commit crimes against humanity. It also illustrates some of the preliminary steps to crimes against humanity, such as hate speech, threats, and incitement of violence against disfavored groups.<sup>62</sup>

### 1. *Official Government Policy: Family Separation*

Under the Trump Administration's Zero Tolerance Policy, DHS officers separated more than 3,900 immigrant children from their parents at or near the southern border of the United States, on the basis of a universal policy of family separation to enable criminal prosecution of the adults for illegal entry.<sup>63</sup> In addition to families that had illegally entered the United States, DHS officials also separated at least sixty families that had legally presented at official ports of entry and requested asylum.<sup>64</sup> In this process, children of all ages, including infants, were taken from their parents.<sup>65</sup> Children were detained separately from their parents for weeks, months, or years, and as of August 2021, three years after the policy had officially ended, more than 1,800 children were still separated from their parents.<sup>66</sup>

DHS did not consistently keep or share records of the adults and children who had been separated, nor of their family relationships, nor did it ensure that it could track and reunite families, nor that it could definitively identify babies and young children who could not affirm their own identities.<sup>67</sup> As a result, many parents were unable to obtain information about their children's whereabouts and

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61. Diaz & Treisman, *supra* note 1.

62. This analysis concerns situations that are continuing to evolve. It is based primarily on events that took place up to February 2021, with updates up to August 2021, when the final draft of the Article was completed.

63. EVALUATION & INSPECTIONS DIV., No. 21-028, U.S. DEP'T OF JUST. REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 2 (2021) [hereinafter DOJ OIG REPORT]; OFF. OF THE INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-18-84, SPECIAL REVIEW—INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 3 (2018) [hereinafter DHS OIG 2018 REPORT]; DEP'T OF HOMELAND SEC., INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES INTERIM PROGRESS REPORT 3 (2021) [hereinafter TASK FORCE REPORT].

64. Sixty is the minimum number of separated families; the actual number is uncertain because DHS's records are incomplete. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-20-35, CBP SEPARATED MORE ASYLUM-SEEKING FAMILIES AT PORTS OF ENTRY THAN REPORTED AND FOR REASONS OTHER THAN THOSE OUTLINED IN PUBLIC STATEMENTS 2, 11 (2020) [hereinafter DHS OIG 2020 REPORT].

65. *Id.* at 8.

66. TASK FORCE REPORT, *supra* note 63, at 3; DOJ OIG REPORT, *supra* note 63, at 2; Exec. Order No. 14011, 86 Fed. Reg. 8273 (Feb. 2, 2021) [hereinafter Reunification EO].

67. DHS OIG 2018 REPORT, *supra* note 63, at 9–10, 15.

well-being for extended periods of time.<sup>68</sup> Some parents have never been able to find out what happened to their children, and some parents were deported without their children.<sup>69</sup> It is still uncertain how many families were separated and over what period of time, and the government is still not able to account for the identities or locations of some of the children it took from their parents.<sup>70</sup>

The Zero Tolerance Policy reversed a “long-standing DHS practice” of keeping families together in civil immigration removal proceedings due to “concerns about separating children from their family during the pendency of the parent’s prosecution.”<sup>71</sup> The government’s justification for these actions was that it intended to criminally prosecute adult immigrants who entered the country without authorization and intended to detain those adults before trial, and children cannot be held in adult criminal detention with their parents, necessitating their separation from their parents.<sup>72</sup>

In June 2018, a federal judge ordered the practice of family separation to be ended and the children to be returned to their parents, as a probable violation of the U.S. Constitution.<sup>73</sup> In addition to the federal court’s finding of a probable due process violation, legal scholars have argued that family separation violates rights under international human rights law, the U.S. Constitution, and U.S. statutory and tort law.<sup>74</sup> After the policy was ended, in 2020, the Center for Constitutional Rights filed a claim for damages under the Alien Tort Statute on behalf of a father and son separated under the family separation policy, arguing that the separation constituted torture and crimes against humanity under customary international law.<sup>75</sup> As of this writing, the court has not ruled on the

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68. OFF. OF INSPECTOR GEN., OEI-BL-18-00510, U.S. DEP’T OF HEALTH & HUM. SERVS. COMMUNICATION AND MANAGEMENT CHALLENGES IMPEDED HHS’S RESPONSE TO THE ZERO-TOLERANCE POLICY 25–26 (2020) [hereinafter HHS OIG REPORT]; HAJAR HABBACH, KATHRYN HAMPTON & RANIT MISHORI, PHYSICIANS FOR HUM. RTS., “YOU WILL NEVER SEE YOUR CHILD AGAIN”: THE PERSISTENT PSYCHOLOGICAL EFFECTS OF FAMILY SEPARATION 15 (2020).

69. DHS OIG 2018 REPORT, *supra* note 63, at 13–14; see Reunification EO, *supra* note 66, at 8273.

70. Reunification EO, *supra* note 66, at 8273; DHS OIG 2018 REPORT, *supra* note 63, at 11–12. An August 2021 report from the Interagency Task Force on the Reunification of Families indicates that of 3,914 children identified as separated from their families, 2,073 had been reunited, forty-five were in the process of being reunited, and the remaining 1,841 children had not yet been reunited with their families; the Task Force was continuing to review records to identify additional separated children. TASK FORCE REPORT, *supra* note 63, at 3.

71. DOJ OIG REPORT, *supra* note 63, at 6.

72. DHS OIG 2018 REPORT, *supra* note 63, at 3. But some families who were legally present were also separated. DHS OIG 2020 REPORT, *supra* note 64, at 2.

73. *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018) (order granting plaintiffs’ motion for class-wide preliminary injunction).

74. Cordero et al., *supra* note 60, at 460–61. Reilly Frye, *Family Separation Under the Trump Administration: Applying an International Criminal Law Framework*, 110 J. CRIM. L. & CRIMINOLOGY 349, 359–72 (2020); Jonathan Todres & Daniela Villamizar Fink, *The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective*, 95 WASH. L. REV. 377, 398 (2020); Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SEC. (Oct. 18, 2018) [hereinafter *Torture*], <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/> [https://perma.cc/9CHQ-FS9U];

Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 279 (2003) (highlighting several situations in which family separation might constitute a violation of crimes against humanity).

75. Complaint, *D.J.C.V. v. United States*, 1:20-cv-5747 (S.D.N.Y.) (filed Jul. 24, 2020).

merits of this claim. In 2021, the Biden Administration created an Interagency Task Force on the Reunification of Families to identify and reunite separated families.<sup>76</sup>

a. Family Separation as a Crime Against Humanity

Considering the policy and its implementation as a whole, family separation may have constituted a crime against humanity. Under the government's Zero Tolerance Policy, there was a widespread,<sup>77</sup> systematic<sup>78</sup> course of conduct of multiple family separations<sup>79</sup> directed against a civilian population of immigrants at the southern border of the United States.<sup>80</sup>

Concerning the underlying acts for crimes against humanity, several physicians' groups attested that it constituted torture to forcibly separate children from their parents, deny them knowledge of each other's whereabouts and wellbeing, and fail to reunite them.<sup>81</sup> In the Draft Articles, torture is defined as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."<sup>82</sup> Concerning intent, internal DHS, Department of Justice ("DOJ"), and Department of Health and Human Services ("HHS") reports and documents indicate that officials were repeatedly warned before and during the early days of the policy that the planned policy would inflict severe psychological trauma, and in particular, that the government did not have a mechanism for tracking, providing information about, and reuniting the children with their families, dramatically heightening the traumatic effect on parents and children.<sup>83</sup> Statements by high-level officials at the time affirm that family separation and the accompanying mental distress were an intended result of the

76. Reunification EO, *supra* note 66, at 8273.

77. Geographically, separations occurred at multiple locations along and near the southern border of the United States. Numerically, they involved thousands of people. *See generally* BUCHANAN ET AL., *supra* note 1.

78. Separations were also part of the organized, institutional implementation of the Zero Tolerance Policy by DHS. The Draft Articles require only that the attack be either widespread or systematic, but here, it appears to have been both. *Frye, supra* note 74, at 368.

79. Thousands of instances of separations have been identified by the government. BUCHANAN ET AL., *supra* note 2, at 1.

80. The immigrants against whom family separation was directed were a civilian population of immigrants entering the United States at its southern border. They were neither involved in armed conflict nor members of militias or military forces. *See Frye, supra* note 74, at 359 (discussing families crossing the border).

81. HABBACH ET AL., *supra* note 68, at 5; Charles Oberg et al., *Treatment of Migrant Children on the US Southern Border Is Consistent with Torture*, 147 PEDIATRICS 1, 2–4 (2021); *see also* Complaint, D.J.C.V. v. United States, 1:20-cv-5747, at 44 (S.D.N.Y.) (filed Jul. 24, 2020) (arguing that the plaintiffs' separation constituted torture).

82. Draft Articles, *supra* note 9, at 7–8.

83. DOJ OIG REPORT, *supra* note 63, at ii; OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-20-06, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES 8 (2019) [hereinafter DHS OIG 2019 REPORT]. HHS OIG Report, *supra* note 68, at 15, 18 & 22; Susan Ferriss, *The Trump Administration Knew Migrant Children Would Suffer from Family Separations. The Government Ramped Up the Practice Anyway.*, TEXAS TRIB. (Dec. 16, 2019, 12:00 AM), <https://www.texastribune.org/2019/12/16/trump-administration-knew-family-separations-harm-migrant-children/> [https://perma.cc/Q6PE-R3F7].

policy; they anticipated that this would serve as a deterrent to immigration.<sup>84</sup> Concerning the severity and nature of the suffering, doctors attested that separated parents and children experienced acute mental suffering and suffered from PTSD, depression and anxiety, particularly in instances in which neither parent nor child knew each other's whereabouts, well-being, or when or whether they would be reunited.<sup>85</sup> The government would likely argue that this suffering was merely incidental to lawful sanctions for immigration violations,<sup>86</sup> but the government's failure to secure the identities and locations of the children and its failure to promptly reunite families following criminal prosecution of the adults was wholly unnecessary to any interest in criminally prosecuting adults; that was gratuitously inflicted suffering.<sup>87</sup>

In instances in which parents were denied information about their children's whereabouts for a period of time or permanently, these separations may also constitute the underlying act of enforced disappearances.<sup>88</sup> In the Draft Articles,

“enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>89</sup>

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84. Frye, *supra* note 74, at 371–72; Phillip Bump, *Here Are the Administration Officials Who Have Said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> [https://perma.cc/5CX9-FXGM]; Beth Van Schaack, *New Proof Surfaces that Family Separation Was About Deterrence and Punishment*, JUST SEC. (Nov. 27, 2018), <https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/> [https://perma.cc/WUP7-6USH].

85. HABBACH ET AL., *supra* note 68, at 3; Ryan Matlow & Daryn Reicherter, *Reducing Protections for Noncitizen Children—Exacerbating Harm and Trauma*, 380 NEW ENG. J. MED. 5, 6 (2019); Matthew G. Gartland, Jose A. Hidalgo & Fiona S. Danaher, *Case 20-2020: A 7-Year-Old Girl with Severe Psychological Distress After Family Separation*, 382 NEW ENG. J. MED. 2557, 2558 (2020). In addition to the intentional infliction of the severe mental trauma of separation, the conditions under which children were held and the administration of psychotropic drugs to separated children in detention may also meet the definition of torture. *See, e.g.*, Gartland, *supra* note 85 at 2558; HABBACH ET AL., *supra* note 68, at 3; Van Schaack, *Torture*, *supra* note 74.

86. Some of the separated families, however, had entered the country legally, and some were asserting asylum claims, which they were legally entitled to do. DHS OIG 2020 REPORT, *supra* note 64, at 19. In addition, DOJ did not have to detain the adults in order to criminally prosecute them, and doing so reversed longstanding agency policy. DOJ OIG REPORT, *supra* note 63, at 6.

87. Also, under U.S. law, torture encompasses a narrower definition of severe mental suffering. 18 U.S.C. § 2340(1). The government would likely argue that it should be held to the standard under U.S. law rather than international law; that, under U.S. law, the purely mental suffering of separation does not represent torture because it was not caused by infliction or threat of physical suffering; that the degree of suffering experienced by the families was not severe enough to constitute torture; and that it lacked specific intent to cause that suffering.

88. PHYSICIANS FOR HUM. RTS., *supra* note 68, at 28; *see also* Complaint at 1–2, *D.J.C.V. v. United States*, 1:20-cv-5747 (S.D.N.Y.) (filed Jul. 24, 2020) (arguing that the plaintiffs' separation constitutes the crimes against humanity of persecution and of other inhumane acts).

89. Draft Articles, *supra* note 9, at 9.

Here, the children were detained by DHS, which did not track the children or provide information about their location or well-being to their parents, in some instances for days, weeks, or months, and in other instances permanently.<sup>90</sup> The government would argue that this was mere incompetence, rather than refusal, but as noted above, high-level officials had advance knowledge that they would not be able to trace the children when they implemented the policy, and did not remedy this before proceeding.<sup>91</sup> The government also did not make any plan for reunifying families before implementing the policy.<sup>92</sup> In so doing, the government had the intention of removing those children from the protection of their substantive due process rights to family integrity under the Fifth Amendment, as a means of deterring immigrants from entering the country; it also made it impossible for parents to enforce that constitutional right in instances in which the children's identities or locations were unknown.<sup>93</sup>

Finally, one distinctive aspect of family separation, in contrast to the other government examples discussed below, is that there was an official government policy at the highest levels of DHS and DOJ.<sup>94</sup> Furthermore, as discussed above, official statements at the time and later investigations by the Offices of the Inspector General at DOJ, DHS, and HHS all indicate that in enacting and implementing the Zero Tolerance Policy, the agencies knew not only this policy would require separating children from parents, but also that DHS could not track children's family identities and reunite them with their parents, and that these measures would cause trauma to the affected parents and children.<sup>95</sup> While some government officials have periodically tried to argue that the Zero Tolerance Policy only encompassed criminal prosecution and that family separation was a mere byproduct, that claim is belied by the numerous statements by the top officials at all three involved agencies that family separation was intended as a deterrent to immigrants.<sup>96</sup>

#### b. Significant Characteristics

As discussed in Part II, the prohibition on crimes against humanity is meant to constrain the power of the government to use its resources and authority against civilians in its jurisdiction, and to counteract its capacity to legalize and institutionalize its own behavior. Family separation demonstrates the risk of the government deploying an official policy through government agencies under the auspices of domestic law, in spite of existing domestic legal and institutional

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90. HABBACH ET AL., *supra* note 68, at 28.

91. DHS OIG 2019 REPORT, *supra* note 83, at 8, 11–23.

92. *Id.* at 23.

93. The government would likely argue that it did not remove the detained children from the protection of the law, because the children were under legal protection in HHS custody, and that any protection or communication failures were merely negligent.

94. DHS OIG 2019 REPORT, *supra* note 83, at 1–2.

95. HHS OIG REPORT, *supra* note 68, at 15, 18, 22; DHS OIG 2019 REPORT, *supra* note 83, at 8; DOJ OIG REPORT, *supra* note 63, at 6.

96. Bump, *supra* note 84; Frye, *supra* note 74, at 371.

safeguards. With its Zero Tolerance policy, the U.S. government designed and implemented an official, high-level policy that it knew would cause severe harm to the affected immigrants, notwithstanding countervailing U.S. constitutional due process requirements and previous DHS policy of prioritizing immigrant family integrity. This is an indicator that there were not sufficient internal procedural or institutional safeguards within DOJ and DHS (which created and implemented the Zero Tolerance policy) and HHS (which took custody of the detained children) to prevent these constitutional and legal violations from occurring. While some staff reportedly expressed concerns at the time, that internal dissent did not affect the development or implementation of the policy.<sup>97</sup>

This also illustrates both the effectiveness and the limitations of the courts as a safeguard against such harms. An official and publicly acknowledged policy in violation of the U.S. Constitution is exactly the kind of government action that the federal courts are well-placed to address, and indeed, a judge promptly ordered the federal government to cease its actions and return the separated children to their parents.<sup>98</sup> The severity of the harm caused was dramatically curtailed by this intervention; by issuing this order, the court limited the number of affected families, ensured that many families would be reunited, and shortened the duration of the mental suffering of those who had already been separated.<sup>99</sup> It also demonstrates, however, that external intervention by courts after a policy has been implemented does not provide either full protection or full redress; by the time the judge issued an injunction, many families had already been separated, and some still have not been reunited.

Finally, another contextual aspect of this policy, as discussed further in Section III.B below, is the anti-immigrant rhetoric that preceded and accompanied it. In 2016, then-candidate Trump described immigrants from Mexico as drug dealers, criminals, and rapists.<sup>100</sup> In 2018, concerning immigrants from majority-Black countries, former President Trump asked: “Why are we having all these people from shithole countries come here?”<sup>101</sup> In 2018, he repeatedly called the movement of immigrants to the southern border of the United States an “invasion.”<sup>102</sup> Such statements, denigrating and dehumanizing particular groups and equating them with criminals and enemies, characteristically precede and accompany atrocity crimes.<sup>103</sup>

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97. HHS OIG REPORT, *supra* note 68, at 15.

98. *See* Ms. L. v. U.S. Immigration & Customs Enf’t, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018) (order granting plaintiffs’ motion for class-wide preliminary injunction).

99. DHS initially estimated that it would separate 26,000 children from their parents during the first five months of the policy. DHS OIG 2019 REPORT, *supra* note 83, at 17–18.

100. Eugene Scott, *Trump’s Most Insulting—and Violent—Language Is Often Reserved for Immigrants*, N.Y. TIMES (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [<https://perma.cc/T467-J4JG>].

101. *Id.*

102. *Id.*; Brent D. Griffiths, *Trump: We Cannot Allow All of These People to Invade Our Country*, POLITICO (June 24, 2018, 3:20 PM), <https://www.politico.com/story/2018/06/24/trump-invade-country-immigrants-667191> [<https://perma.cc/R5C2-6GDW>].

103. Gregory S. Gordon, *The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution*, 39 LOY. L.A. INT’L & COMP. L. REV. 209, 209–10 (2017); Vanessa

## 2. *Willful Blindness and De Facto Policies*

While family separation represents an official government policy at the highest level, there are other systemic and widespread abuses that have long persisted despite countervailing laws and policies, such as police brutality against Black Americans and sexual assaults against detained immigrants. In these situations, government officers have been delegated the power to use force, and they deploy that power to harm those under their control. These abuses represent the inherent risk associated with the government delegating such power, and the need for corresponding oversight to prevent abuse, and particularly to prevent abuse from escalating to a level that threatens crimes against humanity.

Whether these abuses have risen to the level of crimes against humanity depends on the extent to which the state is complicit, and not merely remiss. So, if police department supervisors have consistently turned a blind eye to severe physical abuse against Black Americans specifically so that those abuses can continue unimpeded, or if DHS officials have deliberately ignored patterns of sexual assault in Immigration and Customs Enforcement (“ICE”) detention centers and Customs and Border Patrol (“CBP”) custody so as to enable those attacks, that could constitute a policy for purposes of crimes against humanity.

For purposes of focusing on the current and future risk of crimes against humanity occurring, it is important to remember that even if these sorts of commonplace abuses of power do not constitute crimes against humanity, they are severe human rights violations. As such, they are a serious harm in themselves, as well as a red flag that there is a risk of escalation to crimes against humanity.

### a. Police Brutality Against Black Americans

The most notorious and controversial ongoing human rights abuse in the United States today is systemic brutality against Black Americans by state and local police.<sup>104</sup> Well-known cases include the killings of Michael Brown, Eric Garner, Tamir Rice, Freddie Gray, Philando Castle, Stephon Clark, Breonna Taylor, and George Floyd.<sup>105</sup> In many of these cases, the victims were stopped for minor infractions, were unarmed, were complying with officers, or were not given an opportunity to comply.<sup>106</sup> These events have come to public attention through widely circulated video recordings, sparking public outrage and protests, and causing massive nationwide demonstrations by tens of thousands of people

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Williams & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS INST. (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [https://perma.cc/B4CN-59EK].

104. Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016); Garrett Chase, Note, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1097 (2018).

105. Ursula Perano, *Deaths Without Consequences*, AXIOS (May 30, 2020), <https://www.axios.com/police-killings-black-lives-8fbd7c70-486a-4231-824f-fbd9faa4a817.html> [https://perma.cc/8P58-F34V].

106. Butler, *supra* note 104, at 1422.

following the killing of George Floyd by Minneapolis police officers in 2020.<sup>107</sup> In most of these cases, police officers have not been indicted or have been acquitted;<sup>108</sup> exceptionally, police officer Derek Chauvin was convicted of murder and manslaughter for George Floyd's death in 2021.<sup>109</sup>

In addition to these infamous individual incidents, the aggregate statistics on police killings of Black Americans are alarming. Between 2015–2020, there were more than 5,000 fatal shootings by police officers,<sup>110</sup> and the raw data suggests that Black Americans are twice as likely to be shot by police as White Americans.<sup>111</sup> A recent empirical study found that this pattern continued to persist after controlling for other relevant factors: “We find that, across several circumstances of police killings and their levels of objective reasonableness, Black suspects are more than twice as likely to be killed by police than are suspects from other racial or ethnic groups, including shootings where there are no obvious reasonable circumstances.”<sup>112</sup> Furthermore, the available data on racist patterns in policing may understate the problem, because it is typically based on self-reporting in police administrative records.<sup>113</sup>

These events and aggregate patterns are occurring in the context of other well-known and interrelated systemic racist behaviors, such as racial profiling and “profiling by proxy,” that is, White Americans calling the police to report Black Americans engaging in ordinary life activities, such as waiting for someone at a Starbucks, napping in a college dorm common area, or touring a house for sale.<sup>114</sup> The broader context is, of course, the long, well-known history of racist laws, policies, and abuses against Black Americans, as mentioned above.

Whether police brutality might constitute a crime against humanity depends primarily on whether there is a supportive government policy of some kind.

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107. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [https://perma.cc/HY6L-KRMB].

108. No one was indicted in the Brown, Garner, Rice, Gray, Castle, and Clark cases. In the Taylor case, one officer was indicted for endangering neighbors, but no one was indicted for killing Ms. Taylor. Officers have been indicted and convicted in other incidents, such as the killings of Akai Gurley and Botham Jean. Perano, *supra* note 105.

109. Ray Sanchez & Eric Levinson, *Derek Chauvin Sentenced to 22.5 Years in Death of George Floyd*, CNN (June 25, 2021, 9:54 PM), <https://www.cnn.com/2021/06/25/us/derek-chauvin-sentencing-george-floyd/index.html> [https://perma.cc/LE8H-9Z8B].

110. *Fatal Force*, *supra* note 4.

111. *Id.*

112. Jeffrey A. Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020).

113. Dean Knox, Will Lowe & Jonathan Mummolo, *Administrative Records Mask Racially Biased Policing*, 114 AM. POL. SCI. REV. 619, 626 (2019); Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/> [https://perma.cc/BD3L-M6ED].

114. David A. Harris, *Racial Profiling: Past, Present, and Future*, 34/4 ABA CRIM. JUST. MAG. (Jan. 21, 2020), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/) [https://perma.cc/PD53-NN3M]; Alyssa Lukpat & Eduardo Medina, *Black Real Estate Agent and Clients Handcuffed at House Viewing*, N.Y. TIMES (Aug. 11, 2021), <https://www.nytimes.com/2021/08/08/us/black-realtor-client-handcuffed-michigan.html> [https://perma.cc/5KTL-Q459].

Accusations of police brutality are widespread,<sup>115</sup> there have been multiple commissions against the civilian population of Black Americans,<sup>116</sup> and the alleged killings and injuries could constitute the underlying acts of murder and torture.<sup>117</sup> But there is not an official government policy of racist brutality against Black Americans. To the contrary, all formal government laws and policies prohibit and criminalize such actions, and there have been numerous reform efforts aimed at preventing racist policing.<sup>118</sup> Thus, as Margaret deGuzman argues:

Whether murders and other police brutality against Black people and other people of color constitute crimes against humanity therefore depends on whether the crimes are committed in furtherance of a governmental policy of omissions that aims to encourage an ongoing attack against members of these populations in the United States.<sup>119</sup>

As noted above in Part II, such a policy could be found either on a national level or locally. Because there is not an overarching government authority setting policy for all departments across the country, a nationwide policy of omission would need to be found in gaps in the constitutional standards for use of force that apply nationwide. Here, Paul Butler contends that rather than being an anomaly, police brutality is the inevitable result of the established constitutional standards: that “the system is working the way that it is supposed to.”<sup>120</sup> According to Butler, through a series of cases, the Supreme Court has legitimized sweeping “super powers” for police to stop, search, detain, and use force.<sup>121</sup> Police are using that authority disproportionately, and nonetheless legally, against Black Americans,<sup>122</sup> producing both the troubling statistics discussed above and the individual criminal and civil cases in which police killings and injuries of Black people have been found to be legally justified.

Another way of assessing policy in this context is to focus on the policies of particular police departments. Here, the findings of a DOJ investigation into the Police Department in Ferguson, Missouri after the police killing of Michael Brown underscore the difference between official rules and de facto policy for purposes of the policy requirement of crimes against humanity.<sup>123</sup> Like all police

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115. Geographically, killings and injuries have occurred nationwide; numerically, there are thousands of allegations of excessive force each year, of which a disproportionate number concern Black Americans.

116. While some affected Black Americans may be members of the military, most are not, nor are they acting in a military capacity in their encounters with police.

117. Draft Articles, *supra* note 9, at 27.

118. Harris, *supra* note 114, at 13–16.

119. Margaret deGuzman, *Systemic Racist Police Brutality Shocks the Conscience of Humanity, but Is It an International Crime?*, JUST SEC. (July 11, 2020), <https://www.justsecurity.org/71255/systemic-racist-police-brutality-shocks-the-conscience-of-humanity-but-is-it-an-international-crime/> [<https://perma.cc/PX3N-AY4S>].

120. Butler, *supra* note 104, at 1456.

121. *Id.* at 1451–57.

122. *Id.*

123. See generally U.S. DEP’T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015). In a separate report, DOJ nonetheless found that the killing of Michael Brown did not violate federal law. U.S. DEP’T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4 (2015).

departments, the Ferguson Police Department had rules concerning discrimination, use of force, and other aspects of engagement with its community. But DOJ investigation found that, in reality, Ferguson's Police Department consistently treated "some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue"<sup>124</sup> and therefore aggressively arrested, ticketed, and fined those residents, all the while using force as convenient to gain compliance.<sup>125</sup> Concerning use of force in particular, DOJ found that the official rules were "routinely ignored"<sup>126</sup> and that "[s]upervisors seem to believe that any level of resistance justifies any level of force."<sup>127</sup> DOJ also found evidence of both discriminatory impact and racist intent in how these practices were carried out.

<sup>128</sup> These practices were in violation of the U.S. Constitution and of the Ferguson Police Department's own rules. Yet they were the de facto local policy in this department, as consistently understood, enforced, and rewarded by supervisors within the Department and by City officials.<sup>129</sup>

#### b. Sexual Assaults Against Detained Immigrants

Sexual assault is forbidden by domestic criminal law and by DHS policies, and sexual assaults against detained immigrants constitute a violation of their constitutional rights.<sup>130</sup> Nevertheless, for many years there has been a widespread, persistent problem of sexual abuse of immigrants by DHS officers and contractors, and the DHS has regularly failed to investigate complaints of abuse or take action to enforce policies to prevent it.<sup>131</sup> As with police brutality, the raw numbers of complaints are disquieting: "between May 2014 and July 2016, [DHS] OIG received at least 1,016 reports of sexual abuse or assault filed by people in immigration detention—averaging to more than one complaint per day."<sup>132</sup> Similarly, between March and July 2018, HHS received 859 complaints

124. U.S. DEP'T OF JUST., CIV. RTS. DIV., *supra* note 123, at 2.

125. *Id.* at 2–3.

126. *Id.* at 38.

127. *Id.* at 40.

128. *Id.* at 4–5.

129. *Id.* at 2.

130. *See, e.g.*, E.D. v. Sharkey, 928 F.3d 299, 306–09 (3d Cir. 2019). *See generally* U.S. IMMIGR. & CUSTOMS ENF'T, 2019 NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES (2019).

131. Julie Goldscheid, *Sexual Assault by Federal Actors, #MeToo, and Civil Rights*, 94 WASH. L. REV. 1639, 1645–50 (2019); Brief for Tahirih Justice Center et al. as Amici Curiae Supporting Petitioners at 6–10, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678) [hereinafter Amicus Brief]; Lomi Kriel, *ICE Guards 'Systematically' Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, ABA J. (Aug. 21, 2020, 12:55 PM), <https://www.abajournal.com/news/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say> [https://perma.cc/EY39-BK2M]; *Detained and at Risk*, HUM. RTS. WATCH (Aug. 25, 2010), <https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention#> [https://perma.cc/5H2G-J3NZ]; Alice Speri, *Detained, Then Violated*, INTERCEPT (Apr. 11, 2018, 11:11 AM), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/> [https://perma.cc/P2KN-KG8E].

132. Amicus Brief, *supra* note 131, at 7; Goldscheid, *supra* note 131, at 1645–46.

concerning sexual assault or abuse of unaccompanied (or separated) immigrant children.<sup>133</sup>

Watchdogs have found that thousands of complaints of sexual assaults have gone uninvestigated by the DHS OIG, and “one study found that CBP’s Internal Affairs Office, which is responsible for investigating complaints of misconduct against CBP officers, failed to take any disciplinary action in 97% of complaints about physical, sexual, and verbal abuse.”<sup>134</sup> An internal investigative report by the DHS OIG concluded that agency mechanisms for reporting and addressing such crimes have not functioned effectively.<sup>135</sup> Finally, reports also indicate failures of institutional procedures and safeguards that should prevent opportunities for abuse.<sup>136</sup>

The immediate context for these patterns is the anti-immigrant rhetoric put forth by former President Trump, and the development of the family separation policy with its infliction of severe mental distress to deter immigration, both of which indicate some degree of animus against immigrants. These patterns, however, predate the family separation policy by decades and have persisted through multiple Presidential administrations.<sup>137</sup>

Concerning whether such sexual assaults might constitute crimes against humanity, these reports indicate a disturbing and persistent pattern of sexual assault against immigrants in DHS and HHS custody and detention. The alleged incidents constitute the underlying acts of rape and sexual violence,<sup>138</sup> complaints of sexual assaults have been widespread,<sup>139</sup> and there have been thousands of alleged commissions directed against the civilian population of immigrants in custody or detention.<sup>140</sup>

Thus, as with police brutality, whether these patterns rise to the level of constituting crimes against humanity depends primarily on whether they have occurred pursuant to some kind of de facto government policy, notwithstanding countervailing official law and policy. There is of course no official, publicized government policy of sexual assault, and to the contrary, all government laws and policies prohibit and criminalize such actions. But the extensive and persistent nature of the assaults, together with the pattern of failing to implement protective practices and failing to investigate complaints suggests the possibility of willful blindness at the local or national level. On the local level, individual sexual assault victims have alleged willful blindness by detention center supervisors, as have the plaintiffs in a recent claim of forced sterilizations in an

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133. Amicus Brief, *supra* note 131, at 9; Goldscheid, *supra* note 131, at 1645–46.

134. Amicus Brief, *supra* note 131, at 13; Goldscheid, *supra* note 131, at 1647.

135. DEP’T OF HOMELAND SEC., ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 7 (2019).

136. Amicus Brief, *supra* note 131, at 16; HUM. RTS. WATCH, *supra* note 131.

137. See HUM. RTS. WATCH, *supra* note 131.

138. The Draft Articles prohibit “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.” Draft Articles, *supra* note 9, at 8.

139. Numerically, the alleged assaults number in the thousands, and geographically, they are alleged to have taken place in numerous locations around the United States.

140. The targeted immigrants were not engaging in armed conflict, nor were they members of military groups or militias.

ICE detention center.<sup>141</sup> On the national level, unlike with police brutality, there is a federal agency setting national policy; as noted above, there has been a persistent failure to investigate complaints by the DHS OIG.<sup>142</sup>

c. Significant Characteristics

The widespread and persistent nature of these problems indicates the inherent risk associated with the authority to detain, control, and use force against civilians. That authority creates the opportunity to commit the underlying acts of crimes against humanity, like murder, torture, or sexual assault. Settings of complete control and vulnerability like detention centers enhance both the risks of occurrence and the likelihood of impunity. As discussed below in Part V, the military has acknowledged this risk in its own context by establishing extensive safeguards for combatants held in military detention as well as associated rules for those tasked with serving in such detention centers.

More generally, as discussed below in Section III.B, there is additional risk associated with expanding such authority without pairing it with adequate oversight. In the policing context, for example, the intensification of policing activity associated with the war on drugs is well-known.<sup>143</sup> The Ferguson Police Department provides an example of a particular office's amplification of authority to arrest and use force as a means of enhancing revenue, in the context of a complete failure of oversight of the use of that authority. In the immigration context, there has been more frequent use of detention rather than releasing immigrants, as well as increased arrests of immigrants through workplace raids and other enforcement actions.<sup>144</sup> Indeed, over time, the exercise of authority in the immigration context has grown according to virtually every measure,<sup>145</sup> providing correspondingly greater opportunities for abuse of authority.<sup>146</sup> But as described above, this expanding exercise of authority has been paired with a failure of existing internal institutional safeguards to prevent sexual assaults and other abuses.

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141. E.D. v. Sharkey, 928 F.3d 299, 304 (3d Cir. 2019); Victoria Beckiempis, *More Immigrant Women Say They Were Abused by ICE Gynecologist*, GUARDIAN (Dec. 22, 2020, 11:40 AM), <https://www.theguardian.com/us-news/2020/dec/22/ice-gynecologist-hysterectomies-georgia> [<https://perma.cc/G2BD-69UN>].

142. U.S. DEP'T OF HOMELAND SEC., *supra* note 135, at 7.

143. Harris, *supra* note 114, at 3.

144. Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PA. STATE L. REV. 391, 399–408 (2020); *ICE Worksite Enforcement Investigations Already Double Over Last Year*, U.S. IMMIGR. & CUSTOMS ENF'T (May 14, 2018), <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year> [<https://perma.cc/94Z7-B4RA>].

145. Between 1998 and 2016, the number of Border Patrol Agents increased from 4,000 to 21,000. Anthony, *supra* note 144, at 394. Recently, ICE has been creating internal checkpoints up to 100 miles from the border and deploying roving patrols that operate even further from the border. *Id.* at 399–408.

146. CBP has long been criticized and investigated for excessive use of force and physical abuse. Patrick J. McDonnell & Sebastian Rotella, *When Agents Cross Over the Borderline: Law Enforcement: Charges of Wrongdoing in Border Patrol Have Forced Even Loyalists to Call for Reforms*, L.A. TIMES (Apr. 22, 1993), <https://www.latimes.com/archives/la-xpm-1993-04-22-mn-25801-story.html> [<https://perma.cc/PH3L-Y5UD>]. Against CBP alone, there were about 2,100 claims of excessive force between 2007–2012 and more than 1,200 claims of physical abuse between 2012–2015. Anthony, *supra* note 144, at 395.

These examples also illustrate the types of government complicity that might constitute willful blindness, de facto policies, and local policies that can enable crimes against humanity to develop. In particular, while of course it is critically important to have official policies prohibiting racist behaviors, excessive use of force, and physical and sexual assaults, such policies may in some instances merely provide cover for an actual practice of turning a blind eye to widespread atrocities. This is especially likely in a highly legalistic environment like the United States, where departments and agencies are cognizant of their legal and constitutional obligations and rarely roll out an official policy in violation of their obligations, as occurred in the family separation context.

These patterns also illuminate the connection between such willful blindness and de facto policies and the escalation of individual actions to the scale of crimes against humanity. Individual officers with authority over vulnerable populations may be able to commit some crimes against those populations without being detected, but they should not be able to do so consistently for long stretches of time, nor should it be possible for numerous actors to commit such crimes on a widespread or systematic basis, without eventually being detected by the state. Thus, it is only through the complicity of the state in turning a blind eye or otherwise permitting such crimes that they should be able to escalate to the level of constituting crimes against humanity. Accordingly, evidence of a shocking number of underlying acts committed over a long period of time, while not decisive, is a red flag concerning potential government complicity.

Finally, the long history and continued prevalence of racism in the United States is another important context for assessing these risks. Racist rhetoric concerning immigrants was discussed above. The well-known effects of conscious and unconscious bias; the racial stratification of economic, political and social power; the cultural association of Black Americans with violence; and the common use of racist language and rhetoric all contribute to the heightened risk of crimes against humanity being committed against Black Americans.<sup>147</sup>

Of course, even if these acts do not have government complicity and thus do not constitute crimes against humanity, they are nonetheless severe crimes and human rights abuses. As discussed further in Section III.B, when such serious harms are occurring, and especially when they go unpunished, that increases the risk of escalation to crimes against humanity.

### 3. *Non-State Actors: White Supremacist and Extremist Violence*

The United States has recently seen a dramatic rise in extremist groups, including White supremacist organizations and armed militias, such as the Oath

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147. See generally Butler, *supra* note 104.

Keepers, the Boogaloo Bois, and the Proud Boys.<sup>148</sup> These groups advocate racist, anti-Semitic, sexist, homophobic, and anti-government ideologies.<sup>149</sup> Many openly endorse violence against political opponents and members of disfavored groups and call for revolution or civil war.<sup>150</sup> White supremacist groups have made public appearances and shows of force, as at the “Unite the Right” rally in Charlottesville, Virginia in 2017, where hundreds of armed white nationalists marched and a counter-protester was murdered.<sup>151</sup> Far-right groups have been responsible for most of the terrorist attacks within the United States for several decades, and this pattern has intensified: far-right extremist groups committed 90% of violent terrorist attacks within the United States in the first half of 2020 and represent the greatest danger of future attacks.<sup>152</sup> There has been a sharp increase in violent hate crimes and in publicly expressed racist, anti-Semitic, sexist, and homophobic views since 2016.<sup>153</sup>

In addition, extremist groups have begun targeting government buildings and officials for violence. In 2020, there was an escalating series of assaults on state capitols and plans to murder state officials by members of the Boogaloo Bois and other extremist and white supremacist organizations.<sup>154</sup> In January 2021, members of White supremacist and extremist organizations coordinated online and invaded the U.S. Capitol building to disrupt Congress’s certification of the results of the 2020 Presidential election.<sup>155</sup> As of this writing, the Capitol rioters are being investigated and prosecuted by the U.S. Attorney for D.C.,

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148. See, e.g., Liam Stack, *Over 1,000 Hate Groups Are Now Active in United States*, *Civil Rights Group Says*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/hate-groups-rise.html> [<https://perma.cc/SNQ3-47GT>].

149. *Extremist Files: Groups*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/groups> (last visited May 29, 2022) [<https://perma.cc/3URE-B5SD>].

150. SETH G. JONES, CATRINA DOXSEE & NICHOLAS HARRINGTON, CSIS BRIEF: THE ESCALATING TERRORISM PROBLEM WITHIN THE UNITED STATES, CTR. FOR STRATEGIC & INT’L STUD. 1, 6 (June 2020).

151. Katz, *supra* note 1.

152. JONES ET AL., *supra* note 150, at 1; Bruce Hoffman & Jacob Ware, *The Terrorist Threat from the Fractured Far Right*, LAWFARE INST. & BROOKINGS INST. (Nov. 1, 2020), <https://www.lawfareblog.com/terrorist-threat-fractured-far-right> [<https://perma.cc/4B93-LGUK>]. There was also an increase in the size, visibility and public acts of violence and property damage by far-left, anti-government groups such as Antifa, and conflicts between far-left and far-right groups at protests and public events have sparked violence. Nonetheless, far-left groups committed a small minority of extremist violence in 2019 and 2020, and far-left groups rarely advocate identity-based hatred or violence. JONES ET AL., *supra* note 150, at 1–4.

153. Stack, *supra* note 148; Adeel Hassan, *Hate-Crime Violence Hits 16-Year High*, *F.B.I. Reports*, N.Y. TIMES (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html> [<https://perma.cc/XS4W-R3CW>]; James Piazza, *When Politicians Use Hate Speech, Political Violence Increases*, CONVERSATION (Sept. 28, 2020), <https://theconversation.com/when-politicians-use-hate-speech-political-violence-increases-146640> [<https://perma.cc/6CJL-J3S6>].

154. Kathleen Belew, *The Plot Against Whitmer Won’t Be the Last White Supremacist Threat*, WASH. POST (Oct. 8, 2020), <https://www.washingtonpost.com/outlook/2020/10/08/white-supremacists-gretchen-whitmer/> [<https://perma.cc/2YS7-VRMP>]; Tara C. Mahadevan, *Armed Protesters Storm Oregon State Capitol, Break Windows, Attack Reporters*, (Dec. 22, 2020), <https://www.complex.com/life/2020/12/armed-protesters-storm-oregon-state-capitol-break-windows-attack-reporters> [<https://perma.cc/K92Y-CVN5>].

155. Diaz & Treisman, *supra* note 1.

mostly on charges such as “entering and remaining in a restricted building,” “disorderly conduct,” or “assaulting, resisting, or impeding certain officers.”<sup>156</sup>

Rather than being tight-knit, hierarchical organizations, many extremist groups are more akin to loose networks that are connected primarily online.<sup>157</sup> Furthermore, until recently, most attacks, like the shootings at a Pittsburgh synagogue and a South Carolina church, have been singular events and have been regarded as “lone wolf” actions by individuals.<sup>158</sup> Overall, attacks by members of such groups have not been sufficiently widespread, systematic, connected to a course of conduct of multiple commissions, or driven by an organizational policy, to be considered crimes against humanity.

But that is changing now. Clusters of people within these extremist networks and militias are beginning to devise and coordinate more ambitious attacks to carry out the aims of their organizations.<sup>159</sup> As online platforms have become more sophisticated and popular, group members have leveraged them to grow their organizations and facilitate effective communication and planning.<sup>160</sup> Social media platforms have become organizing hubs and spaces for expression of the group’s aims.<sup>161</sup> These new extremist groups are a representation of the current era in which online influencers regularly reach millions of followers,<sup>162</sup> fundraising on crowdfunding platforms raises more than \$17 billion annually in North America,<sup>163</sup> and foreign election interference plays out on social media.<sup>164</sup> Online networks are now effective conduits of power, influence, and joint action for white supremacists and other extremists.<sup>165</sup> As such, these groups are

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156. *Capitol Breach Cases*, U.S. DEP’T OF JUST., [hereinafter *Capitol Breach Cases*], <https://www.justice.gov/usao-dc/capitol-breach-cases> (last visited May 29, 2022) [<https://perma.cc/GZF8-8ETZ>].

157. Hoffman & Ware, *supra* note 152. Such organizations do not fit the hierarchical, state-like structure that has long been expected to be necessary to muster the resources and planning to commit crimes against humanity. *State Policy*, *supra* note 52, at 954.

158. Hoffman & Ware, *supra* note 152; Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html> [<https://perma.cc/U2GD-3J2P>]; Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/P6U5-58LF>].

159. Hoffman & Ware, *supra* note 152.

160. JONES ET AL., *supra* note 150, at 4–6.

161. Sheera Frenkel, *Fringe Groups Splinter Online After Facebook and Twitter Bans*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/technology/fringe-groups-splinter-online-after-facebook-and-twitter-bans.html> [<https://perma.cc/EGK9-HLFR>].

162. Nicole Fallon & Jacqueline Medina, *Get Connected: Top 5 Social Media Influencers in 9 Industries*, U.S. CHAMBER OF COM., <https://www.uschamber.com/co/grow/marketing/top-social-media-influencers> (last visited May 29, 2022) [<https://perma.cc/PXE4-VQ7M>].

163. Maddie Shepherd, *Crowdfunding Statistics: Market Size and Growth (2021)*, FUNDERA, <https://www.fundera.com/resources/crowdfunding-statistics> (Dec. 16, 2020) [<https://perma.cc/CXG4-2WQR>].

164. Miles Parks, *Social Media Usage Is at an All-Time High. That Could Mean a Nightmare for Democracy*, NPR (May 27, 2020, 5:02 AM), <https://www.npr.org/2020/05/27/860369744/social-media-usage-is-at-an-all-time-high-that-could-mean-a-nightmare-for-democr> [<https://perma.cc/5P2M-WSFL>].

165. Jonathan Carlson, *Dark Web Chat Logs Appear to Show White Supremacists at Work*, CBS (Jan. 30, 2020), [https://www.cbs46.com/investigations/dark-web-chat-logs-appear-to-show-white-supremacists-at-work/article\\_91d4bf1e-43af-11ea-9d4f-5f2df67efb9f.html](https://www.cbs46.com/investigations/dark-web-chat-logs-appear-to-show-white-supremacists-at-work/article_91d4bf1e-43af-11ea-9d4f-5f2df67efb9f.html) [<https://perma.cc/86BW-PAPC>].

becoming increasingly connected through online platforms, and their relatively attenuated nature is no longer a limiting factor in the kinds of attacks they can carry out.

Accordingly, there is an increasing risk of extremist groups committing violent attacks on the scale of crimes against humanity. For example, the attack on the U.S. Capitol building on January 6, 2021 was planned online among a network of people connected with several extremist groups, including the Proud Boys and the Oath Keepers.<sup>166</sup> This attack was systematically organized in advance,<sup>167</sup> and multiple commissions of murder<sup>168</sup> against the civilian population of federal government politicians<sup>169</sup> were plotted so as to achieve the involved extremist groups' anti-government and White supremacist aims, and specifically to prevent Congress from certifying the results of the 2020 Presidential election.<sup>170</sup> Had the insurrectionists succeeded in kidnapping and killing the Vice President and Members of Congress, as many had come prepared to do,<sup>171</sup> it might have constituted a crime against humanity. Whether a version of the U.S. Capitol attack that culminated in the murder of numerous government officials would have been considered a crime against humanity would most likely hinge on the nature of these extremist groups and their involvement: whether their predominantly online networks constitute "organizations," and whether their advocacy of violent warfare and of the specific plan to attack the Capitol constituted "policies."

Thus, White supremacists and other extremist groups represent an escalating risk that has not yet eventuated into crimes against humanity. Their

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166. Diaz & Treisman, *supra* note 155; Frenkel, *supra* note 161; Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021) [hereinafter *The Storming*], <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html> [https://perma.cc/6H28-B53C].

167. Posts on social media indicate advance planning for logistics and weaponry, as well as real-time coordination during the attack itself. Frenkel, *The Storming*, *supra* note 166; Russell Brandom, *These Are the Violent Threats that Made Amazon Drop Parler*, VERGE (Jan. 13, 2021, 10:17 AM), <https://www.theverge.com/2021/1/13/22228675/amazon-parler-takedown-violent-threats-moderation-content-free-speech> [https://perma.cc/8AM8-JL5W]. Concerning whether the attack would also have been considered widespread, geographically, it was narrowly targeted at the U.S. Capitol, and the number of potential victims would likely have been in the hundreds. Of course, for purposes of the elements of crimes against humanity, it must be either widespread or systematic, not both.

168. Advance posts on social media indicated the intent to kill multiple members of Congress. Brandom, *supra* note 167. Some insurrectionists came prepared with zip ties and weapons, and a noose was erected on the Capitol grounds. Jay Reeves, Lisa Mascaro & Calvin Woodward, *Capitol Assault a More Sinister Attack than First Appeared*, AP NEWS (Jan. 11, 2021), <https://apnews.com/article/14c73ee280c256ab4ec193ac0f49ad54> [https://perma.cc/A8VQ-PUEV].

169. The intended victims were the civilian population of Members of Congress and the Vice President. Reeves et al., *supra* note 168.

170. The involved extremist organizations generally advocate violence against political opponents and revolution or civil war. The particular policy here was to use force to prevent Congress from certifying the election results. Among other statements to that effect, in the 30 days leading up to January 6, the phrase "Storm the Capitol" was used more than 100,000 times in this context. Dan Berry, Mike McIntire & Matthew Rosenberg, *"Our President Wants Us Here": The Mob That Stormed the Capitol*, N.Y. TIMES, <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> (Nov. 10, 2021) [https://perma.cc/UDU2-LT55].

171. Reeves et al., *supra* note 168.

actions thus far represent preliminary steps to crimes against humanity, including increasing attacks on government buildings, shows of public force, threats, acts of violence, and hate speech against disfavored groups, including minorities and political opponents.<sup>172</sup> In contrast to the other situations, these actors are not part of the government; rather than representing a risk of abuse or deliberate misuse of state power, they pose the risk associated with a lack of state control over powerful non-state actors.

While they are not government actors, they are certainly influenced by government approval. As with several of the other situations, former President Trump made inflammatory statements that these groups and other observers have understood to constitute endorsement, including urging the Proud Boys to “stand back and stand by”<sup>173</sup> in 2020 and describing some of those engaged in the White supremacist protests in Charlottesville as “very fine people.”<sup>174</sup> His anti-immigrant statements noted above have also served as apparent support for these groups’ stances.<sup>175</sup>

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Overall, there is reason to be concerned that crimes against humanity are occurring and could occur within the United States. The incidents discussed above are widespread and extremely harmful; they represent the gamut of ways that crimes against humanity can manifest, including official government policies, possible willful blindness by government actors, and the policies of non-state organizations like militias. In addition to the incidents themselves, there are actions that often precede or accompany crimes against humanity, like planning, threats, hate speech, and public displays of power. Notably, all are in violation of domestic law or the U.S. Constitution or both—but nonetheless, thus far domestic law and the Constitution do not seem to have sufficed to prevent them from occurring.

### B. Risk Factors

This Section systematically examines risk factors for crimes against humanity within the United States, drawing on the examples discussed in Section III.A and on other characteristics of the U.S. socio-political context. The U.N. has developed a Framework of Analysis for Atrocity Crimes intended to enable observers to assess the risk of atrocities crimes occurring so as to take preventative measures.<sup>176</sup> The overarching structure of the UN Framework

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172. See JONES ET AL., *supra* note 150, at 5–7.

173. Dean Obeidallah, *Trump’s Proud Boys “Stand Back and Stand By” Debate Moment Was More than a Dog Whistle*, NBC (Sept. 30, 2020, 11:48 AM), <https://www.nbcnews.com/think/opinion/trump-s-proud-boys-stand-back-stand-debate-moment-was-ncna1241570> [https://perma.cc/X6LA-93MJ].

174. *Id.*

175. *Id.*

176. See UN Framework, *supra* note 6. The Framework is highly detailed, comprising fourteen major factors with multiple indicators for each factor. A comprehensive analysis of the United States using this Framework would occupy hundreds of pages and is accordingly outside the scope of this Article, which limits itself to highlighting relevant factors and indicators. There are also other analytic frameworks, but the UN Framework is the most directly relevant to the risk of crimes against humanity in the U.S. context. Kathryn

indicates the kinds of circumstances that are important. There are eight “common risk factors,” with accompanying specific indicators, that are relevant to all atrocity crimes: (1) situations of armed conflict or other forms of instability; (2) a record of serious violations of international human rights and humanitarian law; (3) weakness of State structures; (4) motives or incentives; (5) capacity to commit atrocity crimes; (6) absence of mitigating factors; (7) enabling circumstances or preparatory action; and (8) triggering factors.<sup>177</sup> There are also two factors that are specific to crimes against humanity because they relate directly to its *chapeau* elements: “signs of a widespread or systematic attack against any civilian population” and “signs of a plan or policy to attack any civilian population.”<sup>178</sup>

### 1. *Strengths*

Considering these factors and their indicators, the United States benefits from numerous structural and contextual strengths that tend to make it resistant to atrocity crimes. Concerning Risk Factor One regarding conflict and other instability, the United States has not recently suffered from armed conflict within its borders,<sup>179</sup> and it has benefited from relative political, economic, and social stability for many years, although this has arguably diminished recently.<sup>180</sup> Concerning Risk Factor Three regarding state structures, the United States has a well-established legal and political system with robust constitutional rights protected by an independent judiciary.<sup>181</sup> It has longstanding civilian control of its military, and the armed forces have a culture of respect for the constitution and the rule of law, particularly at the highest levels.<sup>182</sup> While imperfect, its government institutions are reasonably well-funded and typically function for their intended governance purposes.<sup>183</sup> Regarding Risk Factor Six, which identifies potential mitigating factors, the United States benefits from multiple mitigating factors on this list. It has a culture of vigorous political and civil society engagement.<sup>184</sup> Its news media is independent, diverse, and well-resourced, and Americans have access to all modes of developing and sharing

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Gillum, *Evaluation of Current Risk Assessment Models for Genocide and Mass Atrocity*, 8 INTERAGENCY J. 68, 70–71 (2017). The Conflict Assessment System Tool focuses on risk of conflict generally and of atrocity crimes within conflict, not specifically on crimes against humanity in peacetime. See, e.g., FUND FOR PEACE, CAST CONFLICT ASSESSMENT FRAMEWORK MANUAL 3–4 (2014). The State Failure Task Force model focuses specifically on the risks of genocide and “politicide,” i.e., the destruction of political opponents, and thus on different atrocity crimes that target particular groups for destruction. Barbara Harff, *Assessing Risks of Genocide and Politicide*, in PEACE AND CONFLICT 57, 57–58 (Monty G. Marshall & Ted Robert Gurr eds., 2005).

177. UN Framework, *supra* note 6, at 9 (formatting edited for readability).

178. *Id.*

179. *See id.* at 10.

180. Of course, there is economic, political or social inequality, but as compared to many states, the United States has been remarkably stable with a consistent political framework uninterrupted by coups or revolutions. *See id.*

181. *See id.* at 12.

182. *See id.* at 12.

183. *See id.*

184. *See id.* at 15.

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information, bolstered by constitutional protection for free speech.<sup>185</sup> Although its international relationships have become more strained recently, the United States has long engaged in numerous international and regional political and economic partnerships and has taken on membership and leadership roles in international and regional institutions.<sup>186</sup> What is most notable about these strengths is that they are all quite longstanding and are deeply embedded in U.S. institutions and society, to the extent that many are part of the Constitution and of the national identity.

## 2. *Red Flags*

But there are also numerous red flags highlighted by the U.N. factors. Under Risk Factor Two concerning serious violations of international human rights, both severe human rights abuses and atrocity crimes, past and present, are indicators of a risk of future atrocities.<sup>187</sup> Thus, regardless of whether they are characterized as crimes against humanity or as human rights abuses, police brutality against Black Americans, sexual assaults in immigration detention, and family separation under the Zero Tolerance Policy, are all negative factors. For the same reasons, the above-mentioned U.S. history of crimes against humanity, torture, and other human rights abuses against Native Americans, Black Americans, criminals, and terrorists, suggests that there is a risk of committing future atrocity crimes. Simply put, having committed such acts in the past suggests that a government may do so again.

Impunity for such atrocities and severe human rights violations is another indicator of risk under Risk Factor Two. Here, the absence of a comprehensive legal or reconciliation process concerning the legacy of atrocities against Native Americans and Black Americans (and, for that matter, other groups), as well as the current failure to effectively address police brutality and sexual assaults in immigration detention, are of concern as indicators of impunity for, tolerance of, and failure to act to prevent severe human rights abuses and atrocities.<sup>188</sup> The quick response of the courts to the family separation policy is a counterexample, and the swift prosecutions of many of the insurrectionists who invaded the Capitol building is another.<sup>189</sup> The failure to effectively address the sexual assault and police brutality issues is particularly notable because a robust constitutional and judicial system is one of the United States' strengths, as noted above.<sup>190</sup> Here, the prompt court order concerning family separation points to where the fault line may lie in judicial responses; it is much easier for the judiciary to address open violations of the Constitution than actions cloaked in laws and policies professing compliance with constitutional norms.

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185. *See id.*

186. *See id.*

187. *See id.* at 11.

188. *See id.* at 11–12.

189. *See supra* Subsections III.A.1, III.A.3.

190. *See supra* Subsection III.A.2.

The growth and public emergence of extremist groups, White supremacist organizations, and armed militias is another significant concern. “[G]rowing nationalistic, armed or radical opposition movements”<sup>191</sup> are an indicator of risk under Risk Factor One concerning conflict and instability. Similarly, under Risk Factor Four concerning motives or incentives for committing atrocity crimes, “[i]deologies based on the supremacy of a certain identity or on extremist versions of identity” provide such an incentive.<sup>192</sup> The known motives of U.S. extremist groups are also identified risks under Risk Factor Four. Political aims, such as consolidating power, economic interests, such as safeguarding the economic well-being of an identity group, and other interests, such as eliminating members of minority groups from an area, can all motivate atrocities.<sup>193</sup>

The capacity to commit atrocities identified by Risk Factor Five is also significant in the U.S. context, as both the government and extremist groups are well armed and capable of carrying out violent attacks. Concerning extremist groups, weapons and ammunition are readily available and easy to transport within the United States, and such groups regularly used guns, explosives, and other weapons in terrorist attacks in 2020.<sup>194</sup> The capacity of these extremist groups is magnified by the fact that they have garnered the support of large numbers of people; thousands turned out for the January 6 riot at the Capitol, and a QAnon supporter was elected to Congress.<sup>195</sup>

There have been multiple events that constitute the preparatory steps that Risk Factor Seven identifies as frequently taking place in advance of atrocities, including the creation and expansion of militias,<sup>196</sup> increasing public expression of White supremacist ideologies and anti-Semitism, and relatively small-scale violent attacks. In addition, government actions like securitization of the southern U.S. border and the Trump Administration’s deployment of federal troops and officers to counter protests constitute the “[s]trengthening of the security apparatus.”<sup>197</sup> It is also important to note that the fact that these developments have occurred in concert further heightens the risk of crimes against humanity: increasing securitization creates a risk of crimes against humanity being committed by security forces, yet the increase in strength and visibility of militias suggests a need for an increase in counteraction by government security and law enforcement officers. As such, there is a risk of these two developments acting synergistically on each other to exponentially increase risk in both dimensions.

Another category of warning signs relates to potential triggering events under Risk Factor Eight and markers of instability under Risk Factor One. The United States has recently experienced several of the political and social events

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191. See UN Framework, *supra* note 6, at 10.

192. See *id.* at 13.

193. See *id.*

194. See *id.* at 14.

195. See *id.*

196. See *id.* at 16.

197. See *id.*

that can trigger atrocities, without sufficient preventative action. Epidemics,<sup>198</sup> elections,<sup>199</sup> and mass protests<sup>200</sup> all fall into this category.

Finally, as discussed in Part IV below, the United States' longstanding disinterest in engaging with international human rights and international criminal law standards concerning its actions, its insistence on treating crimes against humanity and other atrocities as problems that occur only overseas, and its lack of an internal legal or institutional structure or early warning system aimed specifically at crimes against humanity, are all problematic. Each of these represents a missed opportunity to mitigate risk, as identified by Risk Factor Six, by engaging with international actors and protective frameworks that would not be subject to the same internal pressures as the domestic system.<sup>201</sup> The potential utility of a crimes against humanity legal framework is discussed below in Part IV.

### C. *Implications*

The UN Framework analysis identifies multiple relevant risk factors that intersect and interact in complex ways. Past and ongoing human rights abuses by the government constitute a risk factor that is exacerbated when those abuses are tolerated and met with impunity. Aggravating these two intertwined factors is the lack of a legal and institutional framework designed specifically to prevent and address crimes against humanity, which makes it more likely that any such abuses will persist and that they will not be effectively redressed. Extremist ideologies and movements are growing, and their danger is heightened by their easy access to weapons and by significant public support. The rise of extremism tends to prompt a trend toward securitization by the government, which in turn poses a risk of government malfeasance. Finally, preparatory steps like planning, hate speech, small-scale violence, and shows of force, as well as potentially triggering events like the COVID-19 pandemic, elections, and mass protests, all tend to interact synergistically to intensify the overall risk.

In addition, the representative examples discussed above indicate that the risk posed by government actors emanates not only from express policies and plans, but also from situations in which written laws and policies may cover for willful blindness. Here, the UN Framework highlights two salient dynamics: the expansive authority of government officers in security roles (relating to Risk Factor Seven concerning enabling circumstances)<sup>202</sup> operating in a context of insufficient oversight (relating to Risk Factor Three concerning weak state structures).<sup>203</sup> These two factors point to a key understanding that has long been recognized in the war crimes context: it is the granting of authority to use force, detain, and control civilians that enables crimes against humanity by government

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198. *See id.* at 10.

199. *See id.* at 17.

200. *See id.* at 10.

201. *See id.* at 15.

202. *See id.* at 16.

203. *See id.* at 12.

officials.<sup>204</sup> Accordingly, such authority should be granted cautiously and requires robust, effective mechanisms of oversight and prevention that can function as an equal counterweight to the authority granted. The existence of a significant risk of crimes against humanity suggests there is either an imbalance between authority and oversight, or government complicity, or both.

The UN Framework and representative examples also indicate areas of strength that can be leveraged against those risk factors. Of greatest importance for this Article, with its focus on legal interventions, the United States has a strong legal and judicial system that is relatively effective in responding to overt and express violations through responsive interventions. Thus, while DHS, DOJ, and HHS did not prevent family separation, the federal courts did immediately end the practice and require reunification.<sup>205</sup> While the government did not prevent the extremist assault on the U.S. Capitol, the U.S. Attorney for D.C. is investigating and bringing charges against the perpetrators.<sup>206</sup>

This highlights several issues that are important for mitigating the risk of crimes against humanity through legal mechanisms. First, any crimes against humanity-specific legal framework should be able to address several kinds of risks: risks emanating from governmental and non-governmental sources, and from both overt policies and willful blindness. In addition, it should address the risk of crimes against humanity proactively as well as reactively, so as to address preparatory steps before they escalate, so as to reduce both tolerance of and impunity for human rights abuses, and so as to balance authority with oversight. This indicates the need, not only for a legal framework as such, but also for the implementation of that framework as preventative processes within government institutions.

#### IV. LAW

While the risk of crimes against humanity occurring within the United States as assessed in Part III is significant, the United States has no federal law prohibiting, protecting against, or punishing crimes against humanity.<sup>207</sup> Indeed, the federal government does not even seem to have recognized that such a risk might exist. Instead, the considerable resources the United States has devoted to opposing crimes against humanity have consistently been directed internationally at events occurring overseas.

Of course, it is perfectly appropriate and indeed vitally important for the United States to be concerned with atrocities overseas. There are horrific war

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204. M. CHERIF BASSIUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 14, 17, 21–22 (2011).

205. See *supra* Subsection III.A.1.

206. See U.S. DEP'T OF JUST., *supra* note 156.

207. On the state and territorial level, there is only one such law, in Puerto Rico; as of 2019, there had been no prosecutions under that law. Julian Bava, *Prosecuting Extraterritorial Atrocity Crimes Under State Law: An Analysis of the Puerto Rico Model*, 44 VT. L. REV. 327, 329–30 (2019). California has a law addressing the statute of limitations for tort claims concerning crimes against humanity, but no law concerning crimes against humanity itself. CAL. CIV. PROC. CODE § 354.8 (West 2022).

crimes, genocides, and crimes against humanity occurring regularly in many countries that raise serious international criminal law, human rights, and immigration concerns.<sup>208</sup> This Article is not a critique of these international measures. Instead, this Article argues that—in addition to these outward-facing mechanisms—the United States should also concern itself with preventing mass atrocities within its borders as well as abroad.

It is also important to emphasize that, while the United States lacks a federal law on crimes against humanity, it does possess alternative legal mechanisms for preventing such acts. As noted in Part III, it is governed by a federal constitution with extensive protections for human rights. It has federal and state criminal laws that prohibit many of the underlying acts constituting one of the two components of crimes against humanity.<sup>209</sup> And it benefits from a vigorous judiciary that has frequently demonstrated itself to be capable of effectively constraining the President and federal administrative agencies when they overreach these existing domestic safeguards.

The first and most fundamental implication of recognizing there is a significant risk of crimes against humanity within the United States, however, is that its existing constitutional norms, criminal law, and judicial engagement are not succeeding in consistently preventing the underlying acts. If they were, there would not be a significant risk of those acts escalating to the point that they might constitute crimes against humanity.

As such, one important strategy for preventing crimes against humanity is to make existing domestic laws and institutional policies more effective against the underlying acts. Civil suits and criminal prosecutions based on existing law should be deployed to the maximum extent possible.<sup>210</sup> In addition, the risk of crimes against humanity lends further support to calls for reform in the contexts in which those risks are arising, including police use of force and immigration detention.<sup>211</sup> It also suggests that prompt, effective action is warranted to prevent violence by militias and White supremacist organizations, as well as to respond to and mitigate preliminary steps toward such violence, such as hate speech and threats. In so doing, it is important to balance the risk of crimes against humanity associated with increasing the power of security forces, as well as to avoid adopting strategies that could themselves constitute preliminary steps toward atrocities by the government. Thus, while reforming national law and policy to better protect against those underlying acts is not the focus of this Article and so

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208. See Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, in ARCS OF GLOBAL JUSTICE 341, 342 (Margaret M. deGuzman & Diane Marie Amann eds., 2018) [hereinafter *Repairing*].

209. See *supra* Part III.

210. See, e.g., MAGGIE JO BUCHANAN, PHILIP E. WOLGIN & CLAUDIA FLORES, THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY IS OVER: WHAT COMES NEXT?, CTR. FOR AM. PROGRESS 5 (2021).

211. Maisie A. Baldwin, Note, *Left to Languish: The Importance of Expanding the Due Process Rights of Immigration Detainees*, 102 MINN. L. REV. 1703, 1724 (2018); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 635 (2018).

will be discussed only briefly, such measures are a crucial response to the risks of crimes against humanity identified above.<sup>212</sup>

Relatedly, it is important to ensure that any new U.S. prohibition on crimes against humanity does not merely replicate the weaknesses of existing domestic law that have been allowing harmful acts to occur. As discussed in Part II and explored further below, because there are some significant differences between the international crime of crimes against humanity and existing domestic law, there could be comparative advantages to a federal crimes against humanity law. In addition, naming family separation, violent extremism, police brutality, sexual assaults against detained immigrants, and other such actions, as crimes against humanity appropriately expresses the strongest possible condemnation of those acts and of the related government and organizational policies.<sup>213</sup>

This Part considers whether and how a federal law on crimes against humanity might mitigate the risk of crimes against humanity within the United States. Experts and advocates consistently argue for domestic implementation of the international prohibitions on crimes against humanity, genocide, and war crimes as the primary mode of preventing and punishing such acts.<sup>214</sup> In addition, while the United States lacks a federal law on crimes against humanity, it does have laws prohibiting genocide and war crimes, so passing a federal crimes against humanity law is not unimaginable.

On the one hand, criminalizing crimes against humanity under U.S. law would provide specificity, certainty, and legal enforceability far beyond what is available under customary international law. A federal law implementing the international standards discussed in Part II would be a robust framework for comprehensive preventative measures. But to the extent that a federal crimes against humanity law departs from international law, it would be less useful; it would even risk legitimizing behaviors that would comprise crimes against humanity under the international standard but not the domestic one. Furthermore—and here is the Catch-22 inherent in passing federal legislation—the U.S. history of human rights legislation and treaty ratification indicates persuasively that diverging from the international standard in ways that would lend an aura of legitimacy to questionable government practices is exactly what advocates would need to do in order to succeed in passing such a law.<sup>215</sup>

Section IV.A describes the role that a federal crimes against humanity law could ideally play. Section IV.B assesses the reasons for the current legal gap,

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212. See William A. Schabas, *Prevention of Crimes Against Humanity*, 16 J. INT'L CRIM. JUST. 705, 706 (2018).

213. See *supra* Part II; *infra* Section IV.A. As illustrated by the representative situations described above, crimes against humanity can arise in many different contexts, touching on criminal law, immigration law, constitutional law, and many other legal fields. The comparative effectiveness of a new prohibition on crimes against humanity in all of the various arenas in which such crimes might be committed depends on exactly how and why existing legal and bureaucratic safeguards are insufficient to prevent abuses in each relevant situation. Accordingly, it is beyond the scope of this Article to individually evaluate each of the many relevant fields of domestic law in all of these many potential situations; instead, this Article addresses this issue in general terms.

214. See, e.g., Murphy *supra* note 24, at 39.

215. See JOSEPH HELLER, CATCH-22 (1961) (coining the phrase “Catch-22”); see also discussion *infra* Subsection IV.B.2.

focusing in particular on the international orientation of crimes against humanity initiatives and the influence of American exceptionalism. Section IV.C assesses a 2009 attempt at passing federal crimes against humanity legislation and what that legislative process indicates about the likely limits on the scope and effectiveness of a potential federal law.

A. *Role of a Federal Law*

Ideally, a federal crimes against humanity law could provide a comprehensive legal framework for enforcing the international *jus cogens* prohibition on crimes against humanity.<sup>216</sup> Without a federal law, there are only very limited possibilities for enforcement under customary international law within the United States; non-citizens, for example, can bring civil lawsuits under the Alien Tort Statute.<sup>217</sup> Under a federal law, such enforcement could take multiple forms, including preventative measures, deterrence, expressive condemnation, identifying the set of prohibited acts, engagement with international institutions and processes, and, of course, prosecutions.<sup>218</sup>

In so doing, a federal law on crimes against humanity would be intended to complement, not to supplant, existing laws and constitutional provisions that already prohibit the underlying acts of crimes against humanity, such as murder and torture. As noted above in Part II, these underlying acts are often already proscribed under ordinary criminal law or forbidden by constitutional protections, so the particular role of the international crime of crimes against humanity is not typically to criminalize them. Rather, enacting crimes against humanity law serves other functions: to express condemnation of such acts when committed against a group of civilians at the behest of the government or an organization, to allow for special legal rules that make it easier to prosecute those such as government officials who might otherwise be shielded from responsibility, and to enable the enactment of systemic safeguards to protect against the power the state holds over those under its authority.

Addressing first the issue of prevention<sup>219</sup> that is the focus of this Article, a federal law would provide a basis for comprehensive preventative measures throughout the federal bureaucracy, and particularly in those agencies which have the authority to detain and use force against civilians and which thus present

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216. Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 *LAW & SOC'Y REV.* 533, 542 (2017); Mark Berlin, *Implementing International Law: The Criminalization of Atrocities in Domestic Legal Systems Since World War II* 9 (2015) (Ph.D. dissertation, University of California Irvine); William Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 *MICH. J. INT'L L.* 1, 2 (2002) [hereinafter *Community*].

217. U.S. courts enforce the customary international law prohibition on crimes against humanity in the context of Alien Tort Statute civil lawsuits, because the statute expressly invokes international law as a standard. 28 U.S.C. § 1350. *See* Complaint at 6, *D.J.C.V. v. United States*, 1:20-cv-5747 (S.D.N.Y.) (filed July 23, 2020).

218. Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 *MINN. J. INT'L L.* 179, 188–92 (2018); Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 *CHI.-KENT L. REV.* 329, 330 (2008); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT'L L.* 7, 7 (2001).

219. Ford, *supra* note 218, at 242.

an inherent risk of committing crimes against humanity. As discussed in Part III, preventing crimes against humanity by federal officials requires tempering officials' authority with countervailing oversight. In Part V, I discuss how the military has implemented the federal law prohibiting war crimes with comprehensive precautionary measures and how this might serve as a model for implementation of a similar prohibition on crimes against humanity. For now, it is sufficient to note that norm infiltration throughout the federal bureaucracy would enable systemic, pragmatic preventative measures that could build on existing review and oversight processes.<sup>220</sup>

Concerning non-state actors, a federal law could be the basis for prevention in other forms, such as monitoring, early warning systems, and other forms of federal response, before planning and preparation by such groups escalates to the point of action. As discussed below, Congress recently passed a federal law requiring such measures for groups overseas,<sup>221</sup> so it would be feasible to implement these precautions domestically as well. A federal definition of crimes against humanity would provide a robust and specific basis for preventative measures in all forms.

A crimes against humanity law would also serve an expressive function.<sup>222</sup> First and foremost, it denounces the concerned acts and any involvement of a government or organization in an attack on civilians in the strongest possible terms. The definitions and social significance of ordinary crimes fail to “fully capture the international dimension, the special gravity and the degree of condemnation” that an international crime like crimes against humanity conveys.<sup>223</sup> With its reference to actions undertaken under the auspices of a state policy, it signals the state's intention to hold itself and its own officials to account. It likewise provides an opportunity to censure non-state actors who have advocated crimes against humanity and to indicate the government's determination to stand against such organizations.<sup>224</sup> Thus, from an expressive perspective, prohibition and prosecution of harmful acts as crimes against humanity has a social and political meaning that is different and greater than prohibition and prosecution of the same acts as individual crimes.<sup>225</sup>

A domestic atrocity law could also serve a deterrence function.<sup>226</sup> Any preventative measures that are introduced will of course not be entirely effective in preventing all underlying acts or problematic policies. The possibility of being

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220. See generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

221. See *infra* notes 244–46 and accompanying text.

222. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 312–18 (2012); see Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996).

223. Talita de Souza Dias, *Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law*, 18 INT'L CRIM. L. REV. 788, 789 (2018).

224. Berlin & Dancy, *supra* note 216, at 14.

225. See Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L. J. 1628, 1670–71 (2015); deGuzman, *supra* note 222, at 312–14; Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 117–24 (2002).

226. Burke-White, *Community*, *supra* note 216, at 79–80; Berlin & Dancy, *supra* note 216, at 542; MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173 (2007).

prosecuted for crimes against humanity provides an additional safeguard by deterring at least some actors, both within the government and outside it.

Relatedly, of course, a federal crimes against humanity law would also provide a basis for prosecutions. The capacity to engage in domestic prosecutions is a primary justification for such laws.<sup>227</sup> In this prosecutorial context, a crimes against humanity law would serve several purposes, above and beyond what would already be offered by other domestic law.

In keeping with the expressive function described above, the primary prosecutorial role of a crimes against humanity law and other atrocity laws is to charge the defendants with acts that are commensurate with the gravity of their crimes, recognizing their acts as particularly horrific, and attaching the stigma of an atrocity crime to their behavior.<sup>228</sup> In so doing, it corresponds to the principle of fair labelling in both domestic and international criminal law, which indicates that “the label of the offence should fairly express and signal the wrongdoing of the accused, so that the stigma of conviction corresponds to the wrongfulness of the act.”<sup>229</sup> For example, members of a militia that planned and carried out an attack on a state capitol and killed a substantial number of people could be charged with ordinary murder, but charges of crimes against humanity would capture the severity of the entire attack, the extent of the atrocity, and the fact that it is not only a crime but a human rights violation. Charging militia members with crimes against humanity sends a different message even than other severe crimes like terrorism or insurrection, highlighting the human cost and the perpetrators’ abandonment of all standards of decency, not only the political motive. Thus, crimes against humanity invoke universal human values and sparks moral outrage, in addition to signaling the extreme severity of the defendants’ crimes.<sup>230</sup>

Of course, carrying out prosecutions also enhances the deterrent effect of a domestic crimes against humanity law, by demonstrating the state’s willingness to carry out such prosecutions.<sup>231</sup> This may be particularly influential if it is current or former state officials who are prosecuted, as such prosecutions indicate that no one is above the law.<sup>232</sup>

Crimes against humanity prosecutions also serve as a final safeguard against impunity, when other crimes cannot be charged. Official immunity may preclude criminal charges or civil lawsuits against government officials, but atrocity law typically does not recognize such immunities.<sup>233</sup> Statutes of limitations may run for some domestic crimes, but there are generally no statutes

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227. See Berlin & Dancy, *supra* note 216, at 539; Amann, *supra* note 225, at 116; William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 59 (2008).

228. DRUMBL, *supra* note 226, at 173–76.

229. Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT’L L. 925, 927 (2008); see also Dias, *supra* note 223, at 794.

230. Berlin & Dancy, *supra* note 216, at 542.

231. *Id.*; Burke-White, *Community*, *supra* note 216, at 79.

232. See Berlin & Dancy, *supra* note 216, at 542.

233. *Id.* at 546; Akande & Shah, *supra* note 23, at 839–40.

of limitations for crimes against humanity.<sup>234</sup> Supreme Court precedent has limited the availability of many existing statutory and federal common law remedies for civil rights violations;<sup>235</sup> a new statute concerning crimes against humanity would offer a new avenue for relief.

In addition, a crimes against humanity law would be a relatively durable legal protection. As discussed further below in Part V, a federal law is of course far more difficult to change than executive orders or discretionary agency actions undertaken for preventative purposes. As such, a law is more likely to constrain future Presidential administrations than actions based purely in the executive branch.

A crimes against humanity law adopting international standards would also expand the existing federal legal framework to encompass additional harmful acts. Some underlying acts for crimes against humanity do not have analogues in domestic law; for example, U.S. law does not prohibit enforced disappearances.<sup>236</sup> Thus, while most of the underlying acts are already forbidden, in some instances, a crimes against humanity law could criminalize acts not otherwise prohibited.

Finally, another justification for ratifying atrocity law treaties like the Genocide Convention and the Geneva Convention and adopting implementing legislation is to enable states to participate in international institutions and processes.<sup>237</sup> A federal law would enable prosecutions of foreign perpetrators in the United States, as advocated by proponents, as well as a stronger basis for engagement in international interventions to prevent atrocities overseas.<sup>238</sup> The UN Framework suggests that engaging in such international frameworks provides some domestic protection against escalation into crimes against humanity. This would be particularly relevant if a crimes against humanity convention and associated treaty body or other monitoring mechanism is developed. But as discussed below in Section IV.B, the United States has traditionally been reluctant to participate in international human rights frameworks.

Of course, a federal crimes against humanity law adopting international norms would not be a panacea for the risks of crimes against humanity identified in Part III. But it would provide a legal basis for prevention, deterrence, prosecution, and other measures aimed at mitigating that risk. Section IV.B explores why the United States nonetheless has not adopted a federal crimes against humanity legal framework.

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234. Naomi Roht-Arriaza, *After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 341, 353 (2015); Berlin & Dancy, *supra* note 216, at 547.

235. BUCHANAN ET AL., *supra* note 210, at 6–7.

236. See discussion *infra* Section IV.C.

237. Koh, *supra* note 220, at 205.

238. See discussion *infra* Sections IV.B, IV.C.

*B. Dynamics*

The United States has recognized the international *jus cogens* norm prohibiting crimes against humanity in several ways. U.S. federal courts have regularly acknowledged and enforced the prohibition on crimes against humanity under customary international law in the context of Alien Tort Statute cases.<sup>239</sup> The United States has also made a political commitment to prevent crimes against humanity and other atrocity crimes by voting for the U.N. General Assembly's unanimously approved "Responsibility to Protect" resolution in 2005, agreeing that: "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it."<sup>240</sup>

But unlike genocide and war crimes, the United States has not ratified an international treaty setting forth the crimes against humanity prohibition. It has refused to join the ICC, whose Rome Statute is the only existing international legal agreement encompassing crimes against humanity.<sup>241</sup> As of this writing, the International Law Commission's Draft Articles for the Prevention and Prosecution of Crimes Against Humanity have not yet been acted upon by the U.N. Sixth Committee, so the opportunity to consider ratifying a potential convention on crimes against humanity has not yet arisen. The U.S. comments on the Draft Articles, discussed below, indicate that it is unlikely to ratify such a Convention.<sup>242</sup> In both contexts, its predominant objection has been to provisions that might limit its exercise of sovereignty and to international or foreign jurisdiction over its citizens.<sup>243</sup>

Nor, as noted above, has the United States adopted a federal law concerning crimes against humanity. There are two key dynamics that explain why this gap exists: the exclusively international focus of all federal attention to crimes against

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239. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in the judgment); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003); *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995); *Quinn v. Robinson*, 783 F.2d 776, 799–800 (9th Cir. 1986); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1352 (N.D. Ga. 2002).

240. G.A. Res. 60/1, 2005 World Summit Outcome ¶ 138 (Sept. 16, 2005).

241. See generally Rome Statute, *supra* note 19.

242. U.S. Comments, *supra* note 38, at 1. In subsequent discussion in the U.N. Sixth Committee, the United States expressed its support for the development of a Convention, while also reaffirming that the Draft Articles "can and should be modified in key respects." United States Mission to the United Nations, Statement at the 76<sup>th</sup> General Assembly Sixth Committee (Oct. 13, 2021), [https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/08mtg\\_us.pdf](https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/08mtg_us.pdf) [<https://perma.cc/F69P-N7U3>].

243. The United States was an active participant in negotiating the Rome Statute, and its recorded concerns largely concerned jurisdictional issues. See LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (ICC) 3 (2006); see John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 373 (1999). Similarly, the U.S. concerns with the Draft Articles relate primarily to other aspects, such as the jurisdictional provisions, rather than to the definitions. But the U.S. submission also asserts that silence does not necessarily constitute agreement. U.S. Comments, *supra* note 38, at 4.

humanity, and opposition to ratifying similar treaties and passing implementing legislation.

### 1. *International Orientation*

Between the 93rd Congress and the 116th Congress, the phrase “crimes against humanity” was mentioned in legislation and committee reports more than 1,000 times. But none of these instances concerned risks or incidents within the United States.<sup>244</sup> Instead, many of these were recognitions of the victims of past atrocities,<sup>245</sup> while others concerned legislation to address events occurring overseas.<sup>246</sup>

The United States has also devoted considerable financial resources toward supporting international criminal prosecutions in other countries. It was the largest donor to the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia; it has also made substantial financial contributions to the Special Court for Sierra Leone and the Extraordinary African Chambers, among others.<sup>247</sup>

In addition, the United States has committed significant executive branch resources to crimes against humanity and other atrocity crimes; all are aimed entirely at preventing and responding effectively to mass atrocities in other countries. Zachary Kaufman has comprehensively analyzed the key aspects of the multifaceted executive branch strategy for international atrocity prevention, so I will merely highlight a few characteristic examples here.<sup>248</sup>

In 2011, President Obama issued a Presidential Directive declaring atrocity prevention to be “a core national security interest and core moral responsibility” and establishing an interagency Atrocities Prevention Board (“APB”), among other measures.<sup>249</sup> Both the Directive and the reported work of the APB focus entirely on preventing and punishing atrocities overseas; they do not appear to contemplate any risk of atrocities occurring within the United States, and all domestic implementation has been aimed entirely at interdicting foreign perpetrators.<sup>250</sup>

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244. A Congress.gov search for “crimes against humanity” in June 2020 yielded 1,023 results, including legislation and committee reports. CONGRESS.GOV, <https://www.congress.gov/search?searchResultViewType=expanded&q=%7B%22congress%22%3A%22all%22%2C%22source%22%3A%5B%22legislation%22%2C%22comreports%22%5D%2C%22search%22%3A%22%5C%22crimes+against+humanity%5C%22%22%7D> (last visited June 1, 2022) [<https://perma.cc/28ME-2VAB>] (search “crimes against humanity”).

245. *E.g.*, S. Res. 150, 116th Cong. (2019) (enacted) (discussing the Armenian genocide); S. Res. 481, 116th Cong. (2020) (enacted) (discussing the crimes against humanity committed at Auschwitz).

246. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1232, 132 Stat. 1636, 2035 (2018); Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L. No. 115-330, 132 Stat. 4390 (2018); FIRST Freedom Act, H.R. 3194, 114th Cong. (2015).

247. Clint Williamson, *The Role of the United States in International Criminal Justice*, 25 PA. ST. INT’L L. REV. 819, 823 (2007).

248. *See* Zachary D. Kaufman, *Legislating Atrocity Prevention*, 57 HARV. J. ON LEGIS. 163, 170–80 (2020).

249. Presidential Study Directive on Mass Atrocities, 2 Pub. Papers 926–927 (Aug. 4, 2011) [hereinafter Presidential Study Directive 10].

250. *Id.*; Van Schaack, *Repairing*, *supra* note 208, at 346–50; Press Release, White House Off. of the Press Sec’y, Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities (Apr. 23,

In addition, in 2019, Congress passed the Elie Wiesel Genocide and Atrocities Prevention Act (“Elie Wiesel Act”), which strengthens U.S. government capabilities to act against crimes against humanity, war crimes, and genocide and requires various executive branch actions including regular reports to Congress.<sup>251</sup> Many of its mandates are explicitly directed internationally; others do not make a specific statement about their focus, but the international orientation of the law is evident in context.<sup>252</sup> According to the 2020 report to Congress under the Elie Wiesel Act, all relevant executive action was externally oriented at atrocity prevention and accountability in other countries.<sup>253</sup> Implementation within the United States was aimed entirely at “closing the impunity gap,” meaning prosecuting and deporting foreign perpetrators of crimes against humanity, war crimes, or genocide, to prevent them from finding “safe haven” within the United States.<sup>254</sup>

Further emphasizing this international orientation, two agencies that should be directly concerned with preventing atrocities within the United States by virtue of their missions and authority are DHS and DOJ. But neither agency seems to have any programs directed at this aim. Both DHS’s 2013 report on its APB-related atrocity prevention activities and its 2020 Report pursuant to the Elie Wiesel Act described its only domestic activities as immigration enforcement against foreign human rights violators and war criminals.<sup>255</sup> DOJ’s 2014 annual performance report and contributions to the 2020 Elie Wiesel report both characterized its activities as being aimed entirely at events that occurred abroad.<sup>256</sup> The 2013 DOJ report specifically observes as a factor enhancing the difficulty of the DOJ’s work that “[m]ass atrocities occur overseas in chaotic settings,”<sup>257</sup> foreclosing any contemplation of the possibility of atrocities occurring within the United States.

Of course, DHS and DOJ are also closely associated with the risks of crimes against humanity discussed in Part II by dint of their extensive authority to detain and use force against civilians. But since there is no federal law prohibiting crimes against humanity, it should come as no surprise that there is also no domestic implementation aimed at oversight or accountability for DOJ or DHS

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2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro> [<https://perma.cc/RQ5R-LVJH>]. See generally JOHN NORRIS & ANNIE MALKNECHT, *CTR. FOR AM. PROGRESS, ATROCITIES PREVENTION BOARD: BACKGROUND, PERFORMANCE, AND OPTIONS* (June 13, 2013).

251. Elie Wiesel Genocide and Atrocities Prevention Act, Pub. L. No. 115-441, 132 Stat. 5586 (2019); Kaufman, *supra* note 248, at 180–206.

252. See generally Elie Wiesel Genocide and Atrocities Prevention Act.

253. U.S. DEP’T. OF STATE, BUREAU OF CONFLICT AND STABILIZATION OPERATIONS, 2020 REPORT TO CONGRESS PURSUANT TO SECTION 5 OF THE ELIE WIESEL GENOCIDE AND ATROCITIES PREVENTION ACT OF 2018 (P.L. 115-441) (2020) [hereinafter EWGAPA REPORT].

254. *Human Rights Violators & War Crimes Center*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/partnerships-centers/hrwcc> (May 6, 2021) [<https://perma.cc/8J5V-8NBZ>].

255. DEP’T OF HOMELAND SEC., 212-01, ATROCITIES AND HUM. RIGHTS 3–5 (2013); EWGAPA REPORT, *supra* note 253.

256. DEP’T OF JUST., FY 2014 ANNUAL PERFORMANCE REPORT & FY 2016 ANNUAL PERFORMANCE PLAN II-62 (2015) [hereinafter DOJ 2014 REPORT]. See generally EWGAPA REPORT, *supra* note 253.

257. DOJ 2014 REPORT, *supra* note 256, at II-62.

officers. For example, there is no reference to crimes against humanity in ICE's publicly available employee codes of conduct or detention center standards.<sup>258</sup> But there are of course laws and policies prohibiting many of the underlying acts constituting crimes against humanity.

Thus, the U.S. approach to preventing and punishing crimes against humanity has been directed entirely at atrocities committed overseas. There is no federal law prohibiting crimes against humanity, and there are no internal prevention or prosecution mechanisms aimed specifically at crimes against humanity within the federal government. This American exceptionalism<sup>259</sup> is amplified in its approach to other atrocity laws, as discussed in the next section.

## 2. *American Exceptionalism*

The United States does have federal laws criminalizing other international atrocity crimes. It has ratified the Genocide Convention and the Geneva Conventions and has adopted federal laws prohibiting genocide and war crimes.<sup>260</sup> It has also taken federal action against other related international crimes; for example, it has ratified the Torture Convention and passed the U.S. Torture Act and other federal legislation relating to torture.<sup>261</sup>

But these ratifications and the implementing legislation have been hard won in Congress. The United States has consistently been very slow to ratify human rights treaties and atrocity law treaties.<sup>262</sup> There has been strong opposition to such ratifications in the Senate, based primarily on the perceived threat to U.S. nationals, who might then be prosecuted overseas, and to the structure of existing U.S. law, particularly to constitutional protections and federalism. The result has been lengthy battles over ratification and the failure to ratify some nearly universally accepted treaties, such as the Convention on the

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258. 2019 *National Detention Standards for Non-Dedicated Facilities*, U.S. IMMIGR. & CUSTOMS ENF'T (Feb. 18, 2022), <https://www.ice.gov/detention-standards/2019> [<https://perma.cc/6T95-4TYQ>]; *Employee Code of Conduct*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 7, 2012), [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/employee-code-of-conduct.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/employee-code-of-conduct.pdf) [<https://perma.cc/G3J3-CG3S>].

259. There is an extensive literature on American exceptionalism in the human rights and atrocity law contexts. MICHAEL IGNATIEFF, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005); Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1481 n.4 (2003) [hereinafter *Exceptionalism*]. See generally Leila Nadya Sadat, *The Nuremberg Paradox*, 58 *AM. J. COMPAR. L.* 151 (2010).

260. Genocide Convention, *supra* note 9; Genocide Convention Implementation Act of 1987 (the Proxmire Act), 18 U.S.C. § 1091; Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277; Geneva Conventions, *supra* note 9; War Crimes Act of 1996, 18 U.S.C. § 2441; *Treaties, States Parties, and Commentaries: United States of America*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=US](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US) (last visited May 29, 2022) [<https://perma.cc/2EL4-7QW5>].

261. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; U.S. Torture Act, 18 U.S.C. § 2340A; Torture Victim Protection Act, 28 U.S.C. § 1350; *Status of Ratification*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS. [hereinafter *Status of Ratification*], <https://indicators.ohchr.org/> (last visited June 1, 2022) [<https://perma.cc/7KX7-DG9R>].

262. See e.g., Genocide Convention, *supra* note 9; Geneva Conventions, *supra* note 9; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

Elimination of Discrimination against Women and the Convention on the Rights of the Child.<sup>263</sup>

Furthermore, when the United States has ratified a human rights treaty, it has done so with reservations, understandings, and declarations (“RUDs”) and implementing legislation that sharply narrow the key definitions and limit its obligations under the treaty.<sup>264</sup> In this particular pattern of American exceptionalism, the United States “actually exempts itself from certain international law rules and agreements, even ones it may have played a critical role in framing.”<sup>265</sup> This pattern, provides some insight into the international focus of anti-atrocity efforts described above, as well as the course of the 2009 legislation discussed below.<sup>266</sup>

The process of ratifying and implementing the Genocide Convention is an informative example, as the prohibition on genocide is closely related to the prohibition on crimes against humanity. It took the United States forty years to ratify the Genocide Convention, which was signed by President Truman in 1948 and ratified by the Senate under President Reagan in 1988.<sup>267</sup> The concerns expressed in the Senate during the many years of nonratification would also be relevant to any proposed crimes against humanity legislation: that ratifying the Genocide Convention might interfere with constitutional rights or federalism,<sup>268</sup> that the United States would be disadvantaged internationally because it would take its legal obligations under the treaty more seriously than would other states,<sup>269</sup> and that the United States might be obligated to extradite its nationals for prosecution in foreign courts.<sup>270</sup> Debate also raised the familiar argument that genocide is a problem of other states:

It was frequently stated in the Senate that ratification by the United States of the Genocide Convention would constitute a goodwill gesture designed to show support for an international cause because United States citizens are protected by the U.S. Constitution and, in any event, the crime of genocide would be unthinkable in the United States.<sup>271</sup>

The implementing legislation narrowed the definition of genocide in several ways that do not directly address the above-expressed concerns, including by heightening the intent requirement, the proportion of the victim group that must be threatened with destruction, and the type of mental harm that

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263. Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 392, 394 (Michael Byers & Georg Nolte eds., 2003).

264. Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 98 (2011); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 571 (1991).

265. Koh, *Exceptionalism*, *supra* note 259, at 1482.

266. See discussion *supra* Subsection IV.B.1; *infra* Section IV.C.

267. Venetis, *supra* note 264, at 120.

268. Riesenfeld & Abbott, *supra* note 264, at 622.

269. *Id.*

270. Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 462–63 (1999).

271. Riesenfeld & Abbott, *supra* note 264, at 622–23.

must be inflicted to be considered a genocidal act.<sup>272</sup> In ratifying, the Senate attached RUDs intended to limit the U.S. obligations to those defined in the implementing legislation, rather than the broader treaty terms.<sup>273</sup> Thus, the U.S. federal genocide law departs in significant ways from the international treaty and from the associated *jus cogens* norm; all of these divergences served to increase the domestic requirements for genocide and thereby limit U.S. obligations.<sup>274</sup>

The implementing legislation for the Geneva Conventions and the Torture Convention similarly operate to limit U.S. obligations. The War Crimes Act, as amended, only prohibits certain grave breaches of the Geneva Conventions.<sup>275</sup> The United States ratified the Torture Convention with extensive RUDs, limiting the scope of the definition of torture and of its obligations under the treaty.<sup>276</sup> In particular, as it would do with the 2009 CAH legislation, in implementing the Torture Convention, Congress relied as much as possible on restating existing federal laws, rather than introducing new provisions criminalizing torture as such, thus restricting its obligations under the Convention to those already existing under federal law insofar as possible.<sup>277</sup> Among other changes to the international provisions, as discussed in Part III above, the U.S. definition of torture in its implementing law significantly limits its recognition of mental harm.<sup>278</sup> The following observation by Stefan Riesenfeld and Frederick Abbott about the Torture Convention ratification is also pertinent to the Senate's approach to the Genocide Convention and to the crimes against humanity legislation discussed below:

The U.S. understandings to the Torture Convention reflect a caution which is difficult to reconcile with America's self-perception as a leading proponent of human rights. We will not dissect each of the interpretative constraints, but merely note that most are designed to raise the threshold of malicious behavior necessary to constitute a violation of the terms of the treaty.<sup>279</sup>

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272. Venetis, *supra* note 264, at 121–23; Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 723–26 (2009).

273. Venetis, *supra* note 264, at 120; Riesenfeld & Abbott, *supra* note 264, at 623–26.

274. Also, the United States has authorized prosecution of genocide only based on U.S. nationality or territory. Steven, *supra* note 270, at 462. And it does not appear that anyone has been prosecuted under the Genocide Convention Implementation Act. Rather, immigrants suspected of committing genocide have been accused of immigration violations and deported. *See, e.g.*, Press Release, U.S. Dep't of Justice, Kansas Man Charged with Immigration Crimes in Connection with 1994 Genocide in Rwanda (Apr. 23, 2009), <https://www.justice.gov/opa/pr/kansas-man-charged-immigration-crimes-connection-1994-genocide-rwanda> [https://perma.cc/8V3P-RW6Z]; Press Release, U.S. Dep't of Justice, Former Nazi Death Camp Guard John Demjanjuk Deported to Germany (May 12, 2009), <https://www.justice.gov/opa/pr/former-nazi-death-camp-guard-john-demjanjuk-deported-germany> [https://perma.cc/8JCE-M9E4].

275. MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL 33662, THE WAR CRIMES ACT: CURRENT ISSUES 1 (2009).

276. *Status of Ratification*, *supra* note 261; Venetis, *supra* note 264, at 123 (“[The RUDs] nullify the treaty's obligations and language.”).

277. *See* Venetis, *supra* note 264, at 126–27.

278. *Id.* at 127–28; Van Schaack, *Torture*, *supra* note 74.

279. *See* Riesenfeld & Abbott, *supra* note 264, at 631.

States often ratify human rights treaties with no intention of complying with them, and so on the one hand, this U.S. practice reflects a serious approach to the legal implications of ratification and implementation.<sup>280</sup> Whereas other states may make the calculation that ratifying such a treaty is a cost-free endeavor because their obligations under the treaty are unlikely ever to be enforced, the United States may reasonably foresee enforcement in its own, highly active, judicial system; it also regularly raises concerns about the risk of unfounded, politically motivated enforcement in foreign and international courts. By limiting its obligations under a treaty to only those rules it has already enacted in federal law, it ensures it can comply.<sup>281</sup>

But this reluctance also signals an unwillingness to engage with the aspirational and protective aspects of human rights treaties. Such treaties unapologetically set standards that can be difficult to meet and invite states to ratify in a spirit of progressive movement toward compliance. These treaties and their implementing legislation also represent an opportunity for the government to place safeguards against itself, so as to constrain future Presidential administrations and government actors from committing atrocities.

Overall, in U.S. ratification of human rights and atrocity treaties and its consideration of implementing legislation, there is consistently strong opposition from legislators who see these conventions and laws as a threat to U.S. sovereignty, federalism, and constitutional norms.<sup>282</sup> The ratification and implementation processes are directed, not at fully adopting and fulfilling the treaty terms so as to maximize their protections, but rather at narrowing the established legal standards and minimizing U.S. obligations. Accordingly, the international focus of initiatives concerning crimes against humanity is entirely consistent with U.S. exceptionalism concerning other atrocity and human rights treaties, and with the structure and fate of the proposed 2009 legislation on crimes against humanity, discussed in the next section.

### C. 2009 Legislation

The absence of a federal law on crimes against humanity is a well-known and long criticized deficiency in federal atrocity law. David Scheffer and Beth van Schaack, among other scholars, have observed the absence of a prohibition

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280. Berlin, *supra* note 216, at 3; Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 400 (2007).

281. Daniel W. Hill, Jr., *Avoiding Obligation: Reservations to Human Rights Treaties*, 60 J. CONFLICT RESOL. 1129, 1130 (2016). The pattern of U.S. reservations can also be understood as a preference for specificity in enforceable legal provisions; for a state that anticipates facing accusers in court or prosecuting individuals, specific standards are more certain and enforceable and are less subject to judicial interpretation. But the specifics introduced by U.S. RUDs consistently narrow the treaty terms; the RUDs never introduce specifics that expressly adopt, clarify, or broaden existing interpretations.

282. See sources cited *supra* notes 262–66 and accompanying text.

on crimes against humanity within the domestic legal framework and have advocated for such a law before Congress and within the executive branch.<sup>283</sup>

The closest Congress has come to enacting a crimes against humanity law was in 2009, when an effort by the Obama Administration in coordination with Senator Durbin's office culminated in proposed legislation that would have established crimes against humanity as a federal crime.<sup>284</sup> The Crimes Against Humanity Act of 2009 ("2009 CAH legislation") was introduced on June 24, 2009. If passed, the original bill would have criminalized: "commit[ing] or engag[ing] in" specified federal crimes, including murder, kidnapping, torture, and others, "as part of a widespread and systematic attack directed against any civilian population, and with knowledge of the attack."<sup>285</sup> The jurisdictional provisions authorized jurisdiction based on the perpetrator's nationality, residence, or presence in the United States, or on the commission of the offence in whole or in part within the United States.<sup>286</sup> The legislation was referred to the Judiciary Committee and reported out of committee in an amended version, but did not proceed beyond that point.<sup>287</sup>

In light of the difficult struggle to ratify the treaties and pass the implementing legislation discussed above, Senator Durbin's office must have been well aware that a crimes against humanity bill would meet significant opposition. The text of the legislation seems to have been crafted to optimize its chances of passing. The way the bill was characterized by its supporters was also carefully chosen to provide lawmakers with reasons to support the bill and to defuse any perception that it posed a threat to U.S. interests. The sections below review the history of this legislation, including the advocacy strategy.

### 1. *International Orientation*

While the 2009 CAH legislation would by its terms have applied to crimes against humanity committed within the United States, the context in which that legislation was developed and the arguments made in its favor all affirm the predominantly external orientation of U.S. law and policy on atrocities. Supporters' characterization of the purposes of this bill exclusively focused on preventing foreign war criminals who had committed crimes against humanity from "finding safe haven" in the United States.<sup>288</sup> According to proponents, a

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283. Van Schaack, *Repairing*, *supra* note 208, at 346–50; David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 30, 31–32 (2009); Bava, *supra* note 207, at 329; Katherine Morales, *Breaking the Silence: The Case for a Domestic Crimes Against Humanity Statute*, 31 GEO. IMMIGR. L.J. 389, 391 (2017).

284. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. Rec. 7011 (as introduced by S. Comm. on the Judiciary, June 24, 2009).

285. *Id.* at § 519(a).

286. *Id.* at § 519(c).

287. *Actions Overview S.1346—111th Congress (2009–2010)*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/senate-bill/1346/actions> (last visited June 1, 2022) [<https://perma.cc/G6FY-5KHV>].

288. Press Release, Senator Patrick Leahy, Durbin, Leahy, Feingold Introduce Legislation Making Crimes Against Humanity a Violation of U.S. Law (June 24, 2009), <https://www.leahy.senate.gov/press/durbin-leahy-feingold-introduce-legislation-making-crimes-against-humanity-a-violation-of-us-law> [<https://perma.cc/2SRC-8TWC>]; Press Release, Senator Richard Durbin, Durbin: Human Rights Violators Still Finding Safe Haven in

federal law on crimes against humanity equivalent to those on war crimes and genocide would enable the United States to prosecute equally heinous crimes that happened to occur in a non-conflict context without a genocidal purpose.<sup>289</sup> The co-sponsors of the bill pointed to DHS data indicating that at least 1,000 such foreign human rights abusers were in the United States and indicated that the proposed legislation would “close the loophole” and enable such prosecutions by prohibiting crimes against humanity.<sup>290</sup> They couched the bill in terms of the need to uphold the U.S. role as a world leader in opposing and prosecuting such atrocities.<sup>291</sup> The absence of such a law, supporters argued, was harming the country’s international standing and reputation and limiting its redress against perpetrators who attempt to immigrate to the United States.<sup>292</sup>

One significant implication of this international orientation concerns the prospects for domestic implementation. As discussed below in Part V, a federal crimes against humanity law would be of minimal effectiveness in preventing crimes against humanity unless it was successfully implemented. The 2009 CAH legislation did not provide any explicit direction concerning its implementation. But the exclusively international focus of the advocacy for the bill, together with the long history of treating crimes against humanity and other atrocity crimes as foreign issues, suggests its implementation and enforcement would have been focused solely on immigration and international contexts, just like the implementation of the 2011 Directive and the 2019 Elie Wiesel Act.<sup>293</sup>

## 2. *Changes to International Standards*

The reader will recall from Part II that in international law, crimes against humanity comprise several *chapeau* elements and an underlying act or acts. The 2009 CAH legislation maintains this basic structure and adopts some of its language directly from international law. But there are several key differences between the international standards for crimes against humanity discussed above in Part II and the 2009 CAH legislation. These changes would have diminished its scope, and in particular, its effectiveness in protecting civilians from the government itself.

First, the underlying acts were limited in several ways. As discussed in Part II, the Draft Articles list ten underlying acts and a catch-all of “other inhumane acts of a similar character.”<sup>294</sup> In the 2009 CAH legislation, in an apparent effort to hew as closely as possible to existing federal law, the underlying acts are

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America (Oct. 6, 2009), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-human-rights-violators-still-finding-safe-haven-in-america> [<https://perma.cc/TRU2-GKV5>].

289. *Coalition Letter to Sen Durbin: Crimes Against Humanity Act of 2009*, V-DAY (June 24, 2009), <https://www.vday.org/node/1713.html> [<https://perma.cc/UPQ8-VX7U>]; Van Schaack, *Repairing*, *supra* note 208, at 350–51.

290. Leahy, *supra* note 288.

291. *Id.*; Durbin, *supra* note 288.

292. Van Schaack, *Repairing*, *supra* note 208, at 346–50; Scheffer, *supra* note 283, at 32–33.

293. Of course, as noted above, these are legitimate concerns that offer important justification for such a law. This Article does not argue against these concerns, but in favor of also addressing domestic risks.

294. Draft Articles, *supra* note 9, at 7–9.

defined predominantly according to crimes already in the U.S. Code, including among others murder, sexual abuse, and torture.<sup>295</sup> Of particular significance to the representative examples above, by relying on federal law to define the underlying acts insofar as possible, the definition of torture was limited to the narrower definition under U.S. law rather than encompassing the broader international law definition.<sup>296</sup> Also important to the representative examples above is that neither illegal deportation nor enforced disappearances were included in the list of prohibited acts.<sup>297</sup> The legislation does include three underlying acts that were not already criminalized under federal law and might potentially be relevant to prosecutions of White supremacist groups: “extermination,” “national, ethnic, racial or religious cleansing” and “imposed measures meant to prevent births.”<sup>298</sup> Overall, while this legislation did not go as far as past atrocity legislation by eliminating all differences with federal law, it predominantly replicated federal law and diverged significantly from the international definition. Due to these changes, for example, family separation would be considerably less likely to fall within the ambit of the 2009 CAH legislation’s definition than the international law definition.

The 2009 CAH legislation also made several changes to the international *chapeau* elements; each of these changes made it more difficult to meet the *chapeau* requirements. As discussed in Part II, the Draft Articles require the specified underlying acts be part of a “widespread or systematic attack against any civilian population, with knowledge of the attack,” and further defines an attack as “a course of conduct involving the multiple commission of [the listed underlying] acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such [an] attack.”<sup>299</sup> The international “widespread *or* systematic” language was changed to a requirement for a “widespread *and* systematic attack,” heightening this standard.<sup>300</sup> Further, whereas under international law there is no threshold number of victims for an

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295. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(a)(1)–(5) (as introduced by S. Comm. on the Judiciary, June 24, 2009) (referring to violations of federal laws prohibiting torture, hostage taking, kidnapping, sexual abuse, aggravated sexual abuse by force or threat, sex trafficking of children, murder, and multiple provisions relating to peonage, slavery, involuntary servitude, and forced labor). These provisions correlate approximately to the Draft Articles’ provisions on murder; enslavement; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Draft Articles, *supra* note 9, at 27.

296. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(a) (as introduced by S. Comm. on the Judiciary, June 24, 2009).

297. *See id.* As noted in Part II, the United States raised concerns about deportation as a basis for crimes against humanity in its comments on the Draft Articles. U.S. Comments, *supra* note 38, at 6.

298. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(a)(6)–(8) (as introduced by S. Comm. on the Judiciary, June 24, 2009). Of these, only extermination is included in the Draft Articles definition. *See* Draft Articles, *supra* note 9, at 27. The other provisions may be intended as versions of the international prohibitions on deportation and sexual violence.

299. *See* Draft Articles, *supra* note 9, at 27–30; Rome Statute, *supra* note 19, at 3.

300. This language was introduced in the original bill and maintained in the amended legislation produced by the Judiciary Committee. *Compare* Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. § 519(a) (as introduced by S. Comm. on the Judiciary, June 24, 2009), *with* Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(a) (as reported by S. Comm. on the Judiciary, July 21, 2010) (emphasis added).

attack to be “widespread,” and both numerical and geographical factors are relevant, in the Judiciary Committee, the draft legislation was amended to set a minimum of fifty affected persons.<sup>301</sup> And whereas in international jurisprudence, “systematic” refers to the organized and non-random nature of an attack, the 2009 CAH legislation imports the policy requirement into this definition and also increases that policy requirement. It does so by adopting the ICC Elements of Crimes’ requirement that a state or organization must have “actively promot[ed]” the policy, but omitting its corresponding recognition that under certain circumstances willful blindness can constitute a policy.<sup>302</sup> Nor does the Senate definition recognize de facto policies or policies demonstrated via circumstantial evidence, as acknowledged by ICC jurisprudence.<sup>303</sup> This would make it considerably more difficult to use crimes against humanity to protect against risks emanating from de facto policies or willful blindness.

In addition to these definitional changes, there were two other changes that are significant because they dramatically diminish the extent to which this law could have been effective in constraining the state itself from acting against civilian populations under its control. First, in the amended bill, the usual international rules on defenses and immunities were abrogated. This amendment affirming that “[n]othing in this section shall be construed to limit or extinguish any defense or immunity otherwise available to any person or entity” is contradictory to the aim of crimes against humanity to be applicable to all regardless of official position, superior orders, or other immunities.<sup>304</sup> Concerning the representative situations listed above, this would enable government agents to continue to assert qualified immunity or other official immunities for their actions in the crimes against humanity context as well as under other domestic law.

Furthermore, an additional procedural mechanism was introduced to enable the executive branch to intervene to prevent prosecutions. Specifically, the Attorney General had to certify the prosecution in writing, and the Secretary of State, Secretary of Defense, and Director of National Intelligence must also be consulted and not object.<sup>305</sup> This would enable the federal government to exempt anyone from prosecution and thereby undermine the efficacy of the law against government officials.

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301. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(i)(8) (as reported by S. Comm. on the Judiciary, July 21, 2010); *First Report*, *supra* note 47, at 62.

302. Elements of Crimes, *supra* note 47, at 9; *First Report*, *supra* note 47, at 68. The requirement of “active promotion” was added in committee. Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. § 519(i)(7) (as reported by S. Comm. on the Judiciary, July 21, 2010).

303. See discussion *supra* Section II.B.

304. Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 519(g) (as reported by S. Comm. on the Judiciary, July 21, 2010). The Draft Articles provide that neither official position nor superior orders shall be an applicable immunity or defense. See Draft Articles, *supra* note 9, at 66. The Rome Statute has a similar provision. Rome Statute, *supra* note 19, at 15.

305. Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. § § 519(e)(1)(A)–(B) (as reported by S. Comm. on the Judiciary, July 21, 2010). This list of decision-makers suggests that this provision may have been aimed at preventing foreign policy conflicts.

These changes seem to have been introduced to make the bill more palatable to lawmakers by minimizing additional domestic legal obligations beyond those already existing in U.S. law. Many of these changes were made in committee after the introduction of the original bill, further indicating they were added in an effort to reach a compromise and build sufficient support for the bill.<sup>306</sup> These are, of course, the same strategies that were at work in the federal laws implementing the Genocide Convention, Geneva Conventions, and Torture Convention above.

There is some apparent tension between the notion urged by supporters that the law is intended to enable the United States to prosecute foreign perpetrators and the steps taken in the initial drafting and in the Judiciary Committee to narrow the legislation vis-a-vis international law. To put it plainly, why would the United States want to make it more difficult to find a person guilty of crimes against humanity under national law, if the intended function of the law is entirely to protect the United States from foreign perpetrators entering the United States and to enable the United States to prosecute such perpetrators? These two trends—toward characterizing the law as international in focus and toward narrowing it—can be harmonized by treating them both as an accommodation of American exceptionalism; opponents were likely far less concerned with maximizing the DOJ's ability to prosecute foreign perpetrators than with ensuring U.S. actions could not be scrutinized.

### 3. *Implications*

Overall, the 2009 CAH legislation would have prohibited a set of harms like murder and torture as already criminalized under federal law, as well as the additional underlying acts of extermination, measures to prevent births in a group, and ethnic, racial and religious cleansing, when committed in furtherance of an actively advocated policy, in connection with an attack harming at least fifty people. Such acts could have been prosecuted only with the consent of several Cabinet-level officials and would have been subject to all ordinary domestic defenses and immunities. Thus, not only would the 2009 legislation, if passed, have faced the same kinds of obstacles and limits as existing constitutional and criminal law, it would also have been subject to the additional constraint of political approval for any prosecutions.

The proposed federal law would nevertheless have been useful for certain purposes. It would have provided a basis for prosecuting non-government actors (who are not subject to immunities and whom Cabinet officials would be unlikely to exempt from prosecution), thereby enabling government action against White supremacist and extremist groups or other non-state organizations. It would have criminalized several new underlying acts that might be particularly relevant to

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306. *Compare* Crimes Against Humanity Act of 2009, S.1346, 111th Cong. § 2(a) (as introduced by S. Comm. on the Judiciary, June 24, 2009), *with* Crimes Against Humanity Act of 2009, S. 1346, 111th Cong. § 2(a) (as reported by S. Comm. on the Judiciary, July 21, 2010). There is no record of the committee proceedings in which these changes were introduced. *See* CONGRESS.GOV, *supra* note 287.

White supremacist organizations because of those acts' connection to discriminatory motivations.

The proposed federal law would also have operated effectively for the purpose that its proponents advocated: subject to the above-mentioned limits of its definitions, it would have enabled prosecution of foreign perpetrators attempting to immigrate to the United States. While this Article is concerned with domestic prevention of crimes against humanity, as noted above, enforcement against foreign perpetrators is also both appropriate and important.

The 2009 CAH legislation's changes to international law, however, would have substantially undermined its ability to constrain the government itself. First, the legislation does not include two of the underlying acts that relate specifically to government action and that appeared potentially relevant in examining the representative situations in Part III: enforced disappearances and illegal deportation. More importantly, the requirement that the government not only have a policy but that this policy must be expressly advocated, without exception, means only the most overt of government policies would have been covered by the new law. The family separation policy might have been eligible, but situations of willful blindness or de facto policies could not qualify, excluding any possibility of addressing instances of widespread and persistent abuses deliberately overlooked and quietly supported by those in authority. This is particularly troubling, because it is such situations, like sexual assaults in immigration detention and police brutality against Black Americans, that have already been more difficult to address under domestic law.<sup>307</sup> Thus, rather than mitigating this weak spot in existing domestic law, the 2009 CAH legislation would have replicated it. In addition, permitting all defenses and immunities to apply and requiring consent at the highest level of government for each individual case would have eliminated any likelihood of prosecuting current or even former government officials. Once again, this replicates an existing weakness in domestic law: official immunities have been a significant obstacle to prosecutions and civil suits against government actors.<sup>308</sup> Indeed, one of the most significant roles of atrocity law is typically to eliminate such barriers: a comparative study of atrocity trials in post-transition states found that the most important way in which domestic atrocity laws enabled such trials was to lower the legal barriers to prosecutions, such as statutes of limitations, immunities and amnesties, that would have prevented trials for ordinary crimes.<sup>309</sup>

Furthermore, all these limitations would have impacted prevention and deterrence as well as prosecutions. As in the prosecutorial context, it is prevention and deterrence mechanisms aimed at the state that would have been most severely affected. In addition to the constraints imposed by the other definitional limits, any preventative processes within the federal bureaucracy would have been limited to consideration only of express policies. Any deterrent

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307. *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (granting plaintiffs' motion for class-wide preliminary injunction).

308. Goldscheid, *supra* note 131, at 1645.

309. Berlin & Dancy, *supra* note 216, at 534, 544–47.

effect would have been significantly curtailed by the implausibility of eventual enforcement against government officials.

Thus, there is a Catch-22 at the heart of any attempt to pass federal crimes against humanity legislation in the United States. A core purpose of crimes against humanity is to protect people from the power of the government, by offering protections that are more sweeping and more durable than those available under domestic law. But the only realistic possibility of passing federal crimes against humanity legislation in the United States is to eliminate from its provisions any additional protections offered by international law. Accordingly, the only way of gaining the desired protection in principle is to excise any component that would make it protective in fact.

Furthermore, there is an additional risk associated with passing such legislation: that it might be not only toothless, but counterproductive. Specifically, the 2009 CAH legislation could have been used to legitimize government action that was prohibited only under international, but not federal, law. For example, a narrow federal law could have been used to argue that the United States was bound by its own domestic definitions rather than international law, and so policies of willful blindness to widespread abuses, or commission of forms of torture that are recognized only under international law, do not constitute crimes against humanity.<sup>310</sup>

Overall, the best scenario for using a crimes against humanity law to complement and synergize with existing federal law is to pass a law that comports with international norms. Although narrowing international law has significant drawbacks, even a law like the 2009 CAH legislation would provide a legal basis for at least some preventative measures and prosecutions, especially against non-state actors like militias and White supremacist organizations. It has proved to be extraordinarily difficult, however, to pass atrocity laws in the past, and the fate of the 2009 CAH legislation suggests that even an extremely restricted version of a crimes against humanity law will face intense opposition, particularly since political division and partisanship have only increased since then. Given these complications, Part V explores implementation and mitigation strategies that could be pursued either with or without a federal crimes against humanity law.

## V. IMPLEMENTATION AND MITIGATION

As set out in Part III, the risks of crimes against humanity in the United States are long-term and structural, not only immediate and contextual. As

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310. One possible response to this conundrum would be to instead rely on the international *jus cogens* norm prohibiting crimes against humanity for prevention and deterrence, without passing federal legislation. The United States is subject to *jus cogens* norms under international law, even without domestic implementation. See Sue S. Guan, *Jus Cogens: To Revise a Narrative*, 26 MINN. J. INT'L L. 461, 466 (2017) (“As understood today, the term “jus cogens” refers to certain overriding, peremptory norms that states cannot opt out of, by contract or in practice.”). This would maintain the integrity of the norm, but there would be very limited avenues for enforcement within the United States. In particular, this would not enable domestic prosecutions, and the limited enforceability would likely undermine any true preventative or deterrent effect.

discussed in Part IV, a federal law would provide a legal basis for implementing comprehensive institutional safeguards against crimes against humanity within the United States, but such a law would be difficult to pass and would likely be limited in its scope to provisions that mirror existing federal law. Thus, this Part considers several possible protective mechanisms that might be both feasible and durable, capable of mitigating the risk of crimes against humanity not only immediately, but through all kinds of future Congresses and Presidential administrations. Section V.A assesses the military's war crimes model, which would best be effectuated under a federal crimes against humanity law. Section V.B considers countermeasures the executive branch could carry out on its own, without additional legislation.

#### A. *War Crimes Model*

The U.S. legal framework for addressing war crimes recognizes the risks associated with authorizing use of force and detention powers; it accordingly criminalizes war crimes under federal law and deploys a robust set of internal institutional mechanisms designed to prevent war crimes from occurring. As such, it represents a model for how a prohibition on crimes against humanity might be implemented in civilian federal agencies.

In contrast to the lack of a federal law prohibiting crimes against humanity, it is a federal crime punishable by fine, imprisonment, or death for a U.S. national or member of the U.S. military to commit a war crime.<sup>311</sup> Concerning the above discussion about the likely limits of the scope of any potential federal crimes against humanity law, it is significant that the War Crimes Act is narrower in scope than the Geneva Conventions;<sup>312</sup> nonetheless, it has been useful in providing a legal basis for a protective framework.

The prohibition on war crimes is implemented through preventative measures at every level of military action, including planning processes, commanders' direction of their troops, and individual service members' implementation of commanders' orders.<sup>313</sup> The Department of Defense ("DOD") Law of War Manual is a document of more than 1,200 pages that details how to address a wide range of situations in accordance with the law of war, including treatment of civilians and detention conditions.<sup>314</sup> The Manual has obligations for both service members and commanders. It requires that all service members be "trained in the law of war commensurate with their duties."<sup>315</sup> Individual service members are required to act in accordance with their training on the law of war, and to interpret orders in such a way as to follow the law of war rather

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311. 18 U.S.C. § 2441.

312. GARCIA, *supra* note 275, at 2.

313. *Id.*

314. *See generally* DEP'T OF DEF., OFF. OF GEN. COUNS., LAW OF WAR MANUAL (2016) [hereinafter MANUAL].

315. *Id.* at 1082.

than as implicitly authorizing violations.<sup>316</sup> Further, service members are affirmatively obligated to refuse to carry out orders that would clearly violate the law of war.<sup>317</sup> For their part, commanders have an obligation to implement the laws of war, to oversee those under their command, and to investigate and respond to any violations.<sup>318</sup>

In addition, the Manual requires comprehensive, regular legal consultations concerning all military actions to ensure compliance with the laws of war.<sup>319</sup> DOD legal advisors are required to be present to advise commanders “at all levels of command” in every DOD component and to review “all plans, policies, directives, and rules of engagement, and those of subordinate commands and components” for law of war compliance.<sup>320</sup> As a consequence, the military has JAG lawyers deployed throughout its field operations to advise on all operations, and “the extent to which law is now embedded in military command decisions is difficult to overstate.”<sup>321</sup>

Thus, it is not merely having legal strictures prohibiting war crimes in place that is important, although of course that is essential. Rather, it is these components of “organizational structure and institutional culture”<sup>322</sup>—and specifically, integrated internal mechanisms staffed by influential “compliance agents”<sup>323</sup>—that promote proactive observance of those legal norms.<sup>324</sup> The history of the development of these preventative measures further validates this point. While the United States has long had international legal obligations concerning war crimes, it has not always had a robust set of protocols for implementing those obligations. Rather, after atrocities committed in Vietnam became the subject of a scathing internal investigation, the DOD dramatically increased its implementation strategies:

In response, the U.S. military strengthened its internal codes of conduct, updating the U.S. Army Field Manual so that, in addition to specifying prohibited acts, it emphasized that the main objective of war-time detention operations is “implementation of the Geneva Conventions.” At the same time, the Department of Defense dramatically stepped up training activities and gave military lawyers a greater role by initiating a “law of war

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316. *Id.* at 1074. Service members are also subject to countervailing duties to follow orders unless they are clearly unlawful. Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 *BUFF. PUB. INT. L.J.* 103, 148 (2013).

317. *MANUAL*, *supra* note 314, at 1075.

318. *Id.* at 1077.

319. *Id.* at 1078.

320. *Id.* at 1079.

321. Elizabeth L. Hillman, *Lawyers Serving in the Military: Mission Creep in Military Lawyering*, 43 *CASE W. RESV. J. INT'L L.* 565, 572 (2011); *see also* Major R. Scott Adams, *Power and Proportionality: The Role of Empathy and Ethics on Valuing Excessive Harm*, 80 *AIR FORCE L. REV.* 149, 178–80 (2019); Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 *AM. J. INT'L L.* 389, 408 (2014).

322. Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 *AM. J. INT'L L.* 1, 28 (2010).

323. *Id.* at 8.

324. Hillman, *supra* note 321, at 566; Adams, *supra* note 321, at 178–80; Verdier & Voeten, *supra* note 321, at 408.

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program,” run primarily by the JAG Corps, that was designed to educate troops from all services in the law of war. The JAG Corps also gained new responsibilities on the battlefield: judge advocates were placed in the field to develop and review operations plans to ensure compliance with the law of war. Each commander thus had the benefit of a lawyer’s advice in the field, and military lawyers became involved in operational decision making as never before. Such actions helped institutionalize the authority and role of these lawyers in the military bureaucracy.<sup>325</sup>

Of course, these systems are imperfect; there have been numerous reports of alleged war crimes by U.S. military forces that have gone unprevented, unpunished, or both.<sup>326</sup> For example, in 2020, allegations of U.S. war crimes in Afghanistan led to a standoff with the ICC.<sup>327</sup> But this model need not be perfect to be useful; the question is not whether these preventative measures have *eliminated* war crimes, but whether they have significantly *reduced and mitigated* such incidents, and in this, the war crimes model seems to have succeeded.<sup>328</sup>

Thus, overall, the military’s method for preventing war crimes is a particularly important model for several reasons. First, it combines legal rules with a robust, systematic, and proactive implementation system. Second, it is a model that is already in place within the United States within a well-respected branch of the government, imbuing it with legitimacy. Third, it is an obviously feasible model. If the DOD can at least to some extent restrain its considerable authority to use force, surely civilian agencies can too. Just as the DOD was able to change longstanding problematic practices, so can other federal agencies. Finally, this system depends for its effectiveness on lawyers being legalistic and on complex bureaucratic processes being bureaucratic, conditions that are likely to hold within civilian agencies as well. In the crimes against humanity context, a federal crimes against humanity law would likely be needed to provide the legal framework to implement such a robust, comprehensive system, although it is conceivable this model could be used to directly implement the U.S.’s obligations under customary international law.<sup>329</sup>

### B. *Non-Legislative Strategies*

Passing an effective federal law that comports with international standards and implementing a comprehensive internal prevention framework like that in the military would be transformative steps for preventing crimes against humanity within the United States. Because of the durability of a federal law in

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325. Dickinson, *supra* note 322, at 10 (internal citations omitted).

326. *Id.* at 12–14; Bejesky, *supra* note 316, at 129–37.

327. Press Statement, Michael R. Pompeo, U.S. Secretary of State, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020), <https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html> [<https://perma.cc/9PBU-29PV>]; Exec. Order No. 13928, 85 Fed. Reg. 115 (June 11, 2020).

328. Hillman, *supra* note 321, at 566; Adams, *supra* note 321, at 178–80; Dickinson, *supra* note 322, at 25.

329. Obligations under federal law are more certain and enforceable than obligations under international law, especially customary international law. MANUAL, *supra* note 314, at 71.

comparison to solely executive action and because the implementation of the military model would permeate civilian agencies with advance oversight processes, they would be particularly effective in safeguarding against an administration that seeks to leverage its power over ordinary domestic law and policy.

But passing a federal law and implementing a comprehensive strategy within federal agencies is a challenging undertaking, as discussed above, and safeguarding against crimes against humanity is not an all or nothing enterprise. Rather, there is benefit to be gained from incremental protective measures as well as comprehensive programs. Further, there are other non-legislative strategies that could be implemented by the executive branch without requiring a new federal law; while less comprehensive, they would nonetheless be cognizable improvements.

Since, as discussed in Part III, risk is to some extent a formula of balancing the de facto power or legal authority to use force and control with countervailing oversight, I address these measures in two corresponding groups: mechanisms to limit authority and mechanisms to increase oversight.

#### *1. Authority*

In the representative examples discussed in Part III, authority to use force, detain, and otherwise exercise power over civilians took several forms, including specific legal authority to take particular actions as in the family separation context, general delegations of authority that provide the opportunity to exert power and use force as in the police brutality and sexual assault contexts, and legitimation of de facto power through statements implying approval, as in the White supremacy context. To reduce the risks of crimes against humanity, each of these forms of authority could be curtailed to some extent.

Of course, the federal government should refrain from specifically authorizing policies like family separation. While it may not be possible in the absence of a federal law to implement comprehensive review processes concerning crimes against humanity like those that the military uses to prevent war crimes, it ought to be possible for DHS and other agencies to effectively review their policies in advance for unconstitutionality or for conflicts with other protective federal law.<sup>330</sup>

Concerning the general authority of federal agents, DHS and DOJ have considerable discretion over whether and how they deploy their officers and the direction they give those officers.<sup>331</sup> As discussed above, the authority to use force carries with it an unavoidable risk of abuse. To reduce the risk of crimes against humanity, DHS and other agencies could reduce the number of agents they deploy, the situations in which they deploy them, and the scope of their authority to use force, to detain, and to exercise control over detained persons, to

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330. *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018) (order granting plaintiffs' motion for classwide preliminary injunction).

331. *Id.* at 1148.

the extent feasible given their mandates.<sup>332</sup> At a minimum, consideration and mitigation of the risk of abuses up to and including crimes against humanity could be an integral part of the process of approving such deployments. Such measures, however, are of course subject to reversal from one Presidential administration to another. Thus, they are not likely to be protective against a Presidential administration or administrative agency that is attempting to subvert governmental power to abusive ends, nor against one that is willing to turn a blind eye to abuses if increased deployment of federal agents enables it to achieve other policy objectives.

Militias, White supremacist groups, and other such organizations outside the government have no legal authority to use force. But Presidential statements, use of prosecutorial discretion to determine how vigorously to investigate and prosecute such groups, and other government actions and statements may indicate approval or disapproval of their ideologies and violent plans and may leave them with a greater or lesser sphere of power to carry out those plans. As discussed above, statements by former President Trump signaled approval of the aims and actions of White supremacist groups and those who stormed the U.S. Capitol, and those groups celebrated his statements and took them as legitimation and implicit authorization.<sup>333</sup> In contrast, President Biden denounced such groups in his first act as President, his inaugural address.<sup>334</sup> The Biden Administration has also developed a National Strategy for Countering Domestic Terrorism that emphasizes the risk posed by extremist and White supremacist organizations.<sup>335</sup> In addition, the U.S. Attorney for D.C. is investigating and bringing charges against those involved in the U.S. Capitol insurrection,<sup>336</sup> while the FBI has indicated that it has “elevated to the top-level priority racially motivated violent extremism so it is on the same footing in terms of our national threat banding as ISIS and homegrown violent extremism.”<sup>337</sup> These measures further signal the federal government’s stance and shatter any illusion of legitimization or impunity for such groups. Since Presidential statements and

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332. The number of immigration federal agents, enforcement actions, and detained immigrants have all increased significantly over time. RAÚL HINOJOSA-OJEDA, *THE COSTS AND BENEFITS OF IMMIGRATION ENFORCEMENT*, RICE UNIV.’S BAKER INST. 5 (2013).

333. Calvin Woodward & Deb Riechmann, *No Surprise: Trump Left Many Clues He Wouldn’t Go Quietly*, ASSOCIATED PRESS (Jan. 9, 2021), <https://apnews.com/article/donald-trump-ap-top-news-conspiracy-theories-elections-828feb5006a2fad60f457f5a6cbe731f> [<https://perma.cc/D6J8-AWD6>]; John Haltiwanger, *Trump Has Repeatedly Been Endorsed by White Supremacist Groups and Other Far-Right Extremists, and They’ve Looked to Him as a Source of Encouragement*, BUS. INSIDER (Sept. 30, 2020), <https://www.businessinsider.com/trumps-history-of-support-from-white-supremacist-far-right-groups-2020-9> [<https://perma.cc/CZ4F-X9GR>].

334. President Joseph R. Biden, Jr., Inaugural Address (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/> [<https://perma.cc/4RWR-8P39>].

335. NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM 5–6, 9–11 (2021).

336. Martin Kaste, *D.C.’s Acting U.S. Attorney Calls Scope of Capitol Investigation ‘Unprecedented’*, NPR (Jan. 10, 2021, 8:30 AM), <https://www.npr.org/2021/01/10/955314373/d-c-s-acting-u-s-attorney-calls-scope-of-capitol-investigation-unprecedented> [<https://perma.cc/FC8B-DCY3>]; *Capitol Breach Cases*, *supra* note 156.

337. JON LEWIS, SEAMUS HUGHES, OREN SEGAL & RYAN GREER, GEO. WASH. UNIV. PROGRAM ON EXTREMISM, WHITE SUPREMACIST TERROR: MODERNIZING OUR APPROACH TO TODAY’S THREAT 4 (2020).

agency action are not durable from administration to administration, it would be constructive for future Presidents to make such statements a priority in the early days of their administrations, and for DOJ to maintain a robust and well-publicized policy of prioritizing prosecution of members of such organizations when their actions violate federal law.

## 2. Oversight

The other side of the balance is increasing oversight mechanisms. Here, the executive has some options that are entirely within its control and would not require federal legislation. First, it could leverage existing mechanisms already authorized by Congress that are intended to protect against atrocities overseas and direct them toward the risk of domestic crimes against humanity as well. For example, the Elie Wiesel Act mandates “strengthening the diplomatic, risk analysis and monitoring, strategic planning, early warning, and response capacities of the Government.”<sup>338</sup> While these measures are currently being implemented solely toward foreign risks, of the listed areas of activity, only the diplomatic capacity of the United States is exclusively limited to foreign affairs; the others could apply equally well domestically as internationally. Thus, these monitoring and preventative mechanisms could be implemented to assess the risks posed by non-governmental actors like White supremacist groups and even by the federal and state governments. Similarly, the inter-agency Atrocities Early Warning Task Force (as the APB has been renamed) could address domestic developments as well as international ones.<sup>339</sup> Such authority could be constructively used to assess all the representative situations discussed above, including the effects of increased immigration enforcement action, patterns of engagement with Black Americans by police, and other systemic developments.

As noted in Part II, the United States is subject to the existing *jus cogens* requirements of international law, irrespective of whether it implements those requirements in domestic law. Thus, the President and federal agencies like DOJ and DHS could also implement protective mechanisms under the auspices of international law. In addition to not requiring a federal law, this would have the additional advantage of aligning those protective measures to fully comport with existing standards under customary international law, rather than diverging from them, as a federal law would likely do.<sup>340</sup> The extent of such implementation would be limited to preventative measures otherwise within the authority of the executive or the relevant agencies and could not extend to prosecutions,<sup>341</sup> and implementing the international norm directly would be more difficult than implementing such measures under the auspices of a federal law.<sup>342</sup>

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338. Elie Wiesel Genocide and Atrocities Prevention Act, Pub. L. No. 115-441, 132 Stat. 5586 (2019); Kaufman, *supra* note 248, at 183–84.

339. EWGAPA REPORT, *supra* note 253; Presidential Study Directive 10, *supra* note 249.

340. See discussion *supra* Section IV.C.

341. Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1894, 1894–95 (2018).

342. See discussion *supra* Section IV.B.

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Finally, as noted above, constitutional law and criminal law also prohibit the vast majority of the underlying acts that constitute crimes against humanity.<sup>343</sup> Thus, the risk of crimes against humanity occurring could be dramatically reduced by enhancing the capacity of these domestic provisions to prevent the underlying acts from occurring and thus from rising to the level of crimes against humanity. Some such changes might require judicial or congressional action, for example, eliminating or reforming the doctrine of qualified immunity, as proposed by the George Floyd Justice in Policing Act of 2020.<sup>344</sup> Others would be feasible within the concerned agencies, for example, developing more robust internal oversight within agencies of these constitutional and criminal requirements.

## VI. CONCLUSION

As Part V suggests, there are many steps that could be taken to mitigate the risk of crimes against humanity within the United States. But the first and most important step is to recognize that risk. For too long, the federal government has behaved as if the risk of crimes against humanity exists only overseas, in fragile, conflict-ridden, and authoritarian states. While the United States has recognized, at least in principle, that atrocities have been committed against Black Americans and Native Americans, it has not acknowledged that race-based atrocities amounting to crimes against humanity continue into the present. The insurrection at the U.S. Capitol and the rise of White supremacist militias, the government policy of family separation at the southern border, widespread police brutality against Black Americans, and commonplace sexual assaults against immigrants in detention—all of these events signal that the risk of crimes against humanity occurring within the United States is real.

Within government institutions, there are insufficient protections against the development of harmful policies, and there is a fundamental imbalance between authority and oversight. In U.S. society, there is a rising tide of White supremacy and extremism that is accruing the capability to commit acts of violence up to and including crimes against humanity. Whether the United States addresses these risks within the auspices of existing domestic law or by enacting new legal and institutional measures, it is imperative to act before that balance tips too far, and crimes against humanity are no longer a risk but an undeniable reality.

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343. See discussion *supra* Section IV.C.

344. See George Floyd Justice in Policing Act, H.R. 7120, 116th Cong. (as passed by House, June 25, 2020).