

# Impact Jurisdiction & Structural Investigations: The Key to the United States Prosecuting Human Rights Violators

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*Since the turn of the century, there has been an exponential rise in forcibly displaced persons and human rights violations. This rise has coincided with a series of acts that have removed the United States as a global leader in the fight for human rights. When President Biden took office, he stated his goal of returning the United States to being the global moral authority leader. To achieve this goal, the Biden Administration implemented a plan to address the human rights violations in Central America that are driving forcibly displaced persons to the U.S.-Mexico border seeking asylum. The plan, however, focuses on governance and development efforts in the region. While these efforts are important, this approach has proven ineffective time after time in the past.*

*This Note explains why the Biden Administration should add prosecuting human rights violators domestically as a primary focus. It presents Germany's use of universal jurisdiction and a war crimes unit that carries out structural investigations as a blueprint that the United States should copy. It also acknowledges the unprecedented levels of polarization in U.S. politics and the various viewpoints on sovereignty and immigration that conflict with the notion of universal jurisdiction. Thus, it presents impact jurisdiction as a more realistic alternative that caters to all political viewpoints coupled with a war crimes unit that carries out structural investigations.*

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## INTRODUCTION

After two decades of controversial acts, the United States' leadership role toward human rights has reached an all-time low. Following the 9/11 terrorist attacks, the Bush Administration entered into wars in Iraq and Afghanistan and permitted well-documented inhumane interrogation techniques against detainees.<sup>1</sup> During the Obama presidency, the United States' approach toward human rights improved, but was not stellar—drone strikes killed over three hundred civilians, and Guantánamo Bay prison was kept open despite promises to close it.<sup>2</sup> Then, from the ban on the immigration of Muslims and promoting water boarding as an effective form of torture to financially undermining United Nations (UN) institutions like the Human Rights Council (HRC),<sup>3</sup> the Trump presidency was riddled with acts that finished the job in uprooting the United States' role as the leader in the fight for human rights.<sup>4</sup>

Having inherited a country with a diminished world-leadership presence,<sup>5</sup> President Biden committed his Administration to reclaiming the United States' moral-leadership role on the global stage.<sup>6</sup> Such a role, as President Biden emphasized to the State Department following his election, is “our inexhaustible source of strength [and] America's abiding advantage,” and is rooted in America's core values: freedom, opportunity, rule of law, and universal human rights.<sup>7</sup> But, as the President has acknowledged, espousing the United States' values has no impact without leading by example, by practicing what is preached.<sup>8</sup> Therefore, at the outset, President Biden stated he would reverse immoral Trump policies, reengage with U.S. allies to work toward transnational

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1. HUM. RTS. WATCH, *GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES* 13–16 (2011).

2. Kenneth Roth, *Barack Obama's Shaky Legacy on Human Rights*, HUM. RTS. WATCH (Jan. 9, 2017), <https://www.hrw.org/news/2017/01/09/barack-obamas-shaky-legacy-human-rights> (“The hopes behind [Obama's] early receipt of the Nobel Peace Prize — that he would lead a new kind of U.S. foreign relations, built to a large extent on defending human rights — were left unfulfilled.”); see Micah Zenko, *Obama's Final Drone Strike Data*, COUNCIL ON FOREIGN RELS. (Jan. 20, 2017, 1:14 PM), <https://www.cfr.org/blog/obamas-final-drone-strike-data>.

3. *The Trump Administration Human Rights Tracker*, COLUM. HUM. RTS. L. REV., <https://trumphumanrightstracker.law.columbia.edu/> (last visited Apr. 1, 2023); Tamara Keith, *On Waterboarding, A President Trump Could Face Resistance from Some Republicans*, NPR (Nov. 21, 2016, 2:46 PM), <https://www.npr.org/2016/11/21/502871948/on-waterboarding-a-president-trump-could-face-resistance-from-some-republicans>.

4. Cathryn Clüver Ashbrook, *The Trump Legacy and Its Consequences*, BELFER CTR. (Mar. 1, 2020), <https://www.belfercenter.org/publication/trump-legacy-and-its-consequences>; RONALD O'ROURKE, CONG. RSCH. SERV., R44891, *U.S. ROLE IN THIS WORLD: BACKGROUND AND ISSUES FOR CONGRESS* 6–8 (2021).

5. O'ROURKE, *supra* note 4, at 6–9; Eleanor Beardsley, *Last 4 Years Have Tarnished U.S. Image in Europe. Will Biden Be Able To Improve It?*, NPR (Nov. 12, 2020, 3:44 PM), <https://www.npr.org/2020/11/12/934266473/last-4-years-have-tarnished-u-s-image-in-europe-will-biden-be-able-to-improve-it>.

6. Associated Press, *WATCH: Biden Says 'Silence Is Complicity' on Human Rights*, PBS (Oct. 15, 2021, 2:26 PM), <https://www.pbs.org/newshour/nation/watch-live-biden-delivers-remarks-at-the-university-of-connecticut>.

7. President Joe Biden, *Remarks by President Biden on America's Place in the World* (Feb. 4, 2021) (transcript available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/>).

8. *Id.*

human rights solutions, and resolve the refugee crisis at the U.S.-Mexico border by addressing the root causes of migration—of which persecution, violence, and conflict together are the primary cause.<sup>9</sup>

Over eighteen months in, the Biden Administration has repaired relationships with allies and has been working with them toward solutions as the United States was granted a seat on the HRC.<sup>10</sup> Biden has also revoked many of Trump's policies, including the Muslim immigration ban and the order allowing the separation of families at the U.S. border.<sup>11</sup> But as for addressing the refugee crisis, the Biden Administration's efforts have not moved the needle. Thus far, the Administration has mobilized public and private investment toward developing various Central American countries' health, education, and governance sectors, and created task forces to combat corruption and human smuggling.<sup>12</sup> And, while these efforts are undoubtedly important to achieve long-term stability, similar U.S. intervention has failed time after time in the past.<sup>13</sup> In fact, past efforts failed to even *slow* persecution, violence, and conflict in the region, as indicated by the exponential rise of refugees in the past decade: as of 2022, there were approximately 100 million persons forcibly displaced due to persecution, violence, and conflict, more than double the amount in 2012.<sup>14</sup> To put this number in perspective, this is the same number of people who would be displaced if every individual in Australia, New Zealand, Greece, Belgium, Sweden, Portugal, Switzerland, Ireland, Serbia, and the Czech Republic were forced to leave their homes.<sup>15</sup>

Accordingly, the Biden Administration must not rely on practices that have proven ineffective and unreliable in the past. The Administration must take new, additional steps toward addressing the primary root cause of forced displacement

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9. *Id.*; U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2021, at 4 (2022), <https://www.unhcr.org/en-us/publications/brochures/62a9d1494/global-trends-report-2021>.

10. Edward Wong, *On U.S. Foreign Policy, the New Boss Acts a Lot Like the Old One*, N.Y. TIMES (July 25, 2022), <https://www.nytimes.com/2022/07/24/us/politics/biden-trump-foreign-policy.html>.

11. Christopher Hickey, Curt Merrill, Richard J. Chang, Kate Sullivan, Janie Boschma & Sean O'Key, *Here Are the Executive Actions Biden Signed in His First 100 Days*, CNN, <https://edition.cnn.com/interactive/2021/politics/biden-executive-orders/> (Apr. 30, 2021).

12. *See generally* THE WHITE HOUSE: NAT'L SEC. COUNS., U.S. STRATEGY FOR ADDRESSING THE ROOT CAUSES OF MIGRATION IN CENTRAL AMERICA (2021).

13. Alexander Main, *The Destructive Legacy of US Economic Statecraft in Latin America and the Caribbean*, 52 NACLA REP. ON THE AMS. 33, 34 (2020) (“[The] varied tools of economic statecraft are all, according to official discourse, deployed with the objective of improving the lives of Latin Americans. Yet, they have made life harder for the majority of Latin Americans, and contributed to the region's failure to achieve inclusive growth.”); *see also* Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7 GLOB. JURIST 1, 9–13 (2007).

14. *Global Trends: Global Forced Displacement*, UNHCR, <https://www.unhcr.org/flagship-reports/global-trends/> (last visited Apr. 1, 2023).

15. *Countries in the World by Population (2022)*, WORLDOMETER, <https://www.worldometers.info/world-population/population-by-country/> [<https://web.archive.org/web/20221119090320/https://www.worldometers.info/world-population/population-by-country/>] (tallying each country's population at the time as 25,809,973, 4,822,233, 10,423,054, 11,589,623, 10,099,265, 10,196,709, 8,654,622, 4,937,786, 8,737,371, and 10,708,981, respectively).

if it wants to see a positive impact and thus achieve its goal of restoring America's moral leadership on the global stage. Therefore, this Note argues that the Biden Administration should direct more attention to prosecuting human rights violators domestically.

Not only does prosecuting human rights violators domestically provide accountability, justice, and deterrence, but it is also a necessary and suitable solution for the United States to implement. The reality is that not all countries are able to prosecute international criminals. Such prosecutions are very costly, difficult, and require strong judicial systems.<sup>16</sup> Accordingly, the onus falls upon "high-income" countries to prosecute when another country is unable.<sup>17</sup> In the past decade alone, high-income countries have received hundreds of complaints and completed dozens of trials.<sup>18</sup> The vast majority of trials have taken place in European countries that have implemented universal jurisdiction—a form of extraterritorial jurisdiction that allows a country to prosecute crimes that do not have a nexus to that country—into their domestic criminal statutes.<sup>19</sup>

The leader among all high-income countries is Germany.<sup>20</sup> In the past five years, Germany has investigated, indicted, and prosecuted dozens of human rights violators.<sup>21</sup> Germany's success is in large part due, along with universal jurisdiction,<sup>22</sup> to the hundreds of thousands of admitted refugees who were victims or witnesses of human rights violations prior to entering Germany.<sup>23</sup> Accordingly, Germany provides a blueprint for similar high-income countries,

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16. HUM. RTS. WATCH, *THE LONG ARM OF JUSTICE: LESSONS FROM SPECIALIZED WAR CRIMES UNITS IN FRANCE, GERMANY, AND THE NETHERLANDS* 2 (Sept. 2014).

17. Ad hoc tribunals have also assisted in limited fashion; however, they are temporary, country specific, and "involve significant delay and expense." John Stompor, *The Darfur Dilemma: U.S. Policy Toward the ICC*, 7 GEO. J. INT'L AFFS. 111, 114 (2006); see also *Ad Hoc Tribunals*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/doc/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>.

18. See Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779, 781 (2019).

19. *Id.* at 811; TRIAL INT'L, EVIDENTIARY CHALLENGES IN UNIVERSAL JURISDICTION CASES 81–83 (2019) [hereinafter TRIAL INT'L, EVIDENTIARY CHALLENGES]; TRIAL INT'L, UNIVERSAL JURISDICTION ANNUAL REVIEW 2020, at 91–95 (2020) [hereinafter TRIAL INT'L, UNIVERSAL JURISDICTION]; see also *Universal Jurisdiction*, THE CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/what-we-do/litigation/legal-strategy/universal-jurisdiction/> (last visited Apr. 1, 2023) ("Universal jurisdiction is based on the idea that since perpetrators who commit such heinous crimes are *hostes humani generis*—'enemies of all mankind'—any nation should have the authority to hold them accountable, regardless of where the crime was committed or the nationality of the perpetrator or the victim."); HUM. RTS. WATCH, *supra* note 16, at 2–3.

20. Germany is also the only high-income country that has welcomed over 500,000 refugees in each of the past five years. See *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=tAb36e> (last visited Apr. 1, 2023).

21. See Langer & Eason, *supra* note 18, at 786–89; TRIAL INT'L, EVIDENTIARY CHALLENGES, *supra* note 19, at 82; TRIAL INT'L, UNIVERSAL JURISDICTION, *supra* note 19, at 93–94.

22. HUM. RTS. WATCH, *supra* note 16, at 51–52.

23. See Stephen J. Rapp, *Impact-Based Jurisdiction and Crimes Against Humanity Statutes Are Needed for Effective Accountability*, JUST SEC. (Sept. 23, 2021), <https://www.justsecurity.org/78324/impact-based-jurisdiction-and-crimes-against-humanity-statutes-are-needed-for-effective-accountability/>.

like the United States, that have strong judicial systems and the infrastructure to accommodate refugee-witnesses.

Part I of this Note provides a brief background of international treaty obligations to hold human rights violators accountable for war crimes, crimes against humanity, genocide, and the crimes of aggression (core international crimes). Part I, and this Note as a whole, focuses on the core international crimes because they are considered so heinous that universal jurisdiction is deemed appropriate to prevent impunity.<sup>24</sup> However, this Note does not address the United States' lack of a crime-against-humanity or crime-of-aggression statute because, while each would fill legislative gaps toward ending impunity,<sup>25</sup> this Note focuses on the current gap between law in books and law in practice. Part II addresses the United States' implementation of such international laws, where the United States has fallen short of its treaty obligations, and why it is time to amend U.S. laws for holding human rights violators accountable. Part III examines Germany's implementation of international laws and why universal jurisdiction and a structural investigatory approach have led to its success in prosecuting human rights violators. Part IV first acknowledges the reality of U.S. politics and the unlikelihood that the United States will copy Germany by utilizing universal jurisdiction. Part IV then introduces "impact jurisdiction" as an alternative to universal jurisdiction that caters to each differing political viewpoint on both universal jurisdiction and immigration. Lastly, Part IV explains why a war crimes unit that conducts structural investigations will be easy to implement and how the United States should enhance the new war crimes unit's practices.

#### I. BACKGROUND ON STATES' TREATY OBLIGATIONS TO HOLD HUMAN RIGHTS VIOLATORS ACCOUNTABLE

During World War II, approximately sixty million Europeans—many of whom were German and Austrian Jews—were forcibly displaced as they fled the horrors of the Nazi Regime.<sup>26</sup> Many of these refugees, however, were left

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24. INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 1 (2020), <https://www.icc-cpi.int/sites/default/files/understanding-the-icc.pdf>.

25. See, e.g., David Scheffer & Kristin Smith, *Congress Should Close the 'Crimes Against Humanity' Loophole*, JUST SEC. (Feb. 17, 2023), <https://www.justsecurity.org/85135/congress-should-close-the-crimes-against-humanity-loophole/> ("Crimes against humanity can include attacks against civilians during war (and therefore may overlap in part with war crimes), but they also cover a distinct set of crimes that occur in 'peacetime,' leaving many cases unaddressed by war crimes laws."); Jennifer Trahan, *The Need To Reexamine the Crime of Aggression's Jurisdictional Reach*, JUST SEC. (Apr. 4, 2022), <https://justsecurity.org/80951/the-need-to-reexamine-the-crime-of-aggressions-jurisdictional-regime/> ("The idea behind the crime of aggression . . . [is] to deter use of force contrary to the U.N. Charter, and be in a position to prosecute political or military leaders who commit the crime should deterrence fail.")

26. Mary Tomsic, *Learning from the Past: Working with WWII Refugees*, PURSUIT (June 19, 2017), <https://pursuit.unimelb.edu.au/articles/learning-from-the-past-working-with-wwii-refugees>.

with nowhere to go as Western nations were reluctant to open their borders.<sup>27</sup> Western nations' reluctance toward admitting refugees remained throughout the war, despite the numerous reports of Nazis killing Jews in Europe.<sup>28</sup> Sovereignty, discrimination, security, and the fear of refugees burdening the domestic economy won the day as the majority of these nations decided not to raise their respective immigration ceilings or relax visa requirements to allow more refugees in.<sup>29</sup>

Following the war, the Allied Forces discovered the concentration camps and internalized the extent of the atrocities.<sup>30</sup> Additionally, citizens across the world began voicing the need for human rights standards and accountability.<sup>31</sup> In response, the United Nations was established to guide the promotion of peace and security, development, and human rights.<sup>32</sup> Months later, the United Nations established the HRC to define fundamental human rights and provide a moral force toward achieving peace and security.<sup>33</sup>

Two years later, the HRC, led by Eleanor Roosevelt, finalized its work, and the United Nations adopted the Universal Declaration of Human Rights (UDHR).<sup>34</sup> The UDHR defined thirty rights and freedoms to which all human beings are entitled and obligated each nation to take "national and international" measures to secure the universal recognition of human rights.<sup>35</sup> Though the UDHR has no binding authority, subsequent treaties have since codified the rights and freedoms contained in the UDHR.<sup>36</sup> Of these treaties, four call on state parties to hold human rights violators accountable for the core international crimes: the Geneva Conventions of 1949 ("Geneva Conventions"), the Convention on the Prevention and Punishment of the Crime of Genocide

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27. *How Did Leaders, Diplomats, and Citizens Around the World Respond to the Events of the Holocaust?*, HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/question/how-did-leaders-diplomats-and-citizens-around-the-world-respond-to-the-events-of-the-holocaust> (last visited Apr. 1, 2023).

28. *The United States and the Refugee Crisis, 1938–41*, HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/the-united-states-and-the-refugee-crisis-1938-41> (last visited Apr. 1, 2023); Audio tape: *Eclipse of Humanity: The History of the Shoah, Yad Vashem: The Holocaust Remembrance Authority Jerusalem* (2000) (on file with author) [hereinafter *An Interview with Professor Yehuda Bauer*] (interview with Professor Yehuda Bauer).

29. See sources cited *supra* note 28.

30. See sources cited *supra* note 28.

31. *A Short History of Human Rights*, HUM. RTS. RES. CTR., <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm> (last visited Apr. 1, 2023).

32. *History of the UN*, UNITED NATIONS SEVENTIETH ANNIV., <https://www.un.org/un70/en/content/history/index.html> (last visited Apr. 1, 2023) (noting that while it was initially composed of just fifty-one members, the United Nations now consists of 193 member states).

33. *Eleanor Roosevelt and the Universal Declaration of Human Rights*, ELEANOR ROOSEVELT PAPERS PROJECT, <https://erpapers.columbian.gwu.edu/eleanor-roosevelt-and-universal-declaration-human-rights> (last visited Apr. 1, 2023).

34. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; see *International Human Rights Law*, UNITED NATIONS, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited Apr. 1, 2023).

35. See UDHR, *supra* note 34.

36. *Universal Declaration of Human Rights*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited Apr. 1, 2023).

(“Genocide Convention”), the Convention Against Torture (“CAT”), and the Rome Statute of the International Criminal Court (“Rome Statute”).<sup>37</sup>

The Geneva Conventions were the first to both codify many of the UDHR rights and freedoms and call on state parties to hold human rights violators accountable.<sup>38</sup> Under the Geneva Conventions, ratifying parties are obligated to enact all necessary legislation to punish individuals for any “grave breach” of humanitarian conduct during armed conflict such as torture, mutilation, kidnapping, and murder.<sup>39</sup> More broadly, they obligate each country to search for perpetrators, prosecute perpetrators in a country’s domestic courts, or extradite perpetrators to be tried by another state party, thereby codifying universal jurisdiction in an international treaty for the first time.<sup>40</sup>

The Genocide Convention and CAT then built upon the Geneva Conventions’ progress. The Geneva Conventions do not address genocide and only prohibit murder during armed conflict;<sup>41</sup> therefore, the Genocide Convention was drafted to deter and punish any reiteration of the Holocaust, whether in times of peace or war.<sup>42</sup> Although the Geneva Conventions address torture, CAT extended the regulation of torture to times of peace *and* war.<sup>43</sup> Moreover, both the Genocide Convention and CAT obligate a state party to take effective legislative and judicial measures to prevent and punish genocide and torture.<sup>44</sup> The Genocide Convention promotes but does not explicitly obligate state parties to implement universal jurisdiction into their genocide statutes,<sup>45</sup> whereas CAT explicitly obligates state parties to pass torture statutes that allow for universal jurisdiction.<sup>46</sup>

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37. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter CAT]; Rome Statute of the International Criminal Court art. 1, July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

38. UDHR, *supra* note 34; *see* sources cited *supra* note 37.

39. Geneva IV, *supra* note 37, at art. 147.

40. *Id.* at art. 146; *see Basic Facts on Universal Jurisdiction*, HUM. RTS. WATCH (Oct. 19, 2009), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

41. Geneva I, *supra* note 37, at art. 3; Geneva II, *supra* note 37, at art. 3; Geneva III, *supra* note 37, at art. 3; Geneva IV, *supra* note 37, at art. 32.

42. *The Genocide Convention*, UNITED NATIONS, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Apr. 1, 2023). Specifically, the Genocide Convention makes it unlawful to commit acts with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” Genocide Convention, *supra* note 37, at art. 2.

43. Compare Geneva IV, *supra* note 37, at art. 32, with CAT, *supra* note 37.

44. *See* Genocide Convention, *supra* note 37, at arts. V–VI; CAT, *supra* note 37, at art. 5.

45. Genocide Convention, *supra* note 37, at arts. V–VI; CrimC (DC Jer) 40/61 Att’y Gen. v. Eichmann, No. 24060 (1961) (Isr.) (ICC Legal Tools Database), <https://www.legal-tools.org/doc/aceae7>.

46. CAT, *supra* note 37, at art. 5.

Lastly, in the beginning of the twenty-first century, the efforts to hold human rights violators accountable culminated with the Rome Statute and the establishment of the first permanent international criminal tribunal: the International Criminal Court (ICC).<sup>47</sup> The ICC provides more efficient access to justice by eliminating the delay and expense associated with establishing ad hoc tribunals.<sup>48</sup> Furthermore, the Rome Statute granted the court great bandwidth by supplying it with universal jurisdiction over the core international crimes.<sup>49</sup> Importantly, however, the ICC is a “court of last resort,” and will only intervene where states are unable or unwilling to prosecute the crimes themselves.<sup>50</sup> Additionally, the court only has jurisdiction when (1) a crime occurs in the territory of a state party, (2) a crime is committed by a state party national, (3) a non-state party grants ad hoc jurisdiction, or (4) the UN Security Council refers the case to the ICC Prosecutor.<sup>51</sup> Accordingly, even if the ICC wishes to intervene, its jurisdictional limitations may bar it from doing so.

The Rome Statute thus established a relationship of complementarity between the ICC and state parties’ domestic courts, necessitating the implementation of the Rome Statute into state parties’ domestic criminal codes.<sup>52</sup> It thereby places the onus on state parties to complement the ICC by prosecuting human rights violators when the ICC is restricted from doing so. Moreover, it places the sole duty on state parties to prosecute human rights violators from countries like Haiti, Yemen, Syria, and South Sudan, which are non-state parties and thus out of the ICC’s reach, unless the UN Security Council steps in—which it has only ever done twice.<sup>53</sup> Without state parties playing a complementary role for the ICC, human rights violators would enjoy impunity and continue to ignite the refugee crisis.<sup>54</sup>

Together, these treaties obligate state parties to do their part in holding human rights violators accountable. Nonetheless, treaties are still international laws, and are largely unenforceable unless state parties implement them into their domestic criminal codes.<sup>55</sup>

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47. Rome Statute, *supra* note 37, at art. 1.

48. See IONEL ZAMFIR, *INTERNATIONAL CRIMINAL COURT: ACHIEVEMENTS AND CHALLENGES 20 YEARS AFTER THE ADOPTION OF THE ROME STATUTE 3* (2018); Stompor, *supra* note 17.

49. Rome Statute, *supra* note 37, at art. 5.

50. INT’L CRIM. CT., *JOINING THE INTERNATIONAL CRIMINAL COURT: WHY DOES IT MATTER?*, <https://www.icc-cpi.int/sites/default/files/Publications/Joining-Rome-Statute-Matters.pdf> (last visited Apr. 1, 2023).

51. Rome Statute, *supra* note 37, at arts. 11–12.

52. Daley J. Birkett, *Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia*, 18 *CHINESE J. INT’L L.* 353, 354 (2019).

53. See *Refugee Data Finder*, *supra* note 20; *The States Parties to the Rome Statute*, INT’L CRIM. CT., <https://asp.icc-cpi.int/states-parties> (last visited Apr. 1, 2023).

54. See Rapp, *supra* note 23.

55. Keith Suter, *The Successes and Limitations of International Law and the International Court of Justice*, 20 *MED., CONFLICT & SURVIVAL* 344, 344–45 (2004).

## II. IT IS TIME TO AMEND U.S. LAWS FOR HOLDING HUMAN RIGHTS VIOLATORS ACCOUNTABLE.

Of the four aforementioned treaties, the United States has ratified all but the Rome Statute.<sup>56</sup> To give these treaties domestic force, the United States adopted the Genocide Accountability Act of 2007 (“Genocide Accountability Act”), the Foreign Relations Authorization Act, and the War Crimes Act.<sup>57</sup>

The Genocide Accountability Act and the Foreign Relations Authorization Act only require the perpetrator to be “present in the United States,” thus implementing the Genocide Convention’s recommendation to provide universal jurisdiction for genocide and fulfilling CAT’s obligation to provide universal jurisdiction for torture.<sup>58</sup> Until the War Crimes Act was amended in January 2023, the United States had not fulfilled its Geneva Conventions obligation to provide universal jurisdiction for war crimes because the original War Crimes Act was not invoked unless the perpetrator or victim was a U.S. national or member of the U.S. armed forces.<sup>59</sup> Thus, a non-U.S. citizen human rights violator could enter the United States and avoid prosecution for war crimes, so long as the victim was not a U.S. national or armed forces member.

While Congress believed the original War Crimes Act would be a major step in preventing war criminals from hiding out in the United States,<sup>60</sup> the Act had done nothing of the sort; in 2009, a decade after the Act was passed, there were over 1,000 human rights violators living freely in the United States.<sup>61</sup> To

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56. *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties?activeTab=1949GCS-APS-and-commentaries> (last visited Apr. 1, 2023) [hereinafter *Geneva Ratification Statistics*] (noting that the U.S. ratified the Geneva Conventions in 1955); *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en) (last visited Apr. 1, 2023) (noting that the U.S. ratified the Genocide Convention in 1988); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en) (last visited Apr. 1, 2023) [hereinafter *Convention Against Torture*] (noting that the U.S. ratified CAT in 1994).

57. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441), amended by Justice for Victims of War Crimes Act, Pub. L. No. 117-351, 136 Stat. 6265 (2023); Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (amending 18 U.S.C. § 1091 (2007)); Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506(a), 108 Stat. 382, 463–64 (1994) (codified as amended at 18 U.S.C. § 2340A).

58. 18 U.S.C. §§ 1091(e)(2)(D), 2340.

59. *Id.* § 2441(b) (2022), amended by Justice for Victims of War Crimes Act, Pub. L. No. 117-351, § 2, 136 Stat. 6265 (2023).

60. See, e.g., *War Crimes Act of 1996: Hearing on H.R. 2587 Before the H. Subcomm. on Immigr. & Claims*, 104th Cong. 5 (1996) (statement of Rep. Walter Jones), <https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/04/hear-81-1996.pdf>. As the bill for the War Crimes Act was making its way through Congress, North Carolina Congressman Walter Jones explained that the War Crimes Act “restores justice by filling the gaps in Federal criminal law relating to the prosecution of individuals for grave breaches of the Geneva Convention. When passed, the United States will no longer be a safe haven for anyone having committed such crimes.” *Id.*

61. See Press Release from Ill. Sen. Dick Durbin, Human Rights Violators Still Finding Safe Haven in America (Oct. 6, 2009), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-human-rights-violators-still-finding-safe-haven-in-america>; see also *Seeking Justice for Victims Around the World*, ICE,

put a stop to this, Congress amended the War Crimes Act to permit universal jurisdiction.<sup>62</sup> The amended Act is an encouraging sign, as it fulfills the United States' obligations under the Geneva Conventions as it pertains to war crimes and indicates that the United States recognizes its legislative gaps. Nonetheless, skepticism persists. The Genocide Accountability Act has never been used, and the Foreign Relations Authorization Act has only ever been used once,<sup>63</sup> indicating that there are still gaps between the law in books and the law in practice.<sup>64</sup> Therefore, though the War Crimes Act now provides for universal jurisdiction,<sup>65</sup> the relatively unused Foreign Relations Authorization Act and Genocide Accountability Act suggest that universal jurisdiction, though ideal, is not a realistic tool for the United States.

A. ALTERNATIVE CRIMINAL STATUTES AT U.S. PROSECUTORS' DISPOSAL DO NOT DETER FUTURE CRIMES OR HOLD VIOLATORS ACCOUNTABLE.

Notwithstanding the lack of war crimes, torture, and genocide prosecutions, the United States has prosecuted human rights violators for terrorism-related crimes,<sup>66</sup> immigration fraud,<sup>67</sup> criminal denaturalization,<sup>68</sup> and perjury.<sup>69</sup> However, each of these avenues has proven inadequate for numerous reasons.

First, prosecuting immigration fraud, criminal denaturalization, and perjury fails to deter future human rights violations because each charge carries a maximum sentence that is much lower than the maximum sentence for the core international crimes. For example, under 18 U.S.C. § 1546, a fraud conviction carries no more than twenty-five years in prison, whereas under 18 U.S.C.

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<https://www.ice.gov/features/seeking-justice-victims-around-world> (Aug. 4, 2022) (explaining how there are currently thousands of leads being pursued about human rights violators living in the U.S.).

62. Justice for Victims of War Crimes Act, Pub. L. No. 117-351, 136 Stat. 6265 (2023); *Bipartisan, Bicameral Lawmakers Introduce Bill To Broaden War Crimes Jurisdiction*, CHUCK GRASSLEY (May 18, 2022), <https://www.grassley.senate.gov/news/news-releases/bipartisan-bicameral-lawmakers-introduce-bill-to-broaden-war-crimes-jurisdiction> [hereinafter Grassley News Release].

63. See OPEN SOC'Y JUST. INITIATIVE, UNIVERSAL JURISDICTION: LAW AND PRACTICE IN THE UNITED STATES OF AMERICA 5-9 (2022); Laura Richardson Brownlee, *Extraterritorial Jurisdiction in the United States: American Attitudes and Practices in the Prosecution of Charles "Chuckie" Taylor Jr.*, 9 WASH. U. GLOB. STUD. L. REV. 331, 332-33 (2010); see also *Chuckie Taylor*, THE CTR. FOR JUST. & ACCOUNTABILITY, <https://cja.org/where-we-work/liberia/us-v-belfast/> (last visited Apr. 1, 2023) (noting that Charles "Chuckie" Taylor Jr. was the only individual ever prosecuted under the Torture Act).

64. See *infra* Part IV for the reasoning behind the difference between the law in books and the law in practice.

65. 136 Stat. 6265.

66. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 697 (2006); *United States v. Sattar*, 314 F. Supp. 2d 279, 289 (S.D.N.Y. 2004), *aff'd sub nom.* *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009).

67. See TRIAL INT'L, UNIVERSAL JURISDICTION: LAW AND PRACTICE IN THE UNITED STATES 48-49 (2022); see, e.g., *United States v. Boskic*, 545 F.3d 69, 71 (1st Cir. 2008).

68. See TRIAL INT'L, *supra* note 67; see, e.g., *United States v. Ngombwa*, No. 14-CR-123-LRR, 2017 WL 508208, at \*1 (N.D. Iowa Feb. 7, 2017), *aff'd*, 893 F.3d 546 (8th Cir. 2018).

69. See OPEN SOC'Y JUST. INITIATIVE, *supra* note 63, at 48-49; see, e.g., *United States v. Jabatch*, 974 F.3d 281, 302 (3d Cir. 2020).

§ 2441, the maximum penalty for a war crimes conviction is a death sentence.<sup>70</sup> Therefore, any deterrence effect that may have been present is nullified by the prospect of lenient sentences. Moreover, these less severe sentences do not deter human rights violators from trying to hide out in the United States because the prospect of being captured in the United States and facing a lenient sentence does not make a human rights violator think twice about attempting entry.

Deterrence is also an issue when prosecuting for terrorism-related offenses. Terrorism-related charges, which most often involve a charge of “material support to a terrorist organization,”<sup>71</sup> allow the perpetrator to be viewed as a martyr, rather than as an enemy of mankind.<sup>72</sup> Thus, any hope of deterring future acts is undermined because future perpetrators view the acts as noble and sacrificial.<sup>73</sup> If instead the United States prosecuted human rights violators for one of the core international crimes, lumping them into the same category as the Nazi officials prosecuted in the Nuremberg trials, the perpetrators may be viewed differently by their community. Further, terrorist charges do not cover many human rights violators because many are not affiliated with terrorist organizations,<sup>74</sup> such as the heads of state in Venezuela and Haiti, drug cartel leaders, and foreign military members.<sup>75</sup> Therefore, a lenient sentence for perjury, fraud, or criminal denaturalization is all that is left for such actors.

Ultimately, while the alternative criminal statutes fail to deter future crimes and attempted illegal entry into the United States, the primary institutional failure is that the alternatives fail to hold human rights violators accountable for the crimes they have actually committed. To illustrate, Mohammed Jappateh, a former Liberian War Lord who committed “rape, sexual enslavement, slave labor, murder, mutilation[,] ritual cannibalism,” and used children as soldiers, was charged with immigration fraud and perjury and sentenced to only thirty years in prison.<sup>76</sup> Following the trial, the U.S. Attorney lamented that “[t]his prosecution was our only option under the law,” while observing that “his

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70. Compare 18 U.S.C. § 1546(a), with 18 U.S.C. § 2441(a). There is some flexibility with sentencing someone convicted of fraud if the prosecution proves that the defendant was involved in serious human rights offenses. See U.S. SENT’G GUIDELINES MANUAL § 2L2.2(b)(4)(A)–(B) (U.S. SENT’G COMM’N 2016); see, e.g., *Jabateh*, 974 F.3d at 287.

71. See Rapp, *supra* note 23; see also *Trial and Terror*, INTERCEPT, <https://trial-and-terror.theintercept.com/> (Nov. 14, 2022) (“Since 9/11, 54 percent of terrorism defendants prosecuted by the Justice Department have been charged with material support.”).

72. See Rapp, *supra* note 23.

73. *Martyr*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/martyr> (last visited Apr. 1, 2023) (“[A] person who sacrifices something of great value and especially life itself for the sake of principle”).

74. See 18 U.S.C. § 2339B; *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> (last visited Apr. 1, 2023).

75. See *Refugee Data Finder*, *supra* note 20 (tracking tens of thousands of Haitians fleeing Haiti); see also *Venezuela Situation*, UNHCR, <https://www.unhcr.org/en-us/venezuela-emergency.html?query=venezuela> (last visited Apr. 1, 2023) (indicating that there are currently over seven million Venezuelan refugees in the world).

76. *United States v. Jabateh*, 974 F.3d 281, 303 (3d Cir. 2020) (affirming the thirty years’ imprisonment sentence for former Liberian war lord known as “Jungle Jabbah” for immigration fraud and perjury).

sentence achieve[d] at least some measure of justice for his victims.”<sup>77</sup> The current state of U.S. law therefore handcuffs prosecutors and does not achieve an equitable amount of justice for the victims.

#### B. THE UNITED STATES’ CIVIL REDRESS OPTIONS ARE ALSO INADEQUATE.

If none of the criminal charges are available, victims can still seek civil redress via the Torture Victim Protection Act of 1991 (“TVPA”) or the Alien Tort Statute (“ATS”).<sup>78</sup> The TVPA allows both U.S. citizens and non-U.S. citizens to sue a human rights perpetrator for torture or extrajudicial killing committed in foreign territory, thus providing universal jurisdiction.<sup>79</sup> The ATS, on the other hand, is very limited. The ATS only allows non-U.S. citizens to bring suit<sup>80</sup> and, as the Supreme Court held in *Kiobel v. Royal Dutch Petroleum Co.*, requires plaintiffs to prove that the crime “touch[es] and concern[s] the territory of the United States.”<sup>81</sup> What “touch[es] and concern[s]” means, however, is still up for debate because *Kiobel* failed to clarify this new jurisdictional standard.<sup>82</sup> More significantly, *Kiobel* also emphasized that a statute must give a “clear indication” that it provides extraterritorial jurisdiction, or courts are bound to presume that it only applies domestically.<sup>83</sup> Given that the ATS does not explicitly grant extraterritorial jurisdiction,<sup>84</sup> plaintiffs are left with a higher hill to climb to establish a nexus between the United States and the crime. Therefore, unless the crime at issue is torture or extrajudicial killing, the TVPA is inapplicable, and the outlook is grim for a plaintiff seeking civil redress under the ATS.

If a plaintiff does bring a suit under the TVPA or invokes the ATS by managing to show that the crime touches and concerns the United States,<sup>85</sup> the most favorable outcome is a large damages award and deportation of the perpetrator.<sup>86</sup> Alternatively, if perpetrators are not sued or prevail on the civil suit, the United States will likely just deport them for illegally entering the

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77. Press Release, U.S. Attorney’s Off.: E. Dist. of Pa., Former Liberian War Lord Known as “Jungle Jabbah” Sentenced to 30 Years in Prison for Immigration Fraud and Perjury (Apr. 19, 2018), <https://www.justice.gov/usao-edpa/pr/former-liberian-war-lord-known-jungle-jabbah-sentenced-30-years-prison-immigration>.

78. OPEN SOC’Y JUST. INITIATIVE, *supra* note 63, at 51–55.

79. 28 U.S.C. § 1350 note.

80. *Id.* § 1350.

81. 569 U.S. 108, 124–25 (2013).

82. *See id.* Since *Kiobel*, the Court has also held that foreign corporations cannot be sued under the Alien Tort Statute. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018). Additionally, in *Nestlé USA, Inc. v. Doe*, the Court held that plaintiffs suing U.S. corporations must show domestic conduct that is more than general corporate activity conducted by all corporations. 141 S. Ct. 1931, 1937 (2021).

83. *Kiobel*, 569 U.S. at 115–16.

84. *See* § 1350.

85. *Kiobel*, 569 U.S. at 125.

86. *See, e.g.*, Julia Preston, *U.S. Deports Salvadoran General Accused in ‘80s Killings*, N.Y. TIMES (Apr. 8, 2015) (finding former El Salvadoran General Carlos Vides guilty for torturing three Salvadoran civilians and reporting the \$54.6 million damage award to the plaintiffs, and Vides’s subsequent deportation).

country.<sup>87</sup> Either way, the outcome is insufficient. Awarding damages falls short because, while courts have awarded millions in damages,<sup>88</sup> no amount of money can effectively redress victims for the atrocities they have experienced.<sup>89</sup> Awarding damages combined with the knowledge that the perpetrator faced incarceration in their home country following deportation perhaps may effectively redress the victim; unfortunately, it is unlikely that deported perpetrators will face incarceration in their home countries, let alone stand trial, given these countries' weak judicial systems.<sup>90</sup> Deportation could thus equate to granting freedom, effectively opening the door for more human rights abuses by allowing the freed perpetrator to act again. Furthermore, paying damages or being deported with no prospect of jail time undermines any potential for deterring future inhumane acts or attempts to illegally enter the United States because neither provides a real threat. Lastly, deportation to a country with a weak judicial system also opens the door to human rights abuses against perpetrators, as they themselves may fall victim to torture by authorities or receive an unfair trial.<sup>91</sup> While this possibility may provide more of a deterrent effect than freedom, handing someone over to face human rights abuses only exacerbates human rights' subversion and the United States' moral authority problem. Therefore, no matter how the civil-redress process shakes out, it falls short of achieving justice.

### III. GERMANY PROVIDES A BLUEPRINT FOR HOLDING HUMAN RIGHTS VIOLATORS ACCOUNTABLE.

Germany, the nation that once forcibly displaced millions of people,<sup>92</sup> now epitomizes how to effectively hold human rights violators accountable. The foundation for its approach stems from the Rome Statute in addition to the

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87. See *Deportation*, USA GOV, <https://www.usa.gov/deportation> (Apr. 18, 2022) ("The United States may deport foreign nationals who participate in criminal acts, are a threat to public safety, or violate their visa. Those who come to the U.S. without travel documents or with forged documents may be deported quickly without an immigration court hearing."); see, e.g., *US Moves To Deport 150 Bosnians over War Crimes*, BBC NEWS (Mar. 1, 2015), <https://www.bbc.com/news/world-us-canada-31681447> (reporting that the U.S. moved to deport Bosnian war criminals that were involved in "ethnic cleansing" against civilians during the Bosnian Civil War).

88. OPEN SOC'Y JUST. INITIATIVE, *supra* note 63, at 51–55; see, e.g., *Ahmed v. Magan*, No. 10-cv-00342, 2013 WL 4479077, at \*7 (S.D. Ohio Aug. 20, 2013) (awarding \$5 million in compensatory damages and \$10 million in punitive damages for torture under TVPA and ATS); *Samantar v. Yousuf*, No. 04-cv-1360, 2012 WL 3730617, at \*16 (E.D. Va. Aug. 28, 2012) (awarding \$7 million in compensatory damages and \$14 million in punitive damages for torture and extrajudicial killing under TVPA and ATS).

89. See George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 53 (1999) ("[T]he right response to evil is to simply make the offenders suffer as they have . . . made the victims suffer. This is the way most people think of the . . . international criminal court. Its purpose is to ensure that evil is appropriately sanctioned.").

90. *No Safe Haven: Accountability for Human Rights Violators, Part II*, HUM. RTS. WATCH (Oct. 6, 2009), <https://www.hrw.org/news/2009/10/06/no-safe-haven-accountability-human-rights-violators-part-ii>.

91. *Id.*

92. Nick Cumming-Bruce, *Number of People Fleeing Conflict Is Highest Since World War II*, U.N. SAYS, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/world/refugees-record-un.html>.

Geneva Conventions, Genocide Convention, and CAT.<sup>93</sup> As discussed in Part I, while the Geneva Conventions, Genocide Convention, and CAT obligate state parties to enact effective legislation,<sup>94</sup> the Rome Statute elevated matters by also requiring state parties to implement a similar, if not identical, legal framework to the ICC into their respective domestic legal systems.<sup>95</sup> Doing so allows state parties' respective domestic courts to prosecute the same crimes as the ICC so that no one slips through the cracks when the ICC's jurisdictional limitations prevent it from taking a case, thus achieving the envisioned complementary relationship between the ICC and state parties.<sup>96</sup>

#### A. GERMANY'S IMPLEMENTATION OF THE ROME STATUTE WAS INITIALLY DORMANT.

In 2002, two years after Germany ratified the Rome Statute, it passed the *Völkerstrafgesetzbuch* ("VStGB"), also known as the Code of Crimes Against International Law ("CCAIL").<sup>97</sup> The CCAIL resembles the Rome Statute significantly.<sup>98</sup> For example, the CCAIL codifies genocide, crimes against humanity, war crimes, and crimes of aggression; allows for the prosecution of those who order, assist, or are associated in any way with the commission of these core crimes; and grants Germany universal jurisdiction over each crime.<sup>99</sup> Accordingly, the CCAIL appeared like it would be a great weapon against impunity and hold accountable those whom the ICC could not.

Nevertheless, the CCAIL went completely unused in the first seven years—once again demonstrating the difference between law in books and law in practice.<sup>100</sup> Even though complaints were filed, the lack of political backing prevented the Federal Public Prosecutor from using her discretionary power to pursue a prosecution.<sup>101</sup> Additionally, the German government provided neither the financial backing nor the resources to allow the Federal Prosecutor to carry

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93. *Geneva Ratification Statistics*, *supra* note 56 (noting that Germany ratified the Geneva Conventions in 1954); *Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=XVIII-10&chapter=18&clang=_en) (last visited Apr. 1, 2023) (noting that Germany ratified the Rome Statute in 2000); *Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 56 (noting that Germany ratified the Genocide Convention in 1973); *Convention Against Torture*, *supra* note 56 (noting that Germany ratified CAT in 1990).

94. Geneva IV, *supra* note 37, at art. 146; Genocide Convention, *supra* note 37, at arts. V–VI; CAT, *supra* note 37, at art. 5.

95. Birkett, *supra* note 52, at 354.

96. *See id.* at 355.

97. Code of Crimes Against International Law [CCAIL] [International Criminal Code], [https://www.gesetze-im-internet.de/englisch\\_vstgb/](https://www.gesetze-im-internet.de/englisch_vstgb/) (Ger.) [hereinafter CCAIL].

98. Compare Rome Statute, *supra* note 37, with CCAIL, *supra* note 97.

99. *See* CCAIL, *supra* note 97, §§ 1, 6–13 (including torture as a crime against humanity); *see also* HUM. RTS. WATCH, THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN GERMANY 2–3 (2014) ("[A] military or civilian superior's failure to supervise or report one of these crimes is subject to a statute of limitations of five years from the time of commission.").

100. HUM. RTS. WATCH, *supra* note 16, at 52–53.

101. Andreas Schüller, *The Role of National Investigations in the System of International Criminal Justice – Developments in Germany*, 31 SEC. & PEACE 226, 227–28 (2013).

out her work.<sup>102</sup> For instance, in 2006, the lack of support for the CCAIL reached a point where there was only one individual tasked with investigating crimes under the CCAIL.<sup>103</sup>

As a result, the dormant CCAIL became an implicit invitation for human rights violators to enjoy impunity in Germany.<sup>104</sup> But once the German public became aware of various suspected human rights violators living among them, social pressure forced the issue to the forefront.<sup>105</sup> The German Parliament responded by holding a hearing where legal experts, NGOs, and practitioners lobbied the government to reinforce the CCAIL by creating a specialized war crimes unit that would solely handle investigations and prosecutions of the core international crimes.<sup>106</sup> Ultimately, the German government acquiesced and dedicated substantial resources to allow the unit to operate effectively.<sup>107</sup>

#### B. INITIAL FAILURES ILLUSTRATED THE IMPORTANCE OF STRUCTURAL INVESTIGATIONS.

In 2009, the former President of the Democratic Forces for the Liberation of Rwanda (“FDLR”), Ignace Murwanashyaka, and his Vice President, Straton Musoni, were the first human rights violators arrested by the new specialized war crimes unit.<sup>108</sup> Murwanashyaka and Musoni had been living in Germany for many years and were suspected to have coordinated a series of attacks from Germany against thousands of Congolese civilians from 2008 to 2009.<sup>109</sup> In that timespan, the United Nations “documented 1,199 cases of grave human rights violations by FDLR troops, including 384 killings, 135 cases of sexual violence, 521 kidnappings, 38 cases of torture and 5 cases of mutilation.”<sup>110</sup> These acts led to widespread displacement and largely contributed to the hundreds of thousands of Congolese refugees fleeing the region.<sup>111</sup> However, despite these well-documented atrocities, in 2015, the German trial court sentenced Murwanashyaka to only thirteen years’ imprisonment for being a “ringleader in a foreign terrorist organization” and “aiding and abetting four war crimes,” and Musoni to eight years’ imprisonment for his leadership role in a foreign terrorist organization.<sup>112</sup> Moreover, on appeal, the German Federal Court of Justice

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102. *Id.*; HUM. RTS. WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART 66 (2006).

103. HUM. RTS. WATCH, *supra* note 16, at 52–53.

104. *Id.*

105. *Id.* at 54.

106. *Id.*

107. *Id.*

108. EUR. CTR. FOR CONST. & HUM. RTS., UNIVERSAL JURISDICTION IN GERMANY? THE CONGO WAR CRIMES TRIAL: FIRST CASE UNDER THE CODE OF CRIMES AGAINST INTERNATIONAL LAW 10 (2016).

109. *Id.* at 9–11.

110. *Id.* at 9.

111. *Id.*; see *Refugee Data Finder*, *supra* note 20 (indicating over 450,000 Congolese refugees in 2009 and 2010).

112. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108, at 13; Christian González Cabrera & Patrick Kroker, *A Congo War Crimes Decision: What It Means for Universal Jurisdiction Litigation in Germany and*

partially overturned the charges against Murwanashyaka, holding that he was not complicit in the FDLR's war crimes.<sup>113</sup> Therefore, despite what began as an avalanche of war crimes and crimes against humanity charges, the two war criminals were able to avoid every initial charge brought under the CCAIL.

After a lengthy trial, the result was undoubtedly a disappointment for all except the defendants. With the CCAIL and the newly equipped war crimes unit, the German authorities had everything they needed at their disposal. However, the Federal Prosecutor's Office realized early in the trial that, even with the new resources to gather evidence, they still had detrimental evidentiary problems.<sup>114</sup> In turn, the Prosecutor's Office dropped a slew of charges for rape, sexual enslavement, and recruitment of child soldiers, among others, because of a lack of evidence.<sup>115</sup>

Consequently, before the trial even ended, Germany changed its investigatory approach from a targeted approach to a structural one.<sup>116</sup> In other words, instead of arresting an individual and then compiling evidence against that individual—as was the case with Murwanashyaka and Musoni—the unit conducts a general preliminary investigation into countries where serious crimes and widespread displacement are occurring.<sup>117</sup> Then, once significant evidence is compiled and the Federal Prosecutor's Office feels that it should focus part of the investigation on one individual, it proceeds with the targeted approach.<sup>118</sup>

Structural investigations are beneficial because they eliminate a lot of the problems that Germany experienced in the Murwanashyaka and Musoni trial. During the trial, the conflict and violence in the Democratic Republic of the Congo (DRC) was ongoing as the investigation was taking place, which posed grave witness-protection concerns.<sup>119</sup> Accordingly, whether witnesses were flown in from the DRC, Rwanda, or other countries to testify or, alternatively, gave video testimony from secret locations in the DRC, most of their identities were kept anonymous so they would not suffer revenge attacks for testifying.<sup>120</sup> Because of this anonymous witness testimony, the defense could not fully address the credibility and reliability of the evidence.<sup>121</sup> Consequently, to ensure a fair trial, the German trial court held that anonymous testimony alone was insufficient to render a guilty verdict.<sup>122</sup> Moreover, it expended much time and

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*Beyond*, JUST SEC. (Jan. 11, 2019), <https://www.justsecurity.org/62194/congo-war-crimes-decision-means-universal-jurisdiction-litigation-germany/>.

113. Cabrera & Kroker, *supra* note 112.

114. *Id.*

115. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108, at 13.

116. HUM. RTS. WATCH, *supra* note 16, at 60.

117. *Id.* at 51.

118. *See id.* at 60.

119. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108, at 18–19, 23.

120. *Id.* at 19, 23.

121. *Id.* at 24.

122. *Id.* at 14, 24.

money to accumulate witness testimony, fly witnesses in and out of the country, and gather other evidence to supplement the testimony.<sup>123</sup>

A structural investigation significantly detracts from the witness, time, and financial difficulties because refugees who are fleeing these atrocities and are granted asylum in Germany provide some of the necessary evidence.<sup>124</sup> Had the German Federal Prosecutor's Office and the specialized war crimes unit been more proactive and worked with the thousands of Congolese refugees seeking asylum in Germany at that time,<sup>125</sup> they could have inquired whether the Congolese refugees had experienced, witnessed, or known of someone who committed any of the core international crimes—which is now a question on Germany's asylum application<sup>126</sup>—and the evidence would have been compiled in real time. Then, once Murwanashyaka and Musoni were discovered living in Germany, the Prosecutor's Office would have already compiled evidence against them and could have followed up with the refugee-witnesses who mentioned either Murwanashyaka or Musoni on their asylum applications. Further, protecting the witnesses would not have been a concern because the witnesses would be living in Germany on an asylum claim as opposed to returning to the conflict being investigated. Lastly, time and money are not lost on transporting witnesses in and out of their home countries, nor on gathering as much supplementary evidence, because refugees may have evidence on their persons or can provide insight into where to find evidence.

Thus, in the Murwanashyaka and Musoni case, even though universal jurisdiction was not needed because they were charged for their actions on German soil—they had commanded the FDLR via phone, email, and radio from Germany<sup>127</sup>—the trial was a turning point as structural investigations were discovered as the last piece to a successful blueprint. With this new blueprint of universal jurisdiction and a fully supported war crimes unit utilizing a structural investigatory approach, Germany has since opened structural investigations into

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123. *See id.* at 17–20.

124. *See* HUM. RTS. WATCH, *supra* note 16, at 60. The cases of Ibrahim Al F. and Anwar R. illustrate how structural investigations mitigate the witness, time, and financial obstacles. Ibrahim Al F., the leader of a Syrian rebel group that looted neighborhoods, tortured and oversaw torture, and kidnapped civilians, was arrested in 2016, and convicted and sentenced to life imprisonment one year later. *Ibrahim Al F.*, TRIAL INT'L (Aug. 2, 2017), <https://trialinternational.org/latest-post/ibrahim-al-f/>. Anwar R., "the most senior" Syrian government official to be tried for CCAIL crimes, is currently on trial for 4,000 acts of torture, fifty-eight killings, and other crimes against humanity. *Seeking Justice for Syria*, HUM. RTS. WATCH, <https://www.hrw.org/feature/2022/01/06/seeking-justice-for-syria/how-an-alleged-intelligence-officer-was-put-on-trial-in-germany> (last visited Apr. 1, 2023). While the verdict is not expected until 2023, the trial has already gone significantly better than the Murwanashyaka and Musoni trials because multiple Syrian refugees have testified non-anonymously and in person. *Id.*

125. *See Refugee Data Finder*, *supra* note 20 (indicating that over 20,000 Congolese refugees entered Germany from 2007 to 2010).

126. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108, at 19.

127. *Id.* at 12.

Syria, Libya, the DRC, Somalia, and Ukraine, among other countries.<sup>128</sup> And, as of 2020, dozens of human rights violators have been investigated, tried, or convicted of CCAIL crimes.<sup>129</sup> The CCAIL, therefore, demonstrates to other countries how to complement Germany's efforts and the ICC.

#### IV. THE UNITED STATES: IF NOT THE BLUEPRINT, THEN ADOPT AN ALTERNATIVE

The United States should copy Germany's blueprint. It has a strong judicial system capable of handling high-profile cases, a strong economy that can financially support both a war crimes unit and a large influx of refugees, and hundreds of thousands of refugees at the U.S.-Mexico border who have witnessed or experienced countless atrocities in their home countries.<sup>130</sup> However, as demonstrated by the effectively dead Genocide Accountability Act, the Foreign Relations Authorization Act, and Germany's seven-year nonuse of the CCAIL, political backing is a factor that cannot be ignored.<sup>131</sup> This factor has never been more relevant than it is today, as U.S. politics have never been as divided and polarized.<sup>132</sup>

Subpart A addresses why U.S. political views toward universal jurisdiction will continue to prevent the United States from utilizing the universal jurisdiction provided in the Genocide Accountability Act, Foreign Relations Authorization Act, and War Crimes Act, thereby preventing the replication of Germany's blueprint.<sup>133</sup> Then, Subpart B explains why impact jurisdiction—a different form of extraterritorial jurisdiction—is an effective alternative that is attractive to all U.S. political viewpoints and opinions. This Subpart also expounds on why a new specialized war crimes unit that conducts structural investigations is a simple solution for the United States.

##### A. THE UNITED STATES IS UNLIKELY TO UTILIZE UNIVERSAL JURISDICTION ANYTIME SOON.

The United States has long resisted the use of universal jurisdiction for criminal matters. This resistance is exemplified by the country's rocky relationship with the ICC, which, as aforementioned, is empowered by universal jurisdiction and the Rome Statute's call for countries to implement universal

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128. See HUM. RTS. WATCH, *supra* note 16, at 51; see also TRIAL INT'L, UNIVERSAL JURISDICTION, *supra* note 19, at 48.

129. See TRIAL INT'L, UNIVERSAL JURISDICTION, *supra* note 19, at 48, 93–94.

130. John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/>.

131. See *supra* Parts II, III.A.

132. Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TRS. (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide>.

133. Justice for Victims of War Crimes Act, Pub. L. No. 117-351, § 2, 136 Stat. 6265 (2023); Grassley News Release, *supra* note 62.

jurisdiction to complement the ICC's efforts.<sup>134</sup> Despite the United States' significant role in drafting the Rome Statute,<sup>135</sup> it ultimately refused to ratify it.<sup>136</sup> The United States' main concern at the time has remained throughout the years: the United States contests that the ICC has unchecked powers that allow it to reign supreme over state sovereignty.<sup>137</sup> In addition, the United States laments the fact that the ICC Prosecutor can exercise jurisdiction over a non-state party's nationals, without the approval of the UN Security Council, if either the state where the crime occurred or the accused's home state consents.<sup>138</sup> At the 1998 Rome Conference, U.S. Ambassador to the United Nations David Scheffer articulated this sentiment by stating that the United States opposes the "presumption that sixty ratifications of the Treaty, and its entry into force, automatically exposes every individual everywhere in the world to the ICC's jurisdiction."<sup>139</sup>

The United States' ill sentiment toward the ICC's use of universal jurisdiction has also transferred over to other countries attempting to use universal jurisdiction to prosecute Americans. For instance, in 2003, the United States threatened Belgium with various sanctions if it did not dismiss its case against a former U.S. General for war crimes in Iraq.<sup>140</sup> The United States acted similarly toward Spain's investigation of the Bush Administration's involvement in post-9/11 torture and Germany's investigation into former Secretary of Defense Donald Rumsfeld.<sup>141</sup>

While these measures are overkill and the concerns about the ICC and universal jurisdiction are vastly overstated,<sup>142</sup> the views are shared, for the most

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134. See *supra* Part I.

135. See generally David J. Scheffer, *U.S. Policy and the International Criminal Court*, 32 CORNELL INT'L L.J. 529 (1999) (recounting his and his colleagues' work in drafting the Rome Statute); Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 1, 15–16 (2000).

136. John B. Bellinger, *The United States and the International Criminal Court: Where We've Been and Where We're Going*, U.S. DEP'T OF STATE (Apr. 25, 2008), <https://2001-2009.state.gov/s/l/r/rls/104053.htm>.

137. *Id.*

138. *Id.*

139. Scheffer, *supra* note 135, at 533–34. The Ambassador also explained that the United States was wary of the ICC Prosecutor's unchecked power and the negative impacts it could have on U.S. soldiers deployed to carry out state-sponsored missions and preserve international peace. Bellinger, *supra* note 136.

140. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 934 (2009).

141. See Beth Van Schaack, *Universal Jurisdiction Cases Involving U.S. Defendants*, JUST SEC. (Dec. 17, 2013), <https://www.justsecurity.org/4707/universal-jurisdiction-cases-involving-u-s-defendants/>; *Spanish Judge Drops Case Against Bush Lawyers*, CTR. FOR CONST. RTS. (Apr. 14, 2011), <https://ccrjustice.org/home/press-center/press-releases/spanish-judge-drops-case-against-bush-lawyers>. Subsequently, Belgium and Spain amended their criminal codes to restrict universal jurisdiction, which has caused both countries to relinquish their role as leaders in holding international criminals accountable. See Langer & Eason, *supra* note 18, at 786.

142. See, e.g., Reeves, *supra* note 135, at 15–18, 30 (explaining how the Rome Statute and ICC are constitutional and the narrow definitions for the crimes prevent those who are not true human rights violators from being punished); Stuart Ford, *The Biden Administration Should Engage with the ICC – the Evidence Shows That It Saves Lives*, JUST SEC. (Jan. 28, 2021), <https://www.justsecurity.org/74337/the-biden-administration->

part, by both political parties. During the first four years of Bush's presidency, the United States threatened to withdraw financial aid to the ICC and other nations if universal jurisdiction was used against an American.<sup>143</sup> Then, from the beginning of Bush's second term and into the Obama Administration, the outright opposition turned into a selective relationship depending on whether U.S. personnel or interests were at stake. For example, soon after Bush's second inauguration, the United States did not veto the UN Security Council Resolution to refer the Darfur humanitarian crisis to the ICC because the UN Security Council reached a compromise and allowed the United States jurisdiction over its nationals in Darfur.<sup>144</sup> Lastly, and most recently, the Trump Administration reverted back and acted with great animosity toward anyone threatening U.S. interests, highlighted by the financial sanctions he imposed on ICC officials and their families in retaliation for investigating crimes in Afghanistan and Palestine.<sup>145</sup>

Therefore, although Biden has since revoked the sanctions,<sup>146</sup> given that neither political party has ever fully respected the use of universal jurisdiction for criminal matters, it seems unlikely that Biden will significantly change course and fully accept universal jurisdiction for criminal matters. In fact, after the Biden Administration revoked the ICC sanctions, Secretary of State Anthony Blinken reiterated that the United States is only willing to engage with the ICC and other countries when it is within "U.S. interests" to do so.<sup>147</sup> Accordingly, even though the Biden Administration may be less hostile than the Trump Administration toward universal jurisdiction, U.S. interests and U.S. sovereignty will still supersede all else.

Ultimately, the U.S. interest of ending impunity for human rights violators is hamstrung by those responsible for the post-9/11 torture and abuse of detainees that took place at Abu Ghraib, Guantánamo Bay, and other sites that

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should-engage-with-the-icc-the-evidence-shows-that-it-saves-lives/ (explaining that the ICC is a court of complementarity and thus only steps in when states fail to act themselves).

143. For example, in 2002, Congress passed the American Servicemembers' Protection Act, which forbids the U.S. government from financially supporting the ICC if it attempts to prosecute a U.S. national. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 899 (codified as amended at 22 U.S.C. §§ 7421–7425, 7427–7433).

144. Stompor, *supra* note 17, at 115. Another example of this selective relationship is when President Obama issued a memorandum stating that U.S. military deployed to Mali would not be at risk of criminal prosecution by the ICC because the U.S. made an agreement with Mali. Mark Kersten, *Unfortunate but Unsurprising? Obama Undermines the ICC*, JUST. IN CONFLICT (Feb. 4, 2014), <https://justiceinconflict.org/2014/02/04/unfortunate-but-unsurprising-obama-undermines-the-icc/>.

145. Blocking Property of Certain Persons Associated with the International Criminal Court, Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020).

146. *Id.* (indicating U.S. support of ICC's investigation of the atrocities committed in Darfur in the early 2000s); see Christopher Hale, *U.S.-ICC Relations Under a Biden Administration: Room To Be Bold*, JUST SEC. (Jan. 22, 2021), <https://www.justsecurity.org/74302/u-s-icc-relations-under-a-biden-administration-room-to-be-bold/> (indicating U.S. support of the referral of Libya to the ICC).

147. Claus Kreß, *A Plea for True U.S. Leadership in International Criminal Justice*, LIEBER INST. (May 7, 2021), <https://lieber-westpoint.edu/plea-true-u-s-leadership-international-criminal-justice/>.

are still running.<sup>148</sup> The United States has admitted to the torture and has investigated what transpired,<sup>149</sup> but, to date, it has remained unwilling to prosecute those responsible.<sup>150</sup> This is unfortunate because the ultimate form of leading by example would be to prosecute those involved, as many have called upon the United States to do so.<sup>151</sup> Prosecuting its own officials would also be in the United States' best interest because such a historic and momentous act would send shockwaves across the globe and restore the United States as the global leader for human rights. Further, such an act would put all human rights violators on notice that the United States is not the place to go if they wish to hideout and enjoy impunity. And, lastly, it would give back the United States its voice to influence other countries to do the same, thus moving toward a world where human rights violators have no safe hideout.<sup>152</sup>

Admittedly, such a bold act is not realistic. If neither Obama nor Trump sought to prosecute high-ranking officials such as former Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, and even President George W. Bush and Vice President Dick Cheney, the interest of protecting the United States' own officials appears to outweigh the interest of ending impunity at all costs, no matter the administration. Furthermore, if this remains the U.S. government's stance, the United States will *not* utilize universal jurisdiction for criminal matters because if it did, it would encroach on other countries' sovereignty. This would not only open the door for other countries to retaliate and prosecute U.S. nationals, but it would subvert the Biden Administration's goal to lead by example and reclaim the United States' moral authority. The world would also view the United States as continuing down the same road of exceptionalism and hypocrisy toward human rights that has been its label since 9/11.<sup>153</sup>

#### B. IMPACT JURISDICTION AND STRUCTURAL INVESTIGATIONS: AN ALTERNATIVE THAT CATERS TO ALL

Though universal jurisdiction is unrealistic, Germany's blueprint can still be implemented to a similar degree. However, given the state of U.S. politics and the polarization that exists between the two parties,<sup>154</sup> the solution must cater

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148. HUM. RTS. WATCH, *supra* note 1.

149. Roberta Rampton & Steve Holland, *Obama Says That After 9/11, 'We Tortured Some Folks,'* REUTERS (Aug. 1, 2014, 12:47 PM), <https://www.reuters.com/article/us-usa-cia-obama/obama-says-that-after-9-11-we-tortured-some-folks-idUSKBN0G14YY20140801>.

150. *Id.*; Ford, *supra* note 142.

151. *See generally* Letta Tayler & Elisa Epstein, *Legacy of the "Dark Side,"* HUM. RTS. WATCH (Jan. 9, 2022, 12:01 AM), <https://www.hrw.org/news/2022/01/09/legacy-dark-side>.

152. *See The Power of America's Example: The Biden Plan for Leading the Democratic World To Meet the Challenges of the 21st Century*, BIDEN HARRIS, <https://joebiden.com/americanleadership/#> (last visited Apr. 1, 2023).

153. *Id.*; *see* William V. Spanos, *American Exceptionalism in the Post-9/11 Era: The Myth and the Reality*, 21 SYMPLOKE 291, 303–04 (2013).

154. Dimock & Wike, *supra* note 132.

to all ideologies. Otherwise, Congress will not pass it or, if implemented by executive order, it will get revoked by future administrations. As it pertains to the issue of sovereignty, the solution must not only support U.S. interests to receive support from those whose views align with the Obama and Bush Administrations, but must also put “America first” in order to gain support from those whose views align with Trump.<sup>155</sup> Additionally, given that Germany’s blueprint involves the reception of refugees, the solution must cater to those who believe that increased border security or a closed border is the only solution needed to keep out terrorists, human rights violators, and other dangerous individuals. The solution that falls in line with each of these viewpoints is impact jurisdiction coupled with a specialized war crimes unit utilizing structural investigations.

### 1. *Impact Jurisdiction and the “Court of Last Resort” Provisions*

Impact jurisdiction is a variant of extraterritorial jurisdiction that is more constrained than universal jurisdiction. Under impact jurisdiction, when a crime has a direct or indirect negative affect on a country that is otherwise not linked to the crime, that country has jurisdiction to prosecute.<sup>156</sup> In the context of core international crimes, if refugees fleeing atrocities in their home country are granted asylum, that accepting country has jurisdiction to prosecute the human rights violators who caused their flight because there has been a negative “impact” on that country.<sup>157</sup> This impact simply comes from the asylum seekers’ admission. The country of asylum must provide resources and financial assistance to accepted asylum seekers so they can fully resettle.<sup>158</sup> Though in the long run refugees end up providing substantial benefits to the receiving country’s economy,<sup>159</sup> the initial economic burden creates a “negative impact” on the economy that creates a nexus and invokes impact jurisdiction.

By relying on impact jurisdiction, the United States is not opening itself up to retaliation as a result of infringing on another nation’s sovereignty because the United States itself is “injured” by the human rights violation. Under the U.S. Constitution, federal courts may only hear a case if (1) there is an injury in fact,

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155. See, e.g., Bellinger, *supra* note 136. Bellinger, the Legal Adviser for the Department of State in the Bush Administration, explained that the United States was committed to developing a “practical approach” for working with the ICC. *Id.* He emphasized that the United States and ICC have the same goal—to end impunity for human rights violators and achieve international justice. *Id.* Presidents Obama and Bush refused to prosecute those who authorized the torture at Guantánamo and Abu Ghraib. Luis Moreno Ocampo, *Trump’s Rationale for Attacking the ICC—Continuity with Bush and Obama’s War on Terrorism*, JUST SEC. (June 25, 2020), <https://www.justsecurity.org/71039/trumps-rationale-for-attacking-the-icc-continuity-with-bush-and-obamas-war-on-terrorism/>; see also Donald J. Trump, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/election2020/candidate-tracker/donald-j.-trump> (last visited Apr. 1, 2023).

156. See Rapp, *supra* note 23.

157. *Id.*

158. William N. Evans & Daniel Fitzgerald, *The Economic and Social Outcomes of Refugees in the United States: Evidence from the ACS* 25, 33 (Nat’l Bureau of Econ. Rsch., Working Paper No. 23498, 2017).

159. Amy Maxmen, *Migrants and Refugees Are Good for Economies*, NATURE, <https://www.nature.com/articles/d41586-018-05507-0> (June 21, 2018).

(2) the injury has a causal connection to the action at issue, and (3) the injury is redressable.<sup>160</sup> An economic injury is one of many injuries that satisfies the first prong of the federal standing requirement.<sup>161</sup> Thus, even if the physical injury (the human rights violation) did not occur in the United States and a U.S. citizen was not the victim or the perpetrator, there is still a nexus between the United States and the crime: the “injury” to the U.S. economy.

Moreover, another jurisdictional principle called the “objective principle of territorial jurisdiction,” which is nearly identical to “impact jurisdiction,” has been utilized for almost a century now.<sup>162</sup> Under the objective principle of territorial jurisdiction, a U.S. federal court has jurisdiction when a criminal act committed outside the United States is “intended to have effect in the United States.”<sup>163</sup> Such jurisdiction has been critical for prosecuting drug smugglers that are caught by the U.S. Coast Guard before entering U.S. waters.<sup>164</sup> For example, in *United States v. Postal*, the Fifth Circuit held that jurisdiction was appropriate over defendants who were arrested on a ship outside of U.S. waters for conspiring to import marijuana into the United States with the intent to sell.<sup>165</sup> Accordingly, for the “objective principle of territorial jurisdiction,” the “intent” to have a negative effect establishes the nexus between the drug smugglers and the United States.

The nexus is the key factor that caters to politicians who oppose universal jurisdiction for sovereignty reasons. Moreover, the fact that the objective principle of territorial jurisdiction necessitates such an attenuated nexus and has been used for almost a century indicates that, so long as there is a nexus, the sovereignty concerns are quelled. With the objective principle of territorial jurisdiction, U.S. sovereignty is infringed by those who plot to carry out criminal acts in the United States. With impact jurisdiction, U.S. sovereignty is infringed by human rights violators who cause refugees to seek asylum in the United States and negatively affect the U.S. economy. If a “plot” is sufficient, then surely an “economic injury” will satisfy those whose main concern is sovereignty and the potential for retaliation that comes with using universal jurisdiction—a principle that does not require a nexus.

To further satisfy lawmakers who require a nexus for sovereignty reasons, under this solution, impact jurisdiction would be accompanied by the same “court of last resort” provision that restricts the ICC and protects the United States’ and other nations’ sovereignty. Under this provision, the United States would only be able to prosecute human rights violators if their home country is

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160. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); see U.S. CONST. art. III, § 2.

161. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 432 (1998).

162. *United States v. Postal*, 589 F.2d 862, 885 (5th Cir. 1979) (citing *Ford v. United States*, 273 U.S. 593, 620 (1927)).

163. *Id.*

164. Stephen E. Chelberg, *The Contours of Extraterritorial Jurisdiction in Drug Smuggling Cases*, 4 MICH. J. INT’L L. 43, 46 (1983).

165. *Postal*, 589 F.3d at 864.

unable or unwilling to prosecute the individuals themselves. Countries that do not have an adequate judicial system to prosecute high-profile crimes still value their sovereignty and do not want other countries to engage in “judicial imperialism.”<sup>166</sup> Thus, the United States would only take on a complementary role and would not run the risk of other nations encroaching on its sovereignty in retaliation for infringing on theirs.

As for catering to U.S. interests, impact jurisdiction also puts U.S. interests first because the immigration crisis and border security are top priorities for Americans.<sup>167</sup> Many Americans have argued that securing our borders by increasing the number of border patrol agents or building a wall is the key to achieving both interests.<sup>168</sup> However, the number of unauthorized immigrants—nonlegal residents—living in the United States has remained relatively unchanged over the past two decades, at about eleven million persons.<sup>169</sup> While this may seem like a success, there are also hundreds of thousands of unauthorized immigrants deported each year.<sup>170</sup> Therefore, for every unauthorized immigrant who leaves the United States, another one enters.

Further, these numbers can be expected to rise as the number of asylum seekers continues to rise because what is effective in deterring migrants seeking economic opportunities is likely ineffective for those fleeing violence and persecution.<sup>171</sup> Increased border security and harsher consequences, such as felony prosecutions, have proven effective to deter those attempting illegal entry for economic reasons because these consequences are the worst-case scenario for such migrants.<sup>172</sup> For asylum seekers, on the other hand, the cost-benefit analysis is very different. They are willing to assume a much higher risk because nothing can be worse than the atrocities occurring in their home country.<sup>173</sup>

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166. U.N. GAOR, 76 Sess., 15th mtg. at 4, U.N. Doc. GA/L/3642 (Oct. 22, 2021).

167. *Public's Top Priority for 2022: Strengthening the Nation's Economy*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/politics/2022/02/16/publics-top-priority-for-2022-strengthening-the-nations-economy/>; J. Baxter Oliphant & Andy Cerda, *Republicans and Democrats Have Different Top Priorities for U.S. Immigration Policy*, PEW RSCH. CTR. (Sept. 8, 2022), <https://www.pewresearch.org/fact-tank/2022/09/08/republicans-and-democrats-have-different-top-priorities-for-u-s-immigration-policy/>.

168. See Loretta Sanchez, *Sanchez: Massive Effort To Secure Borders Has Spanned Two Presidents*, ROLL CALL (Mar. 12, 2013, 6:07 PM), <https://rollcall.com/2013/03/12/sanchez-massive-effort-to-secure-borders-has-spanned-two-presidents/>; Jessica Glenza, *Trump's Border Wall Breached by Smugglers over 3,000 Times, Records Reveal*, GUARDIAN (Mar. 3, 2022, 10:33 EST), <https://www.theguardian.com/us-news/2022/mar/03/trump-border-wall-breached-smugglers>.

169. BRYAN BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JAN. 2015–JAN. 2018, at 1 (2021).

170. *Deportations/Removals*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/topics/deportationsremovals> (last visited Apr. 1, 2023); U.S. DEP'T OF HOMELAND SEC., 2019 YEARBOOK OF IMMIGRATION STATISTICS 103 (2020), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook\\_immigration\\_statistics\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook_immigration_statistics_2019.pdf).

171. See *Global Trends Forced Displacement in 2020*, UNHCR, <https://www.unhcr.org/flagship-reports/globaltrends/> (last visited Apr. 1, 2023).

172. Edward Alden, *Is Border Enforcement Effective? What We Know and What It Means*, 5 J. ON MIGRATION & HUM. SEC. 481, 486 (2017).

173. *Id.* at 487.

Accordingly, it does not matter what border enforcement tactics are employed; illegal immigration will still be present unless other solutions are implemented.

Lastly, impact jurisdiction should be attractive to those who put “America first” and do not support accepting more migrants who, according to President Trump, take American jobs and drain public benefits.<sup>174</sup> Given that increased border security can only do so much, those who put America first and do not support accepting more migrants should support impact jurisdiction because it not only (1) allows the prosecution of human rights violators illegally entering the country and (2) provides a deterrent effect for human rights violators attempting entry, but also (3) deters future human rights violations, thus decreasing the number of migrants who wish to leave their home countries for the United States.

## 2. *Incorporating Structural Investigations Is a Simple but Necessary Solution.*

Impact jurisdiction is necessary to get federal prosecutors to act, but without a successful investigation, there is no case to begin with. Therefore, if the United States truly wants to end impunity for human rights violators, it should refocus its current war crimes unit to carry out structural investigations.<sup>175</sup>

The Human Rights Violators and War Crimes Center (“HRVWCC”), a division in U.S. Immigration and Customs Enforcement (ICE), is the current U.S. investigatory unit charged with bringing human rights violators to justice.<sup>176</sup> Unfortunately, the unit has proven inadequate. In 2009, there were over 1,000 human rights violators suspected to be living in the United States.<sup>177</sup> In 2018, the Department of Homeland Security (DHS) had approximately 2,000 open cases on human rights violators suspected to be living in the United States.<sup>178</sup> Then, in 2022, ICE reported that they were still pursuing thousands of leads of suspected violators living in the United States.<sup>179</sup> In essence, the effect of the HRVWCC appears to be minimal, as thousands of human rights violators continue to use the United States as a safe haven.

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174. Sally Kohn, *Nothing Donald Trump Says on Immigration Holds Up*, TIME (June 29, 2016, 10:04 AM), <https://time.com/4386240/donald-trump-immigration-arguments/>.

175. See *supra* Part III.B; HUM. RTS. WATCH, *supra* note 16, at 45.

176. *Human Rights Violators & War Crimes Center*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/partnerships-centers/hrvwcc> (May 6, 2021).

177. *Durbin: Human Rights Violators Still Finding Safe Haven in America*, DICK DURBIN (Oct. 6, 2009), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-human-rights-violators-still-finding-safe-haven-in-america>.

178. Prue Clarke, *'Jungle Jabbah' Was Accused of Cannibalism and Other Horrors in Liberia. How a U.S. Court Brought Him to Justice*, THE WASH. POST (Apr. 14, 2018, 07:08 PM), [https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/world/national-security/jungle-jabbah-was-accused-of-cannibalism-and-other-horrors-in-liberia-how-a-us-court-brought-him-to-justice/2018/04/14/51ddc97a-3e5f-11e8-974f-aacd97698cef_story.html).

179. See *Seeking Justice for Victims Around the World*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 4, 2022), <https://www.ice.gov/features/seeking-justice-victims-around-world>.

The problem with the HRVWCC is its overall strategy. ICE formed the HRVWCC to focus on the “identification, investigation, prosecution, and removal of individuals who have committed human rights violations.”<sup>180</sup> In addition, it is tasked with identifying human rights violators outside the United States and flagging them to prevent their entry.<sup>181</sup> Thus, the HRVWCC engages in a targeted investigative approach as opposed to a structural investigative approach.<sup>182</sup>

Given that the United States has not been conducting structural investigations, the targeted approach is necessary for the human rights violators already in the United States because apprehending these people is the primary concern once the HRVWCC discovers their identities and whereabouts. These human rights violators fall into the same category as Murwanashyaka and Musoni, where it was the discovery that Murwanashyaka and Musoni were living in Germany that caused authorities to act.<sup>183</sup> Because German authorities had not already conducted structural investigations, they were forced to work backwards through a targeted approach and gather evidence after Murwanashyaka and Musoni’s arrest.<sup>184</sup> Unfortunately, the United States is forced to do the same thing. For the HRVWCC, which is only supported by seventy-four people, this is a tall task that will likely produce similarly unsuccessful results and allow human rights violators to slip through the cracks.<sup>185</sup>

The targeted approach is not necessary, however, for the human rights violators living outside the United States, given that they are not already using the United States as a safe haven. Fortunately, it is an easy transition to a structural investigation strategy because the HRVWCC already has a unit in place, the Human Rights Target Tracking Team (“HTR3”), that is responsible for the work outside the United States.<sup>186</sup> The HTR3 just needs to shift its strategy and investigate the regions where refugees are fleeing atrocities. As for the refugees at the U.S.-Mexico border, the majority are from Haiti, El Salvador, Nicaragua, and Venezuela.<sup>187</sup> Accordingly, the HTR3 simply needs to open an investigation into each country and add a question to the asylum application inquiring whether asylum seekers have witnessed or experienced a human rights violation.<sup>188</sup> If the asylum seeker answers “yes” to this question, an interview

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180. *Human Rights Violators & War Crimes Center*, *supra* note 176.

181. *Id.*

182. *See supra* Part III.B. (explaining targeted versus investigatory approach and the benefits of structural investigations); *see also* HUM. RTS. WATCH, *supra* note 16, at 4.

183. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108 at 9.

184. HUM. RTS. WATCH, *supra* note 16, at 4.

185. *Human Rights Violators & War Crimes Center*, *supra* note 176.

186. *Id.*

187. *See Refugee Data Finder*, *supra* note 20.

188. *See generally* I-589, *Application for Asylum and for Withholding of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.unhcr.org/en-ie/5859a14c4.pdf> (last visited Apr. 1, 2023) (providing no question

can follow, and this information is shared with the team on the ground in whichever region the asylum seeker is fleeing to facilitate the team's investigation. These simple steps would go a long way in helping solve the problems of (1) gathering evidence after time has passed since the crime was committed, and (2) locating witnesses and evidence in foreign countries, both of which ICE recently reported as impediments to HRVWCC's success.<sup>189</sup> Further, simply adding a question to the asylum application and beginning structural investigations will put all human rights violators in Central and South America on notice, which in turn would help prevent their attempted entry into the United States—a priority for those of every political viewpoint.

Lastly, there are other examples aside from Germany, like France's war crimes unit or the Netherlands' war crimes unit, that the United States can evaluate. In fact, in 2014, Human Rights Watch, an international organization that promotes the advancement of human rights recognition, published a report that documented the specialized war crimes units in the Netherlands, France, and Germany and explained what was working and what was not.<sup>190</sup> The United States could see immediate results by looking to these examples and avoiding the mistakes other countries have made thus far. For example, in the Murwanashyaka and Musoni trial, the German war crimes unit did not disseminate the updates of the trial to the DRC.<sup>191</sup> This kept the region in the dark, which undermined the sense of justice that victims were seeking and substantially subtracted from the deterrent effect the trial updates could have had on FDLR members. The United States would be able to avoid making such a mistake, allowing the re-strategized HRT3 to make an even more substantial impact.

#### CONCLUSION

The United States' diminished leadership role in the fight for human rights has coincided with the largest refugee crisis since World War II. This refugee crisis has landed at the doorstep of the United States at the U.S.-Mexico border. To resolve the refugee crisis, the Biden Administration's plan has focused on enhancing the health, education, and governance sectors in struggling Central American countries and addressing corruption and human smuggling problems through the formation of task forces.

Notwithstanding the value of the current plan, it does not attack the primary root cause of the refugee crisis—conflict, persecution, and violence. Accordingly, this Note argues that the Biden Administration should fill that gap by pursuing legislation and altering its investigatory strategy abroad to prosecute

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regarding whether asylum seekers have witnessed or experienced atrocities or whether they have evidence on their person or phones about atrocities).

189. *Id.* at 11.

190. See generally HUM. RTS. WATCH, *supra* note 16.

191. EUR. CTR. FOR CONST. & HUM. RTS., *supra* note 108, at 27.

the human rights violators igniting the refugee crisis. Not only does this hold human rights violators accountable and provide justice for victims, but it also helps accomplish the Biden Administration's other goal of reestablishing the United States' leadership role and overall moral authority on the global stage.

The foremost legislative and investigatory strategy that this Note argues for is universal jurisdiction combined with a war crimes unit that carries out structural investigations. Germany has had tremendous success with these two components over the past decade, and the United States—a country with a strong judicial system and the infrastructure to accept an influx of refugees—can easily have the same success. However, as the past three presidential Administrations have demonstrated with their combative, undermining actions toward the ICC and other countries' use of universal jurisdiction, the United States' prioritization of its own sovereignty and other interests will likely continue to prevent it from utilizing universal jurisdiction and thus adopting Germany's blueprint wholesale.

Therefore, if these sentiments remain, this Note alternatively proposes a similar, more realistic approach that the United States can take: (1) amend each core international crime statute, replacing the universal jurisdiction principle with impact jurisdiction and a "court of last resort" provision, and (2) repurpose the HRT3 unit to carry out structural investigations. This solution caters to all U.S. interests and political viewpoints and reclaims the United States' leadership role in the fight for human rights as it holds perpetrators accountable and provides justice for victims. Moreover, this solution will also put human rights violators on notice, thereby deterring them from attempting entry into the United States. And in reclaiming its leadership role, the United States will be able to influence other countries to act similarly, thus hopefully deterring future human rights violations in the first place, when human rights violators know they have nowhere to seek safe haven.

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