

PROSECUTING EXTRATERRITORIAL ATROCITY CRIMES UNDER STATE LAW: AN ANALYSIS OF THE PUERTO RICO MODEL

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ABSTRACT

Ideally, justice for mass atrocities would be meted out by national courts in the jurisdiction in which the crimes were committed. Due to political and practical constraints, however, this task is sometimes delegated to international tribunals and foreign courts that are able and willing to prosecute such cases. In the United States, human rights litigators have recourse to many federal statutes establishing civil and criminal penalties for war crimes, crimes against humanity, and genocide. Academics and practitioners have argued in favor of three main avenues of international justice in U.S. courts: (1) federal tort claims, (2) federal criminal prosecution, and (3) state tort claims. This article argues that a fourth must be opened: (4) state criminal prosecutions. Whereas Congress is a body of enumerated powers, state legislatures may prescribe criminal law subject only to the limitations set forth by the Constitution. States are empowered to prescribe criminal sanctions where Congress has not or cannot. Where the scope of existing statutes is too limited to fully capture the unconscionable injustices faced by survivors, state criminal law could fill the void.

This Article discusses the viability of state criminal prosecutions as a domestic model of international justice by analyzing the only statute that currently permits such proceedings: Articles 299 and 300 of the Puerto Rico Penal Code, which respectively codify genocide and crimes against humanity. Part I defines four typologies of justice for atrocities available within the U.S. legal system and makes the case for pursuing criminal justice in state courts. Part II builds on these typologies to survey the current state of U.S. atrocity law, and then introduces Puerto Rico's own atrocity crimes legislation. Part III analyzes the Puerto Rico statute, with an emphasis on its crimes against humanity provision. Part IV addresses several challenges that state atrocity crimes statutes might face.

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INTRODUCTION

Extraterritorial human rights litigation in the United States is generally limited to the civil jurisdiction conferred by the Alien Tort Statute (ATS),¹ the Torture Victim Protection Act (TVPA),² the Foreign Sovereign Immunities Act (FSIA),³ and state law.⁴ The rediscovery of the ATS as an accountability tool for human rights abuses ushered in an unprecedented series of lawsuits filed by U.S. and non-U.S. residents alleging war crimes, genocide, and crimes against humanity (CAH).⁵ These suits represented an important alternative to criminal trials, the viability of which is curtailed by reluctant prosecutors with narrow jurisdiction.⁶ Although federal law proscribes an array of atrocity crimes,⁷ these statutes are underutilized. Prosecutions for extraterritorial cases are more common for terrorism than for human rights abuses.⁸ Civil complaints, however, are no substitute for criminal proceedings. They potentially subject survivors and their families to retraumatization without the benefit of determining the historical record beyond reasonable doubt. Regardless, the Supreme Court's decisions in *Kiobel v. Royal Dutch Petroleum Co.*⁹ and *Jesner v. Arab Bank, PLC.*¹⁰ point to increased judicial reluctance to assert jurisdiction over ATS cases.

In response to the difficulties associated with civil suits and criminal prosecutions in federal court, policymakers should penalize atrocity crimes at the state level. The Puerto Rican legislature has done exactly that. Articles 299 and 300 of Title 5 (“Crimes Against Humanity”) of the Penal Code of

1. Alien Tort Statute, 28 U.S.C. § 1350 (2017).

2. *Id.* § 1350 note (Torture Victim Protection).

3. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611 (2017).

4. See Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 10 (2013) (recognizing that state courts can hear extraterritorial human rights claims).

5. See Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1487 (2014) (explaining that dozens of ATS claims have been litigated since 1980).

6. See Nicholas P. Weiss, Note, *Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals*, 45 CASE W. RES. J. INT'L L. 579, 594 (2012) (“Ensuring that war criminals stand trial for their substantive crimes is often incredibly difficult.”).

7. “Atrocity crimes” generally refer to genocide, CAH, war crimes, torture, and other crimes of similar magnitude. David Scheffer, *Genocide and Atrocity Crimes*, 3 GENOCIDE STUD. & PREVENTION: INT'L J. 237, 238–39 (2004).

8. See Beth Van Schaack & Zarko Perovic, *The Prevalence of “Present-In” Jurisdiction*, in 107 PROCEEDINGS ANN. MEETING 237, 241 (AM. SOC'Y OF INT'L L.) (2013) (stating that universal jurisdiction in the U.S. judicial system is most commonly used to prosecute terrorism).

9. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013).

10. *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1390 (2018).

Puerto Rico (Penal Code) criminalize genocide and CAH respectively,¹¹ regardless of where these crimes are committed¹² and without statutes of limitations.¹³ These provisions are unique in that no U.S. jurisdiction had previously criminalized atrocity crimes, and federal law still provides no punishment for CAH.¹⁴ Even more curiously, the Penal Code's definition of CAH only partially mirrors the consensus definition adopted by the International Criminal Court (ICC).¹⁵ It omits the "State or organizational policy"¹⁶ requirement that is present in the Rome Statute of the International

11. P.R. LAWS ANN. tit. 33, §§ 5401–02 (2012). The Spanish-language version of this Title, "Delitos Contra la Humanidad," should not be confused with "Crímenes de lesa humanidad," codified at Article 300. "Delitos contra la humanidad" translates to "offenses against humanity," whereas "crímenes de lesa humanidad" translates to "crimes against humanity." The former term is a broader category that may encompass CAH. The prohibitions against genocide and crimes against humanity were originally codified under the 2004 Penal Code as Articles 305 and 306. They were respectively renumbered as Articles 299 and 300 after the Puerto Rican Legislative Assembly revised the Penal Code in 2012. This Article refers to each provision by the article number designated by the 2012 Penal Code, which remains in force as of the date of this article's publication. Translations are provided by the author.

12. *See id.* § 5003(d) (stating that the criminal act does not need to occur within Puerto Rico's borders for a person to be subject to it).

13. *See id.* § 5133 (listing the crimes that are not subject to any statute of limitations).

14. *See Pursuing Accountability for Atrocities: Hearing Before the Tom Lantos Human Rights Commission, United States House of Representatives, 116th Cong. 4* (2019) (statement of Professor Beth Van Schaack, Leah Kaplan Visiting Professor of Human Rights Acting Director, Human Rights & Conflict Resolution Clinic Stanford Law School) (introducing the fact that no federal laws criminalize CAH).

15. *Compare* P.R. LAWS ANN. tit. 33, § 5402(1) (2012) (excluding the "State or organizational policy" requirement for crimes against humanity and including human trafficking as an act that constitutes a CAH "when committed as part of a widespread or systematic attack against a civilian population"), *with* Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (requiring an act to be committed as part of "State or organizational policy" when committed as part of a widespread or systematic attack *directed* against a civilian population to qualify as a CAH and excluding human trafficking as an act that could constitute a CAH *per se*).

16. *See supra* note 15.

Criminal Court (Rome Statute)¹⁷ and includes human trafficking as a constituent act.¹⁸

This Article focuses its analysis on the history and text of Puerto Rico's CAH legislation to determine whether Puerto Rico's "state-level" criminalization model is an effective accountability tool for the United States. Part I defines four typologies of atrocity responses that are available within the American legal system: (1) federal criminalization, (2) federal civil litigation, (3) state civil litigation, and (4) state criminalization. The first two categories are "typical" tools within the human rights litigators' arsenal, while some commentators and practitioners advocate for greater use of the third. This part argues, however, that the fourth typology—state criminalization—offers unexplored normative and practical advantages over its three counterparts. First, dressing human rights violations as a breach of contract between plaintiff and tortfeasor ignores the broader community's right to seek condemnation of such conduct. Second, a decentralized approach allows willing state governments to fill the accountability void left by federal law. Lastly, expanding the reach of atrocity law to state courts constitutes a natural exercise of traditional state power not reserved by the federal branches.

Part II provides an overview of the shortcomings within the federal typologies of atrocity response (referred to herein as "federal atrocity law") and briefly maps the primary responses to these failings: civil suits brought under federal statute.¹⁹ This part then introduces Title 5 and related provisions of the Puerto Rico Penal Code—the only example of state

17. The Rome Statute defines a CAH as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Rome Statute, *supra* note 15, art. 7(1)(a)–(k). The Rome Statute further defines an "[a]ttack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." *Id.* art. 7(2)(a).

18. P.R. LAWS ANN. tit. 33, § 5402(1)(d) (2012).

19. While the "state civil litigation" typology is a crucial component of atrocity law litigation generally, it has already been thoroughly explored by other authors, and understanding its various dimensions is not critical to this Article's central thesis. See Seth Davis & Christopher Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 400 n.11 (2018) (citing authors who have discussed human rights claims based on state and foreign tort law).

criminalization in the U.S. atrocity law context—as well as the historical and legal framework under which these provisions arose.

Part III offers a textual analysis of Title 5 of the Penal Code that focuses on Article 300's prohibition of CAH. It examines how the Article challenges traditional understandings of what constitutes an "attack directed against any civilian population,"²⁰ and then expands this discussion by analyzing how Article 300 interacts with the Penal Code's independent definition of human trafficking.

Part IV addresses four potential challenges to Puerto Rico's atrocity crimes statute. The first three are relevant to any stateside attempt to follow the island's footsteps. The first category of challenges arises from various preemption concerns. This part contends that express, conflict, and object preemption do not currently limit a state's right to codify atrocity crimes. The second group of challenges is rooted in the possibility that field preemption or the theory of dormant foreign affairs preemption (DFAP) forestall state action on matters involving the federal government's foreign affairs powers, regardless of any federal legislation or policy on the matter. But even if DFAP exists, it cannot preempt the proper exercise of traditional state police powers. Moreover, this part rejects the assumption that the codification of atrocity crimes necessarily falls within the ambit of foreign affairs, even when such crimes are committed extraterritorially. Rather, these criminalization efforts are better conceptualized as the exercise of a legitimate state interest in defining criminal conduct.

A third challenge, based on the extent to which a state may apply its criminal laws to extraterritorial conduct, is not well understood. Applying state criminal law extraterritorially raises two substantial questions of states' prescriptive jurisdiction: (1) whether state sovereignty permits states to punish conduct that occurs beyond their borders, and (2) how the Fourteenth Amendment's Due Process Clause limits this power. This part suggests that states are equally (if not more) empowered to legislate extraterritorially than the federal government, but may not violate an individual's right to fair notice of the law. Because crimes such as genocide and CAH are universally condemned as violations of international law, an individual must reasonably expect to be subject to criminal prosecution when traveling to any territory of the United States.²¹ However, Puerto Rico may be limited in applying its

20. Rome Statute, *supra* note 15, art. 7(2)(a).

21. See Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 911 (2009) "[D]efendants cannot avoid conviction by claiming lack of notice . . . because the State exercising universal jurisdiction is not extending its own laws extraterritorially, but is instead acting as the application and enforcement vehicle of an otherwise applicable and preexisting international law that covers the globe . . .").

human trafficking CAH provision extraterritorially because there is no similar recognition of a *jus cogens* prohibition of human trafficking committed as a widespread or systematic attack against a civilian population.²² Nevertheless, Article 300 is a significant first step for this to norm to emerge.

Lastly, Puerto Rico's territorial relationship with the United States poses a special challenge to the island's atrocity crimes statute. Whereas the Tenth Amendment affords states a significant degree of legislative autonomy, the Constitution's Territorial Clause grants Congress plenary powers over Puerto Rico's internal affairs. This may provide an avenue for Congress to preempt Title 5, if it so chooses, without running afoul of typical federalism considerations. Additionally, because the Puerto Rican and federal governments are not "separate sovereigns,"²³ federal prosecutions pursuant to statutes conferring jurisdiction over atrocity crimes may preclude local prosecutions for the same acts under the Double Jeopardy Clause. Given federal inaction, however, Puerto Rico retains the same rights as states to define and punish atrocity crimes.

This article concludes that Puerto Rico's atrocity crimes legislation not only pushes international law in a novel direction, but also provides tangible opportunities for victims to seek redress. Title 5 may prevent Puerto Rico from becoming a safe haven for *hostis humanis generis* by deterring perpetrators and discouraging them from transiting the island.²⁴ Puerto Rico's human rights legislation serves as a useful model for state-level criminalization of serious international law violations like genocide, war crimes, and CAH. While this model presents various constitutional challenges, these obstacles are surmountable. Moreover, shifting the focus of U.S.-based human rights litigation to criminal trials offers significant normative advantages that will help the United States meet its responsibility to punish grave abuses and provide meaningful redress to survivors.

I. STATE-LEVEL CRIMINALIZATION: NORMATIVE AND PRACTICAL CONSIDERATIONS

Taken together, the federalized structure of American government and the country's common law legal system create four typologies of legal

22. See, e.g., Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 374, U.N. Doc. A/CN.4/725 (2019) (largely adopting the Rome Statute's definition of crimes against humanity, which does not include human trafficking as a constituent act *per se*).

23. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016).

24. *Hostes*, BLACK'S LAW DICTIONARY (11th ed. 2019).

responses to atrocity crimes. These are: (1) federal criminalization, (2) federal civil litigation, (3) state civil litigation, and (4) state criminalization.²⁵ As elaborated in Part II.B, current practice generally relies on the first two response categories, effectively discarding state-level responses.²⁶ While there is increased support for civil litigation in state courts, almost no attention has been paid to state-level prosecution of atrocity crimes.²⁷ The reluctance to turn to state prosecutions may be due to a bias in favor of creative lawyering over legislative advocacy. It is wrong, however, to assume that the difficulties associated with codifying atrocity crimes at the federal level (see Part II.C) would necessarily transfer to state-level advocacy. Recent scholarship on civil suits in state courts is likely a vestige of human rights lawyers' marriage to the ATS and TVPA. This part argues that there is a host of normative and practical advantages to supporting prosecutions for international crimes in state courts.

A. Criminal or Civil Justice?

Civil suits in federal court revolutionized human rights litigation in the United States by allowing victims to seek justice through legal mechanisms already at their disposal.²⁸ While this approach obviated the need for lengthy legislative advocacy and empowered victims to bring forward their own cases, there is a reason every international tribunal tasked with redressing grave human rights violations is fundamentally criminal in nature.²⁹ Civil proceedings address wrongdoing vis-à-vis the private rights of individual victims. In contrast, criminal prosecutions deliver justice for public harms that concern all people regardless of their connection to the immediate

25. See *infra* Parts II.A.1, II.B.1, III.A.

26. See *infra* Part II.B.

27. See Beth Van Schaack, *New California Human Rights Legislation*, JUST SECURITY (Oct. 6, 2015), <https://www.justsecurity.org/26619/california-human-rights-legislation/> (highlighting changes to the California Civil Code that extend the statute of limitations for assault and battery where the conduct would also constitute torture, genocide, war crimes, extrajudicial killing, or crimes against humanity, and highlighting that the only reference to crimes against humanity in the non-federal criminal context is found in Puerto Rico's Penal Code).

28. See *supra* notes 1–6 and accompanying text.

29. While many international tribunals incorporate victim support units and reparations mechanisms, these do not detract from the tribunals' criminal character, because they are ultimately tied to criminal prosecutions. The civil functions of various international courts never operate independently from these courts' criminal functions. See, e.g., *Reparation Orders*, INT'L CRIM. CT., <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders> (last visited Jan. 18, 2020) (linking the activities of the ICC's Trust Fund for Victims in connection to parallel criminal cases); *Victims Support Section*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <https://www.eccc.gov.kh/en/organs/victims-support-section> (last visited Jan. 18, 2020) (linking victims' right to seek collective and moral reparations to their status as parties to criminal proceedings).

injury.³⁰ Dressing human rights violations as a breach of contract between plaintiff and tortfeasor ignores the collective interest in seeking condemnation for grave violations of human dignity.

Rather than offer here an airtight normative theory of international justice, this part simply contends that criminal prosecutions are superior to civil proceedings as a means for achieving the demands of international justice, however defined. Ideally, both processes would operate in tandem, but criminal law should not take the backseat in the name of political expediency.³¹ Most justifications for prosecuting human rights violators draw from standard theories of criminal justice.³² For instance, retribution is sometimes seen as a necessary requirement of justice.³³ In this context, prosecutions legitimize society's demand for punishment by safeguarding the accused's procedural rights.³⁴ Alternatively, some justify criminal prosecutions on empirical grounds by referring to their purported deterrent effect.³⁵ Others claim that the purpose of criminal law is to "reaffirm[], or even creat[e], social identity and/or social solidarity" by reinforcing a "common moral order."³⁶

As far as the American adversarial court system is concerned, civil proceedings cannot fulfill any of these aims as well as their criminal counterparts can.³⁷ From a retributivist perspective, incarceration clearly represents a more severe form of punishment than damages, especially considering how *Jesner* foreclosed victims' ability to seek damages from wealthy corporations.³⁸ Likewise, it is reasonable to assume that insofar as the law can deter mass atrocity at all, the threat of criminal sanction produces

30. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 3 (8th ed. 2018).

31. This is not to say that the answer to every international injustice is a legal proceeding. Each case requires a context-specific determination that takes into account many considerations, including accountability, memory, peace, and resources. See Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding International Justice*, 15 HARV. HUM. RTS. J. 39, 43 (2002) ("[T]his Article will challenge the primacy of prosecution and will argue for goal- and culture-specific responses to mass atrocity.").

32. Adil Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFFALO CRIM. L. REV. 273, 280–81 (2005).

33. *Id.* at 283.

34. *Id.* at 281.

35. See Yvonne Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN'S L. REV. 105, 114 (2017) ("[D]eterrence and prevention of future crimes is an oft-cited rationale for employing international justice.").

36. Aukerman, *supra* note 31, at 85 (footnotes omitted).

37. See 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.3(a) (3d ed. 2018) ("[C]riminal punishment, with emphasis on imprisonment, is on the whole more drastic than the sanctions, with emphasis upon paying money, imposed by the civil law . . .").

38. See *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1407 (2018) ("[F]oreign corporations may not be defendants in suits brought under the ATS.").

a larger deterrent effect than the prospect of being ordered to pay unrecoverable monetary compensation.³⁹

Lastly, a judicial proceeding that only establishes culpability on the preponderance of the evidence cannot uphold a “common moral order” to the same degree.⁴⁰ A community recovering from the trauma of mass atrocity must be entitled to the truth of what occurred, and successive generations must be kept apprised of this truth. Criminal trials offer an imperfect but workable solution to the challenge of crafting historical narratives that can successfully repair rifts sowed by conflict.⁴¹ Thus, human rights lawyers should view civil suits as a complementary, rather than exclusive means, of achieving justice for victims of human rights abuses.

B. Federal or State Forum?

Prosecuting atrocity crimes in state courts offers significant practical and normative advantages.⁴² States are well-positioned to fill the jurisdictional and substantive gaps left by federal atrocity law (see Part II).⁴³ In fact, states have been taking stands on issues traditionally left to the federal government’s remit for quite some time. For instance, when the Bush Administration declined to ratify the Kyoto Protocol, numerous states and cities responded by implementing their own Kyoto-style regulatory frameworks, sometimes in direct cooperation with foreign governments.⁴⁴ To cite another example, dozens of states have enacted various forms of legislation denouncing the Boycott, Divestment, and Sanctions (BDS) movement.⁴⁵ Some such laws entail declaratory statements,⁴⁶ while others

39. See *supra* notes 28–38 and accompanying text.

40. See LAFAVE, *supra* note 37, § 1.3(a) (footnote omitted) (explaining that damages in civil law can be equitable or financial, while criminal penalties can include fines or imprisonment).

41. Barrie Sander, *History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts*, 67 BRITISH INST. INT’L & COMP. L. 547, 547 (2018).

42. See *infra* Part III.A.

43. See *infra* Part II.

44. Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL’Y 369, 372 (2006). Cities’ powers derive from state governments. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907); MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 62–63 (2016).

45. David Von Drehle, *Anti-BDS Laws Are Popular. That Doesn’t Mean They’re Constitutional.*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/opinions/anti-bds-laws-are-popular-that-doesnt-mean-theyre-constitutional/2018/12/18/8c0e122e-0300-11e9-b5df-5d3874f1ac36_story.html.

46. See, e.g., S.J.R. 170, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015) (“[T]he members of the General Assembly condemn the international Boycott, Divestment, and Sanctions movement and its activities in Tennessee for seeking to undermine the Jewish people’s right to self-determination, which they are fulfilling in the State of Israel.”).

prohibit the state government from contracting with entities that advocate BDS against Israel.⁴⁷ Time has shown that the United States does not speak with “one voice” with regard to foreign affairs.⁴⁸

As Part IV explores in further detail, “[e]ven in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers.”⁴⁹ While federalist principles do not give states *carte blanche* to regulate outside their spheres of traditional competence,⁵⁰ matters that concern foreign relations should not necessarily be excluded from the list. Moreover, it would be mistaken to consider human rights—even trials for extraterritorial human rights violations—as a fundamentally international issue. A state’s power to define and punish international atrocity crimes is not a question of its authority to intrude into the ambit of foreign affairs. Rather, it is a question of that state’s ability to exercise what is arguably its most fundamental prerogative: to regulate criminal conduct.⁵¹ Indeed, where the federal government regulates criminal conduct, it often does so concurrently with the states, rather than exclusively.⁵²

State enforcement of human rights is not only compatible with federalism, but is also required if the United States is to guarantee compliance with international law throughout its territory. This observation underpins one of the United States’ “understandings” of the International Covenant on Civil and Political Rights (ICCPR),⁵³ which declares “[t]hat the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction

47. See, e.g., H.B. 89, 8th Leg., Reg. Sess. (Tex. 2017) (prohibiting government entities from entering into contracts with companies that boycott Israel).

48. See *United States v. Pink*, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring) (“In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.”).

49. *Arizona v. United States*, 567 U.S. 387, 423 (2012) (Scalia, J., concurring in part and dissenting in part). While Justice Scalia’s partial dissent rests on dubious grounds, he was right to caution against relying on an amorphous connection to foreign affairs as evidence of field preemption of state law.

50. See *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003) (discussing the limits federal preemption places on state authority).

51. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (footnote omitted) (“Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”). Part IV contends that this concept extends to extraterritorial criminal conduct.

52. See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016) (acknowledging that the states and the federal government often exercise concurrent jurisdiction over criminal conduct because they are separate sovereigns).

53. 138 CONG. REC. 7936, 8068 (daily ed. Apr. 2, 1992) (statement of Sen. Mitchell on the International Covenant on Civil and Political Rights).

over the matters covered therein, and *otherwise* by the state and local governments.”⁵⁴ This statement contemplates the existence of some human rights obligations that the federal government is constitutionally restricted from fulfilling, but that nonetheless remain obligatory and cognizable by the states. None of this precludes the federal branches from preempting state laws that conflict with federal foreign policy objectives. Certainly, states are just as fallible as the federal government and can sometimes “get it wrong.”⁵⁵ However, human rights principles and our system of government require that we balance state and federal interests before crossing the preemption bridge.

II. FEDERAL CRIMINALIZATION, FEDERAL CIVIL LITIGATION, AND STATE CRIMINALIZATION

Federal law comprises a wide range of statutes dealing with the prevention and punishment of atrocity crimes. This assortment of laws might collectively be referred to as *federal atrocity law*.⁵⁶ In the U.S. context, this body of law prescribes both criminal sanctions and civil remedies.⁵⁷ Even though a number of these statutes were passed in order to comply with U.S. treaty obligations, many leave significant gaps by defining the crimes too narrowly or limiting jurisdiction.⁵⁸ These failures of justice have led many human rights practitioners to pursue civil remedies over criminal prosecutions.⁵⁹ Part II.A outlines the main deficiencies in the realization of the federal criminal approach as it currently stands, and Part II.B briefly traces the history of federal civil litigation as a response to these shortcomings. Part II.C introduces the key provisions and legislative history of Title 5 of the Puerto Rican Penal Code—the only statute in the United States to criminalize CAH.⁶⁰ As will be illustrated subsequently, the Puerto

54. *Id.* at 8071(emphasis added).

55. *See, e.g., infra* Part III.B.1 for a discussion of how Puerto Rico’s Penal Code’s definition of human trafficking undermines the prosecution of human trafficking as a CAH, as envisioned by Article 300.

56. Former U.S. Ambassador-at-Large for War Crimes Issues David Scheffer has argued that the term “atrocity law,” as a subfield of international law, should be used to accurately capture the range of atrocity crimes, which comprise distinct legal elements. Scheffer, *supra* note 7, at 239, 244–45 (2006). This nomenclature is suitable for use in the U.S. legal context at both the federal and state levels.

57. Scheffer, *supra* note 7, at 239; 28 U.S.C. §§ 1330, 1350; Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

58. *See* Beth Van Schaack, *The Parallels Between South African and U.S. Law on Universal Jurisdiction*, JUST SECURITY (Dec. 16, 2013), <https://www.justsecurity.org/4611/parallels-south-african-u-s-law-universal-jurisdiction/> (illustrating the “gaps” in the law created by defining international crimes too narrowly or by limiting jurisdiction).

59. *See infra* Part II.B.

60. Article 299 of Title 5 also criminalizes genocide, but the focus of this Article’s analysis will be on Article 300, which criminalizes CAH.

Rican example demonstrates how the state criminalization model may serve as an important tool against impunity for atrocity crimes.

A. Federal Criminalization

1. Crimes Against Humanity

The most conspicuous gap in federal atrocity law is the absence of any legislation that defines and punishes CAH. Senator Dick Durbin introduced the Crimes Against Humanity Act of 2010,⁶¹ which would have granted federal jurisdiction over CAH committed: (1) anywhere by U.S. nationals; (2) anywhere by U.S. residents, regardless of immigration status; (3) anywhere by stateless individuals whose habitual residence is in the U.S.; and (4) in whole or in part in the U.S. by any person.⁶² However, this bill never progressed beyond committee.⁶³ Other bills have attempted to provide varying measures of accountability for CAH—without providing a definition or specific criminal penalties—but few have become law.⁶⁴

To be sure, various federal statutes do grant extraterritorial criminal jurisdiction over certain crimes that might otherwise qualify as CAH. For example, Congress passed the Federal Torture Statute just before ratifying the Convention Against Torture (CAT).⁶⁵ The statute grants federal jurisdiction over torture committed by U.S. nationals or by persons present

61. Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. (as reported by S. Comm. on the Judiciary, July 21, 2010).

62. *Id.* § 2(a).

63. *Actions, S. 1346—Crimes Against Humanity Act of 2010*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/senate-bill/1346/all-actions?overview=closed#tabs> (last visited Jan. 28, 2020).

64. *See, e.g.*, Elie Wiesel Genocide and Atrocities Prevention Act of 2018, H.R. 3030, 115th Cong. (2d Sess. 2018) (providing an example of an unenacted federal bill that was designed “[t]o help prevent acts of genocide and other atrocity crimes” without explicitly defining crimes against humanity or specific criminal penalties). *See also* Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. (1st Sess., as reported by S. Comm. on Foreign Relations, June 12, 2017) (providing an example of an unenacted bill that would “require a report on, and authorize technical assistance for, accountability for war crimes, crimes against humanity, and genocide in Syria, and for other purposes” without defining crimes against humanity or specific criminal penalties). *But see, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 7033(a)(3), 132 Stat. 348, 899 (2018) (authorizing, *inter alia*, funding for victims of crimes against humanity and for promoting accountability for crimes against humanity in Iraq and Syria); *see* American Servicemembers’ Protection Act, 22 U.S.C. § 7433 (2002) (clarifying that “[n]othing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity”).

65. *US: Support Anti-Torture Legislation*, HUMAN RIGHTS WATCH (Jun. 16, 2015), <https://www.hrw.org/news/2015/06/16/us-support-anti-torture-legislation>.

in the United States.⁶⁶ While the statute eliminates the motive element found in the CAT's definition of torture,⁶⁷ it inserts a "color of law"⁶⁸ requirement that has sometimes been difficult to prove even by a preponderance of the evidence.⁶⁹ Other laws provide for near-universal federal jurisdiction over slavery and similar practices,⁷⁰ human trafficking,⁷¹ and terrorism.⁷² None of these statutes defines CAH.

2. Genocide

As its title suggests, the Genocide Convention Implementation Act of 1987 (Proxmire Act) was passed to harmonize U.S. law with international standards on the punishment of genocide.⁷³ This implementing legislation grants near-universal jurisdiction for genocide (including incitement, attempt, and conspiracy).⁷⁴ However, the Proxmire Act diverges from the Genocide Convention by requiring proof of specific intent to destroy a protected group "in whole or in *substantial* part,"⁷⁵ defined as "part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such [a] group is a part."⁷⁶ It is widely understood that under international law, genocide includes the commission of any proscribed acts with intent to destroy a protected class in whole or in part within a limited geographic scope.⁷⁷ The Proxmire Act's narrow definition of "in substantial part" undermines this notion and could hinder the prosecution of individuals who commit smaller-scale acts of genocide within a wider genocidal context.

66. 18 U.S.C. §§ 2340A(b)(1)–(2) (2012).

67. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

68. 18 U.S.C. § 2340(1).

69. The TVPA provides civil remedies for torture and extrajudicial killing when committed "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note § 2(a) (2012). Courts have construed the color of law provision to require proof of a "symbiotic relationship between a private actor and the government that involves the conduct that is the subject of the complaint." *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008).

70. See 18 U.S.C. § 1596(a) (2012) (stating that "the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591").

71. *Id.*

72. See Van Schaack, *supra* note 58 (explaining the jurisdictional basis for terrorism crimes under U.S. law).

73. 18 U.S.C. § 1091 note (2012) (short title of the act).

74. *Id.* § 1091(e).

75. *Id.* § 1091(a) (emphasis added).

76. *Id.* § 1093(8).

77. William Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 161, 183–85 (2008) (emphasis added).

3. War Crimes

The War Crimes Act of 1996 (WAA) is the principal war crimes statute applicable to civilians.⁷⁸ It prohibits a large number of war crimes by reference to various treaties to which the United States is party.⁷⁹ However, the United States has not ratified the first two Optional Protocols to the Geneva Conventions, which codify many important aspects of international humanitarian law.⁸⁰ Because the WAA contains no provisions incorporating customary international law, some conduct that is prohibited under more comprehensive statutes (e.g., the Rome Statute) could go unpunished.⁸¹ Moreover, the WAA only confers jurisdiction over war crimes whose perpetrators or victims are U.S. nationals or members of the U.S. armed forces.⁸² These shortcomings stand in contrast with the Uniform Code of Military Justice, which authorizes courts-martial for virtually any war crime against any individual ordinarily subject to trial by military tribunal.⁸³

The Child Soldier Accountability Act (CSAA) establishes near-universal jurisdiction over the recruitment and use of child soldiers.⁸⁴ This statute is limited to children under 15 years old, which generally accords with international law.⁸⁵ However, the last two decades have witnessed a growing trend toward abolishing the use of children under the age of eighteen in hostilities.⁸⁶ The CSAA fails to recognize this emerging reality.

78. See 18 U.S.C. § 2441 (2012) (describing the WAA as applying to nationals of the United States).

79. *Id.*

80. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977., INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=470 (last visited Jan. 29, 2020); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977., INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=475 (last visited Jan. 29, 2020).

81. 18 U.S.C. § 2441(c).

82. *Id.* § 2441(b).

83. 10 U.S.C. § 818 (2012). For a more complete discussion of U.S. jurisdiction over foreign nationals via court-martial and military commission, see generally Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49 (2003).

84. 18 U.S.C. § 2442(c) (2012).

85. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* art. 77(2), June 8, 1977, 1125 U.N.T.S. 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 609; *Rome Statute*, *supra* note 15, arts. 8(2)(b)(xxvi), 8(2)(c)(vii); *Convention on the Rights of the Child* art. 38(2), Nov. 20, 1989, 1577 U.N.T.S. 3.

86. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* arts. 1–4, May 25, 2000, 2173 U.N.T.S. 222; *Convention Concerning*

4. Immigration Fraud

The Immigration and Nationality Act (INA) provides for the inadmissibility of any asylum applicant who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion”⁸⁷ or who “committed a serious nonpolitical crime outside the United States.”⁸⁸ The INA also bars entry to any visa applicant who has participated in genocide,⁸⁹ torture,⁹⁰ extrajudicial killing,⁹¹ or the recruitment of child soldiers.⁹² While these proscriptions are not themselves criminal in nature, alleged perpetrators may be charged with immigration fraud and perjury on the basis of misrepresenting their involvement in such criminal acts in their asylum or residency applications.⁹³ However, these provisions do not explicitly exclude applicants who have allegedly committed CAH or most war crimes.⁹⁴ Moreover, immigration fraud does not capture the full scope of the atrocity crimes that the applicant may have committed.⁹⁵ Refocusing international justice as a tool for immigration enforcement may even instigate unwarranted public antagonism against immigrant communities.

B. Federal Civil Litigation

The preceding part illustrates how the current state of federal atrocity law provides important yet inadequate tools for achieving criminal

Minimum Age for Admission to Employment art. 3, June 26, 1973, 1015 U.N.T.S. 297; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3, June 17, 1999, 2133 U.N.T.S. 161; Org. of African Unity [OAU], African Charter on the Rights and Welfare of the Child art. 22, Doc. CAB/LEG/24.9.49 (Nov. 29, 1999), refworld.org/docid/3ae6b38c18.html.

87. 8 U.S.C. § 1158(b)(2)(A)(i) (2012).

88. *Id.* § 1158(b)(2)(A)(iii).

89. *Id.* § 1182(a)(3)(E)(ii).

90. *Id.* § 1182(a)(3)(E)(iii).

91. *Id.*

92. *Id.* § 1182(a)(3)(G).

93. 18 U.S.C. §§ 1546, 1621 (2012).

94. *See* 8 U.S.C. § 1182 (2012) (providing for classes of inadmissible noncitizens on the basis of having perpetrated genocide, torture, and extrajudicial killing, but not war crimes or CAH *per se*); *but see* Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, 76 Fed. Reg. 49275 (Aug. 9, 2011) (suspending entry as immigrants and nonimmigrants of persons who commit war crimes, crimes against humanity, or other serious violations of human rights if their entry would harm the foreign relations interests of the United States).

95. *See* 8 U.S.C. § 1182(a)(6)(C)(i) (illustrating that immigration fraud and misrepresentation under the INA do not capture the full scope of the atrocity crimes that an asylum applicant may have committed).

accountability for grave international law violations. Human rights practitioners have sought to overcome these deficiencies in criminal law by making use of federal statutes that confer civil jurisdiction over torts committed in violation of the law of nations. These are namely the Alien Tort Statute (ATS), the Torture Victim Protection Act (TVPA), and the Foreign Sovereign Immunities Act (FSIA).⁹⁶ Previous literature already explores the history and scope of these statutes in detail.⁹⁷ However, this part will briefly highlight these statutes' key shortcomings in order to contextualize the need to shift toward an accountability strategy that recognizes civil litigation as complementing, rather than substituting, criminal prosecutions.

1. Alien Tort Statute

Enacted in 1789, the ATS reads, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹⁸ This centuries-old statute was nearly lost in history until its revival by the Second Circuit in *Filártiga v. Peña-Irala*.⁹⁹ The Second Circuit held that the ATS confers jurisdiction over common law torts in violation of peremptory norms of international law.¹⁰⁰ The Supreme Court later narrowed the scope of actionable claims to those based on norms that are “specific, universal, and obligatory.”¹⁰¹

However, the Supreme Court subsequently ruled that “the presumption against extraterritoriality applies to [ATS] claims.”¹⁰² For an ATS claim to survive, it must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application,”¹⁰³ or it must involve domestic conduct that falls within the ATS’s “focus.”¹⁰⁴ Additionally, “foreign corporations may not be defendants

96. 28 U.S.C. §§ 1330, 1350 (2012); Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992).

97. See, e.g., Stephens, *supra* note 5, at 1470 (discussing the origins of the Alien Tort Statute); BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 1, 75, 89 (2d ed. 2008) (chronicling the Alien Tort Statute, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act); Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH U.L. REV. 1117, 1126–28 (2011) (recounting the history of the Alien Tort Statute).

98. 28 U.S.C. § 1350.

99. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

100. *Id.* at 887.

101. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citation omitted).

102. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

103. *Id.* at 124–25.

104. *RJR Nabisco, Inc. v. Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016) (citation omitted).

in suits brought under the ATS.”¹⁰⁵ These more recent developments have posed serious obstacles to the future of ATS litigation,¹⁰⁶ leading scholars to produce a substantial amount of literature on the litigation of extraterritorial human rights claims in state courts.¹⁰⁷

2. Torture Victim Protection Act

The TVPA, signed into law in 1992, creates a cause of action against any natural person who subjects an individual to torture or extrajudicial killing “under actual or apparent authority, or color of law, of any foreign nation.”¹⁰⁸ This statute has been favored in the post-*Kiobel* landscape as no presumption against extraterritoriality applies.¹⁰⁹ However, the TVPA’s narrow “color of law”¹¹⁰ requirement limits complaints against non-state actors to those that demonstrate “a symbiotic relationship between a private actor and the government that involves the torture or killing alleged in the complaint.”¹¹¹ Thus, it is not enough for the plaintiff to demonstrate a generalized connection between the state and the defendant; concrete state action or support must be tied to the alleged injury.

3. Foreign Sovereign Immunities Act

The FSIA waives the sovereign immunity of any state sponsor of terrorism—and provides a separate federal cause of action—where a plaintiff alleges “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.”¹¹² A plaintiff who pleads a cause of action under the FSIA must be: (1) a U.S. national, (2) a member of the U.S. armed forces, (3) an employee or contractor of the U.S. government, or (4) a legal representative thereof.¹¹³ As of this writing, the only state

105. *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1390 (2018).

106. Seth Davis & Christopher Whytock, *State Remedies for Human Rights*, 98 B.U.L. REV. 397, 410 (2018).

107. *Id.* at 400 n.11.

108. 28 U.S.C. § 1350 note § 2(a) (2012).

109. See Curtis Bradley, *The ATS, the TVPA, and the Future of International Human Rights Litigation*, 108 PROC. ANN. MEETING (AM. SOC’Y OF INT’L L.) 145, 145-46 (2014) (explaining that the presumption against extraterritoriality is inapplicable to the TVPA because the statute explicitly creates an extraterritorial cause of action).

110. 28 U.S.C. § 1350 note § 2(a).

111. *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008).

112. 28 U.S.C. § 1605A(a)(1) (2012).

113. *Id.* §§ 1605A(c)(1)–(4).

sponsors of terrorism that may be sued under the FSIA are North Korea, Iran, Sudan, and Syria.¹¹⁴

III. STATE CRIMINALIZATION AND THE CASE OF PUERTO RICO

The previous part highlights how federal atrocity law is fraught with definitional and jurisdictional shortcomings that hinder accountability processes for mass atrocities in U.S. courts. This part undertakes a historical analysis of the only example of “state-level” criminalization of genocide and CAH.¹¹⁵ This part presents a brief overview of Puerto Rico’s political history and legal system, which is necessary to understanding the development and ultimate legality of the island’s atrocity crime legislation (Title 5 of the Puerto Rico Penal Code). This part then introduces the Penal Code’s articles on genocide and CAH, as well as other relevant provisions of Puerto Rican law, and reviews its legislative history.

This analysis reveals that the executive and legislative branches of the Puerto Rican government advocated for atrocity crimes legislation because they believed that it was necessary to comply with Puerto Rico’s international legal obligations, independent of any duties and responsibilities shared with the United States government.¹¹⁶ The Legislative Assembly’s subsequent amendment to Article 300, incorporating human trafficking as a CAH, may have arisen from a misunderstanding of the definition of CAH. The Puerto Rican government and other actors, nevertheless, hailed this amendment as a positive development and implied that it was the natural exercise of Puerto Rico’s right to define international crimes on its own terms.¹¹⁷

A. The Political History and Legal System of Puerto Rico

Puerto Rico’s relationship with the United States began in 1898 when Spain relinquished the island as a spoil of the Spanish-American War.¹¹⁸ Two years later, Congress passed the Foraker Act, which established Congress’s and the President’s near-total control over Puerto Rico’s system of

114. Dianne E. Rennack, Cong. Research Serv. R43835, *State Sponsors of Acts of International Terrorism—Legislative Parameters: In Brief 1* (2018); *see also* 28 U.S.C. § 1605(a) (2017) (providing that the FSIA waives the sovereign immunity of nations listed as state sponsors of terrorism by the U.S. Secretary of State).

115. While Puerto Rico is not a state of the United States, this Article uses the term “state-level” synonymously with “non-federal” unless otherwise indicated. *See infra* note 120 and accompanying text.

116. *See supra* Part III.C.

117. *See infra* notes 162–72 and accompanying text.

118. *See Treaty of Peace (Treaty of Paris)*, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754 (stating that Spain transfers sovereignty over Puerto Rico to the United States).

government.¹¹⁹ Subsequent Supreme Court decisions, collectively known as the *Insular Cases*, declared that “the Island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States.”¹²⁰ Indeed, Puerto Ricans were only granted citizenship and allowed to elect their own legislature once Congress passed the Jones Act of 1917.¹²¹ It was not until the passage of Public Law 600 in 1950 that Puerto Rico could convene its own constitutional convention and thus establish the Commonwealth of Puerto Rico.¹²² Though Public Law 600 was adopted in the nature of a compact,¹²³ Congress still retains plenary powers over the island’s internal affairs.¹²⁴

Puerto Rico’s piecemeal integration into the United States has preserved many vestiges of Spanish colonial rule. Puerto Rico utilizes a mixed legal system that incorporates elements of both civil and common law.¹²⁵ Many areas of Puerto Rican law are extensively codified and interpreted in accordance with the civil law tradition.¹²⁶ However, Puerto Rican courts regularly apply standard common law principles in their judicial decisions.¹²⁷ Federal courts may exercise jurisdiction over cases originating in Puerto Rico in the same way as they do over cases from the several states.¹²⁸ Thus, federal courts may apply Puerto Rican, federal, or international law in their

119. See Foraker Act, Pub. L. No. 56-911, 31 Stat. 77 (delineating the broad powers over the organization of Puerto Rico’s government reserved by Congress or delegated to the President).

120. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

121. Jones Act of 1917, Pub. L. No. 64-368, §§ 5, 26, 27, 35, 39, 39 Stat. 951, 963.

122. Puerto Rico Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319, 319.

123. *Id.*

124. Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism”*, 131 HARV. L. REV. 67, 84 (quoting David M. Helfeld, *Congressional Intent and Attitude Towards Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U. P.R. 255, 307 (1952)).

125. Luis Muñoz-Argüelles, *Puerto Rico*, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 381, 412 (Vernon Valentine Palmer ed., 2d ed. 2012).

126. See *id.* at 388-89, 402, 407 (explaining that civil codes left in place after the annexation of the island continue to be interpreted through a civil law tradition).

127. See *id.* at 410, 412 (noting that common law principles are used in judicial interpretations of civil codes).

128. See 28 U.S.C. § 1331 (2012) (establishing federal jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States”); 18 U.S.C. § 3231 (2012) (establishing federal jurisdiction over “all offenses against the laws of the United States”); 28 U.S.C. § 1332 (2012) (establishing federal jurisdiction over “civil actions” where the parties are “citizens of different States,” “citizens of a State and citizens or subjects of a foreign state,” or “a foreign state . . . as plaintiff and citizens of a State or of different States”). The United States District Court for the District of Puerto Rico hears cases originating from the island when jurisdictionally appropriate. See also *About U.S. Federal Courts*, FED. BAR ASS’N, http://www.fedbar.org/public-messaging/about-us-federal-courts_1.aspx (last visited Jan. 18, 2020) (explaining the structure of the federal court system). These cases may be appealed to the United States Court of Appeals for the First Circuit, and subsequently to the Supreme Court of the United States. *Id.*

decisions, though federal courts generally must defer to Puerto Rican tribunals' interpretations of local law.¹²⁹

Many questions arising under the application of federal doctrine to Puerto Rico remain unanswered due to the imprecise nature of the Commonwealth's relationship with the United States. However, the Supreme Court held that:

Although Puerto Rico has a unique status in our federal system . . . , the parties have assumed, and we agree, that the test for federal pre-emption of the law of Puerto Rico at issue here is the same as the test under the Supremacy Clause . . . for pre-emption of the law of a State.¹³⁰

Federal courts have ruled that, in addition to preemption, doctrines of comity and abstention apply with equal force to Puerto Rico.¹³¹ The First Circuit adopted in a case concerning Puerto Rico the same reasoning applied by the Fifth Circuit, which held that: "Here the jurisdiction of the state court was already invoked and the [plaintiffs] had sought to bring about that unseemly conflict between two sovereignties which the doctrines of comity and abstention are designed to avoid."¹³² These examples illustrate that the federal courts often treat Puerto Rico as if it was a state in many, though not all, circumstances.¹³³

B. Article 300 and Relevant Statutes

Article 300 of the Puerto Rican Penal Code largely mirrors the Spanish translation of the Rome Statute but differs from it in four important ways. First, and most obvious, is that Article 300 considers human trafficking a CAH when "committed as part of a [widespread] or systematic attack against a civilian population."¹³⁴ It is plausible that under the Rome Statute, narrow

129. *See Bonet v. Tex. Co. (P.R.)*, 308 U.S. 463, 471 (1940) ("To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation.").

130. *P.R. Consumer Affairs v. Isla Petroleum*, 485 U.S. 495, 499 (1988) (citations omitted).

131. *See Cruz v. Melecio*, 204 F.3d 14, 23 (1st Cir. 2000) (explaining that the doctrines of comity and abstention apply to Puerto Rico, much like they would to one of the fifty states).

132. *Id.* (quoting *Glen Oaks Utils., Inc. v. City of Houston*, 280 F.2d 330, 334 (5th Cir. 1960)); *but cf. Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (holding that Puerto Rico and the federal government are not separate sovereigns for double jeopardy purposes).

133. *See supra* notes 118–24 and accompanying text.

134. P.R. LAWS ANN. tit. 33, § 4934 (2012). The official English translation of the 2004 Penal Code translates "generalizado" as "general," rather than "widespread." P.R. LAWS ANN. tit. 33, § 4934 (2004). This article will translate "generalizado" as "widespread" in order to preserve the Legislative Assembly's presumed intent. In the event of a discrepancy between the Spanish and English versions of

forms of human trafficking could be conceived as “[e]nslavement”¹³⁵ or “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹³⁶ However, Article 300 of the Puerto Rican Penal Code explicitly enumerates human trafficking as a potential CAH, thereby eliminating the need to conform acts of human trafficking to any pre-established constituent act.¹³⁷

Second, unlike the Rome Statute, the Penal Code does not define “[a]ttack” as conduct committed “pursuant to or in furtherance of a State or organizational policy.”¹³⁸ Indeed, the Penal Code does not define this term at all, even though it does incorporate many of the remaining terms defined by Article 7(2)(a) of the Rome Statute.¹³⁹ The gravity of this omission should not be understated. Prior literature explains how this restrictive definition of “attack” could limit the ICC Prosecutor’s ability to pursue CAH charges against non-state actors.¹⁴⁰

Third, the Penal Code models the language employed by the Spanish translation of the Rome Statute in that it refers to acts “committed as part of a widespread or systematic attack against a civilian population.”¹⁴¹ The Spanish translation omits the word “directed,” which appears before the word “against” in the official English version of the Rome Statute.¹⁴² The inaccuracy of an authentic translation of the Rome Statute¹⁴³ is cause for concern, but this inconsistency could provide a Puerto Rican court greater leeway to define the scope of CAH.

any law, the Puerto Rico Civil Code stipulates that the interpretation of the original text shall prevail. In cases of ambiguity, the Spanish language text shall be given preference. P.R. LAWS ANN. tit. 31, § 13.

135. Rome Statute, *supra* note 15, art. 7(1)(c).

136. *Id.* art. 7(1)(k).

137. P.R. LAWS ANN. tit. 33, § 4934 (2012).

138. Rome Statute, *supra* note 15, art. 7(2)(a).

139. *See* P.R. LAWS ANN. tit. 33, § 4934 (providing no definition of “attack”).

140. *See* William Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 972 (2008) [hereinafter *State Policy*] (arguing that a strict construction of “attack” is necessary to prevent prosecutions of non-state actors that were not envisioned by the framers of the Rome Statute); *but cf.* Charles C. Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity*, 28 AM. U. INT’L L. REV. 381, 431–32 (2013) (arguing that a strict construction of “attack” poses an overly severe limitation to prosecuting international crimes).

141. Estatuto de Roma de la Corte Penal Internacional [hereinafter Estatuto de Roma], art. 7(1), July 17, 1998, 2187 U.N.T.S. 307 (entered into force July 1, 2002) (authentic Spanish text).

142. *Compare* Rome Statute, *supra* note 15, art. 7(1) (emphasis added) (defining “crime against humanity” as certain specified acts “committed as part of a widespread or systematic attack *directed* against any civilian population”), *with* Estatuto de Roma, *supra* note 141, art. 7(1) (defining “crime against humanity” without explicitly stating that the general or systematic attack must be *directed* against a civil population).

143. *See* Rome Statute, *supra* note 15, art. 128 (establishing that the original versions of all translations of the Rome Statute, including the Spanish translation, “are equally authentic”).

Fourth, the Penal Code establishes a fixed term of 99 years of imprisonment for murder, extermination, rape, and forced disappearance as a CAH.¹⁴⁴ It further establishes a fixed term of 25 years for the remaining modalities.¹⁴⁵ The Rome Statute, on the other hand, allows ICC judges to issue prison sentences of up to 30 years, though they may impose a life sentence under exceptional circumstances.¹⁴⁶

The 2004 Penal Code reform introduced expansive extraterritorial jurisdiction for CAH and genocide.¹⁴⁷ Article 3 of the Penal Code states:

The criminal law of Puerto Rico shall apply to any offense committed or attempted within the territory of the Commonwealth of Puerto Rico. This territory includes the land, sea[,] and air space subject to the jurisdiction of the Commonwealth of Puerto Rico. Notwithstanding the foregoing, the criminal law of Puerto Rico shall apply outside the territory of the Commonwealth of Puerto Rico under any of the following cases: (a) Offenses whose results occurred outside of Puerto Rico when parts of the acts or omission are carried out within its territory. (b) Preparatory acts or omissions carried out outside of Puerto Rico with the purpose of committing an offense whose results occur in its territory (d) Genocide or crimes against humanity, as defined in this Code. (e) Offenses subject to trial in Puerto Rico, in accordance with the treaties or conventions ratified by the United States of America.¹⁴⁸

Thus, Puerto Rican courts may exercise universal criminal jurisdiction over CAH wherever they occur and regardless of the nationality of the perpetrator. Though trials *in absentia* are not expressly prohibited by the Penal Code, arrests may only be carried out in the Commonwealth's territory,¹⁴⁹ and federal law generally prohibits such trials.¹⁵⁰ Finally, Article 88 contains a list of crimes that are not subject to a statute of limitations, which includes genocide and CAH.¹⁵¹

144. P.R. LAWS ANN. tit. 33, § 5402(2) (2012).

145. *Id.* § 5402(3).

146. Rome Statute, *supra* note 15, arts. 77(1)(a)–(b).

147. P.R. LAWS ANN., tit. 33, § 4933 (2012).

148. *Id.* § 5003.

149. P.R. LAWS ANN. tit. 34, app. II, r. 8(b).

150. FED. R. CRIM. P. 43.

151. P.R. LAWS ANN. tit. 33, § 5133.

C. Legislative History of Title 5: 2004 Penal Code

Puerto Rico's CAH legislation was enacted by way of a broader reform of the 1974 Penal Code.¹⁵² Senators Antonio Fas Alzamora and Eudaldo Báez Galib introduced Senate Project 2302, a bill whose revisions spanned a wide range of criminal justice issues.¹⁵³ The bill passed in June 2004 and was codified as Law 149.¹⁵⁴ One of the project's main purposes was to align Puerto Rico's criminal code with the Commonwealth's civil law tradition, which had been increasingly influenced by common law principles imported from the United States.¹⁵⁵ The Senate further debated measures such as imposing harsher sentences,¹⁵⁶ regulating abortion,¹⁵⁷ and repealing the prohibition against same-sex physical intimacy.¹⁵⁸ In fact, these issues commandeered the debate over the new Penal Code such that there exists almost no public record of the origins or legislative history of Articles 299 and 300.¹⁵⁹ However, several government agencies and private actors submitted written analyses on Title 5 to the Senate Judiciary Commission.¹⁶⁰ Since these submissions were presented in response to the circulation of the new draft Penal Code, they do not elucidate the origins of these specific provisions. However, they do shed light on how the Puerto Rican government and civil society interpreted the provisions' scope and purpose.¹⁶¹

152. P.R. LAWS ANN. tit. 33, § 4934 (2004).

153. S.B. 2302, 14th Leg. Assemb., 5th Reg. Sess. (P.R. 2003).

154. S.B. 2302, 14th Leg. Assemb., 7th Reg. Sess. (P.R. 2004).

155. S.B. 2302, 14th Leg. Assemb., 5th Reg. Sess. 2 (P.R. 2003).

156. See, e.g., DIARIO DE SESIONES [Session Record] 6109, *Debate Proyecto del Senado 2302* [Senate Project 2302 Debate], 7, 39 (May 12, 2003) (highlighting the senate debate on imposing stricter sentences).

157. See, e.g., *id.* at 34 (discussing abortion regulation); see also Transcripción de la vista pública del 26 de abril de 2002 sobre la R. del S. 203 [Transcript of the Public Hearing of April 26, 2002 on S. R. 203], 14th Leg. Assemb., 2d Reg. Sess. 100-07 (P.R. 2002) (adding to the discussion on abortion regulation).

158. See S.B. 2302, 14th Leg. Assemb., 5th Reg. Sess. 14–18 (P.R. 2003) (debating the prohibition against same-sex physical intimacy).

159. Neither an independent search of publicly available materials nor research undertaken by the Office of Legislative Services of Puerto Rico at the author's request rendered any legislative record specific to Articles 299 or 300.

160. See *Ponencias 2001–2004 (Proyecto del Senado 2302)*, OFICINA DE SERVICIOS LEGISLATIVOS DE LA ASAMBLEA LEGISLATIVA DE PUERTO RICO, http://www.oslpr.org/legislatura/lista_ponencias.asp?r=P%20S2302 (last visited Nov. 20, 2019) (listing the government agencies and other entities that submitted reports to the Senate Judiciary Commission on the proposed Penal Code revision).

161. See, e.g., ANABELLE RODRÍGUEZ, P. DEL S. 2302, PONENCIA DE LA HON. ANABELLE RODRÍGUEZ, SECRETARIA DE JUSTICIA, ANTE EL SENADO PARA LA CONSIDERACIÓN DE LA REFORMA DEL CÓDIGO PENAL DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO [Report of the Hon. Anabelle Rodríguez, Secretary of Justice, before the Senate for the Consideration of the Reform of the Penal Code of the Commonwealth of Puerto Rico], at 2 (P.R. 2003) (expressing the official position of the Department of Justice with respect to Senate Project 2302).

The Puerto Rican Legislative Assembly created the Civil Rights Commission (CRC) as an affiliated, yet independent, body of the legislature.¹⁶² Members of the Commission are nominated by the Governor and approved by the Senate.¹⁶³ Among other duties, the CRC is tasked with reviewing proposed legislation, submitting amicus curiae briefs, and investigating civil rights complaints filed by any citizen.¹⁶⁴ In its submission to the Senate Judiciary Commission, the CRC described Title 5 as an “important innovation”¹⁶⁵ that implements international legal obligations contained in documents such as the Convention for the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Suppression and Punishment of the Crime of Apartheid.¹⁶⁶ The CRC further stated that Article 88 of the Penal Code¹⁶⁷ adheres to the norms established by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.¹⁶⁸

On the issue of Puerto Rico’s incorporation of international law into its criminal code, the CRC declared that: “As a general [norm], the Commonwealth may incorporate principles of international law as public policy independently [of whether] the convention or instrument has been ratified . . . by the United States . . . , unless the adopted principle contravenes a legal norm [over which] the federal government has reserved supremacy”¹⁶⁹ This assertion, in addition to statements highlighting the United States’ history of non-ratification of international treaties cited by the CRC, suggests that the CRC views Title 5 as a means of filling a void left by the federal government. Indeed, the CRC proclaimed that “the crimes defined in these articles not only constitute offenses against Puerto Rican society . . . but also transgressions against the whole of humanity.”¹⁷⁰

Likewise, former Puerto Rico Secretary of Justice, Anabelle Rodríguez, wrote in her submission that with these new provisions:

162. COMISIÓN DE DERECHOS CIVILES, PLAN ESTRATÉGICO 2016–2019 [Strategic Plan 2016–2019] at 26 (P.R. 2015).

163. *Id.* at 22.

164. *Id.* at 23–24.

165. MIGDALIA ADROVER RODRÍGUEZ, COMISIÓN DE DERECHOS CIVILES, PONENCIA DE LA COMISIÓN DE DERECHOS CIVILES [Report of the Civil Rights Commission] 16 (2003).

166. *Id.*

167. Article 88 was originally numbered as Article 100 in the 2004 Penal Code and referred to as such by the Commission.

168. ADROVER RODRÍGUEZ, *supra* note 165, at 18.

169. *Id.* at 17.

170. *Id.* at 18.

We situate ourselves in the most modern international trends and commit to raising the conscience of our citizens to those situations that afflict us as citizens of the world. This, in my judgment, results in the strengthening of our democracy. We must be conscious that democracy is incompatible with impunity and that the eradication of the latter is the best defense of the former.¹⁷¹

This statement indicates that the executive branch did not consider Title 5 a symbolic statement of principle, but rather a means of ensuring that Puerto Rico does not become a haven for human rights abusers. The contention that these provisions are intended to be *enforced* is buttressed by the Puerto Rico Police Superintendent's submission, which states, "[t]hese new crimes reflect our condemnation and protection of [humankind], such that we permit our courts of justice to institute proceedings that, until present, have been avoided or ignored, but that affect us all as Puerto Ricans."¹⁷²

In short, both the Justice Department and the police have expressed their commitment to allowing Puerto Rico to become a venue for extraterritorial human rights prosecutions. Dr. Dora Nevares, one of the principle architects of the 2004 Penal Code revision, confirmed this in her submission to the Senate, stating: "Extraterritorial jurisdiction is extended in order to, as well as maintain current circumstances, incorporate [the circumstances of] genocide and crimes against humanity, alongside those situations which arise from treaties or conventions ratified by the United States."¹⁷³

Dr. Nevares's explanation of Article 3¹⁷⁴ is clear evidence of the legislature's intent to incorporate international principles of universal jurisdiction into the Penal Code. Her submission further implies that the Puerto Rican government considers its international legal obligations as independent from those accepted by the United States, insofar as those obligations are not superseded by federal law.

Lastly, Amnesty International's Puerto Rico chapter lauded the proposed revision of the Penal Code as a "historic opportunity to update and harmonize this law with the universal cause of the protection of human

171. ANABELLE RODRÍGUEZ, *supra* note 161, at 5.

172. VÍCTOR RIVERA GONZÁLEZ, P. DEL S. 2302, PONENCIA DEL LIC. VÍCTOR RIVERA GONZÁLEZ, SUPERINTENDENTE DE LA POLICÍA DE PUERTO RICO [Report of Víctor Rivera González, Esq., Superintendent of the Puerto Rico Police], at 4 (P.R. 2003).

173. DR. DORA NEVARES MUÑIZ & ROSA NOEMÍ BELL BAYRÓN, PONENCIA DE LA DRA. DORA NEVARES MUÑIZ Y LA LIC. ROSA NOEMÍ BELL BAYRÓN EN VISTA PÚBLICA SOBRE EL P. DEL S. 2302 DEL NUEVO CÓDIGO PENAL DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO [Report of Dr. Dora Nevares Muñiz and Rosa Noemí Bell Bayrón, in Public Hearing on S. Project 2302 of the New Penal Code of the Commonwealth of Puerto Rico], at 2 (2003).

174. The relevant provisions of this article were originally codified under Article 7 of the 2004 Penal Code but were reconstituted under Article 3 when the Penal Code was revised in 2012.

rights.”¹⁷⁵ Further, they observed that the establishment of extraterritorial jurisdiction for genocide and CAH presents Puerto Rico with “the opportunity to indict individuals who commit these crimes of such an atrocious nature, even when [they] have not been committed on our territory.”¹⁷⁶ However, Amnesty International noted that the newly proposed Title 5 did not contain penalties for torture, forced disappearances, slavery, or slave trade.¹⁷⁷ It bears noting that war crimes provisions were also absent from the Senate bill.¹⁷⁸ Ultimately, the Puerto Rican government did not incorporate Amnesty International’s recommendations into their final version of Title 5.¹⁷⁹

D. Legislative History of Title 5: Human Trafficking as a CAH

The revision of Puerto Rico’s Penal Code in 2012 incorporated various amendments to Article 300.¹⁸⁰ The most striking of these was the addition of human trafficking as a constituent act of CAH.¹⁸¹ Human trafficking became salient to the Puerto Rican public when the Ricky Martin Foundation issued its first investigation on the matter, titled *Human Trafficking in Puerto Rico: An Invisible Challenge*.¹⁸² This report sparked significant media attention and encouraged the former speaker of the Puerto Rico House of Representatives, Jennifer González, to take special interest in the issue.¹⁸³

175. AMNISTÍA INTERNACIONAL, SECCIÓN DE PUERTO RICO, PONENCIA ANTE LA COMISIÓN DE LO JURÍDICO DEL SENADO DE PUERTO RICO SOBRE EL PROYECTO DEL SENADO 2302, PARA ADOPTAR EL CÓDIGO PENAL DE PUERTO RICO [Report before the Legal Commission of the Senate of Puerto Rico on Senate Project 2302, to Adopt the Penal Code of Puerto Rico], at 1 (2003).

176. *Id.* at 2.

177. *Id.*

178. *See generally* P.R. S.B. 2302 (2003) (noting the lack of war crimes provisions).

179. Ultimately, Title 5 did not include provisions for torture, forced disappearances, slavery, or slave trade. P.R. S.B. 2302 (2004).

180. COMISIÓN CONJUNTA DE LA ASAMBLEA LEGISLATIVA PARA LA REVISIÓN CONTINUA [sic] DEL CÓDIGO PENAL Y PARA LA REFORMA DE LAS LEYES PENALES, TERCER INFORME POSITIVO SOBRE EL P. DEL S. 2021 [Third Positive Report on S. Project 2021], 16th Leg. Assemb. 6th Reg. Sess., at 193–94 (P.R. 2011), <http://www.oslpr.org/2009-2012/%7B64414653-135C-47B5-88B0-431791B8D3C7%7D.doc>.

181. *See infra* notes 184–86 and accompanying text.

182. *See generally* CÉSAR A. REY HERNÁNDEZ & LUISA HERNÁNDEZ ANGUEIRA, HUMAN TRAFFICKING IN PUERTO RICO: AN INVISIBLE CHALLENGE (2010) (examining human trafficking in Puerto Rico).

183. *See Fundación Ricky Martin impulsa campaña contra maltrato y explotación infantil* [Ricky Martin Foundation Promotes Campaign Against Child Abuse and Exploitation], EL NUEVO DIARIO (May 19, 2010), <https://www.elnuevodiario.com.ni/variedades/74719-fundacion-ricky-martin-impulsa-campana-maltrato-ex/> (stating that the issue generated interest from president of the House of Representatives, Jennifer González).

González, who would later be elected Puerto Rico's Resident Commissioner, introduced House Project 2530 to amend the Penal Code to incorporate human trafficking as a CAH.¹⁸⁴ While this measure passed unanimously in the House, the Senate Judiciary Commission did not ultimately recommend the bill's final approval.¹⁸⁵ However, this was only due to the Senate's efforts to incorporate Representative González's proposal into the 2012 reform of the Penal Code.¹⁸⁶ As far as the public record shows, the Representative's project was adopted by the Penal Code reform without controversy.

As with the prior criminal reform initiative, virtually none of the written submissions to the Senate addressed Puerto Rico's CAH provision. To be sure, several submissions were presented to the Judiciary Commission during its review of Representative González's original bill.¹⁸⁷ The CRC expressed qualified approval in stating that incorporating human trafficking into Article 300 would be a "positive" development, but that it would not "fulfill the legislator's intent" because CAH as defined by international law is unlikely to occur in Puerto Rico.¹⁸⁸ While there may be no precedent for litigating cases of human trafficking committed as part of a "widespread or systematic attack against a civilian population," the CRC wrongly implies that Puerto Rico's jurisdiction over CAH is limited territorially.¹⁸⁹ Article 3 of the Penal Code unambiguously provides for extraterritorial jurisdiction in this case.¹⁹⁰ The Superintendent of the Puerto Rico Police stated in his submission to the Senate on this issue, "It is important to recognize that our people are alienated from the sad truth that human trafficking presently affects our people, and these are not situations that only occur on the other side of the hemisphere."¹⁹¹

The Secretary of Justice lauded the legislature's incorporation of genocide and CAH into the 2004 Penal Code as "avant-garde."¹⁹² He

184. H.R. 2530, 16th Leg. Assemb., 3d Reg. Sess. (P.R. 2010).

185. COMISIÓN DE LO JURÍDICO DEL SENADO DE PUERTO RICO, S. 16, 3D REG. SESS., INFORME NEGATIVO SOBRE EL P. DE LA C. 2530 [Negative Report on H. Project 2530] [hereinafter INFORME NEGATIVO], at 6 (P.R. 2012), <http://www.oslpr.org/2009-2012/%7B5D8F6E23-C693-4BCC-9AB9-5169D05C7626%7D.doc>.

186. *Id.* at 5.

187. *See generally infra* notes 188, 191, 193 and accompanying text.

188. ROSA RODRÍGUEZ GANCITANO & TANIA N. DELGADO SOTO, COMISIÓN DE DERECHOS CIVILES, PROYECTO DE LA CÁMARA 2530/PROYECTO DE LA CÁMARA 2531 [Senate Project 2530/Senate Project 2531] (2010), <http://www.oslpr.org/2009-2012/ponencias/C2KVCZFO.pdf>.

189. *Id.*; *see supra* note 134 and accompanying text.

190. P.R. LAWS ANN. tit. 33, § 5003 (2012).

191. JOSÉ E. FIGUEROA SANCHA, POLICÍA DE PUERTO RICO, PROYECTO DE LA CÁMARA 2530 Y 2531 [Senate Project 2530 and 2531], at 3 (2010), <http://www.oslpr.org/2009-2012/ponencias/C2KVCZG4.pdf>.

192. Letter from Guillermo A. Somoza Colombani, Secretario de Justicia, Departamento de Justicia, to José Emilio González, Presidente, Comisión de lo Jurídico Penal (Aug. 17, 2010) at 5,

implicitly recognized that the 2012 reform sought to modify the language of a predefined international crime, but asserted that this posed no legal barrier to the Puerto Rican Legislative Assembly, stating, “[e]ven though the referenced provision has its origin in Article 7 of the Rome Statute of the International Criminal Court, we understand that this is not an impediment to effectuating the proposed amendments, given that the scope of Article [300]’s application is circumscribed to the jurisdiction of Puerto Rico.”¹⁹³

Thus, the Puerto Rican government acknowledged the novelty of introducing human trafficking as a CAH, but it believed that the Legislative Assembly was within its rights to modify the Rome Statute definition of CAH for the purposes of amending the Penal Code. While it is possible that the Secretary of Justice was unaware of Article 3’s grant of extraterritorial adjudicative jurisdiction over CAH, his statement is better understood as an affirmation of the Legislature’s prescriptive jurisdiction to define international crimes under Puerto Rican law.

E. Textual Analysis of Article 300’s CAH Definition

1. Chapeau Elements

Article 300’s text differs from Article 7(2)(a) of the Rome Statute in that it does not require proof of a “State or organizational policy.”¹⁹⁴ Despite some scholarly debate to the contrary,¹⁹⁵ international tribunals and foreign courts have declared that the ICC’s policy requirement is not rooted in customary international law.¹⁹⁶ The Pre-Trial Chamber of the ICC has further ruled that an “organizational policy” may pertain to a non-state actor, such as a political party in the case of the “Situation in the Republic of Kenya.”¹⁹⁷

<http://www.oslpr.org/2009-2012/ponencias/C2KVCZfZ.pdf> [hereinafter Letter from Guillermo A. Somoza Colombani to José Emilio González]

193. *Id.* at 6.

194. *See supra* note 15 (comparing Article 300 of Puerto Rico’s Penal Code with Article 7(2)(a) of the Rome Statute).

195. *See, e.g., State Policy, supra* note 140, at 975 (“[T]he approach is rooted in customary international law”); Thomas Obel Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons from and for The Case of Kenya*, 43 GEO. WASH. INT’L L. REV. 1, 13–14 (2011) (citing M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 151–52 (2005)).

196. *See Minister of Citizenship & Immigration v. Mugesera*, [2005] S.C.R. 100, 106 (Can.) (“There is currently no requirement in customary international law that a policy underlie the attack.”); *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (stating customary international law does not require policy to convict a defendant).

197. *See Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 90 (Pre-Trial Chamber II Mar. 31, 2010) (explaining that a group that has the capability to

Regardless, the jurisdictional barriers contained within Article 7(2)(a) are not present in the Puerto Rican Penal Code, even though Article 300 was modeled after the Rome Statute.¹⁹⁸

This development expands Puerto Rico's ability to prosecute human trafficking as a CAH. Omitting the "State or organizational"¹⁹⁹ language contained within Article 7(2)(a) facilitates the prosecution of human traffickers for CAH. Because human trafficking is typically committed by non-state actors,²⁰⁰ eliminating any question of whether CAH applies to "organizations" or other entities removes a significant barrier to prosecution. Moreover, the absence of this requirement obviates the need for an inquiry into the precise definition and scope of qualifying "organizations." Human trafficking is often a multi-stage process that may involve both informal networks of traffickers and highly organized criminal syndicates.²⁰¹ Including a "State or organizational policy"²⁰² requirement in Article 300 would have created an impunity gap in which human trafficking committed as part of a widespread or systematic attack could fail to qualify as a CAH simply because the perpetrators do not satisfy the undefined criteria of an *organization*.

It could be said that removing the policy condition in its entirety weakens a key element that distinguishes CAH from ordinary criminal activity. A CAH must be linked to an attack, either widespread or systematic, that amounts to more than the amalgamation of isolated acts of violence (e.g., a "crime wave").²⁰³ However, the value of a "policy" requirement in defining this distinction has largely been overstated, because the "widespread or

perform acts that infringe on human rights may qualify as an organization for the purposes of Article 7(2)(a)).

198. See Letter from Guillermo A. Somoza Colombani to José Emilio González, *supra* note 192, at 6 (noting that the scope of Article 300 is limited to the jurisdiction of Puerto Rico).

199. See *supra* note 15.

200. Lorna McGregor, *Applying the Definition of Torture to the Acts of Non-State Actors: The Case of Trafficking in Human Beings*, 36 HUM. RTS. Q. 210, 213 (2014).

201. See United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons*, at 14 (2014) (explaining the complex nature of some human trafficking networks).

202. See *supra* note 15.

203. "In order to demonstrate a situation of widespread or systematic violation . . . one cannot simply pick violations at random; rather, one must show that a common situation exists linking the violations and evidence one presents. Hence, some commentators have assigned the policy requirement [to] this role, making it the criterion upon which unassociated crimes in the context of a crime wave are not considered to constitute a situation of crimes against humanity . . ." Christopher Roberts, *On the Definition of Crimes Against Humanity and Other Widespread or Systematic Human Rights Violations*, 20 U. PA. J.L. & SOC. CHANGE 1, 19 (2017) .

systematic” chapeau element renders it redundant.²⁰⁴ Moreover, requiring proof of a policy creates an undue evidentiary burden.²⁰⁵

While the absence of a policy requirement in the Puerto Rican Penal Code should be welcomed, some apprehension is appropriate. Unlike the ICC and International Criminal Tribunal for the Former Yugoslavia (ICTY) statutes, Article 300 does not specify that an attack be “directed” against a civilian population.²⁰⁶ The term “directed” implies the existence of an organizational hierarchy.²⁰⁷ In the context of the Rome Statute, the term “directed” serves as a redundant safeguard that preserves the “State or organizational policy” element.²⁰⁸ The absence of the word “directed” in Article 300 is conspicuous, because, without it, there is no other language to compel proof that an attack that is merely “widespread” (rather than “systematic”) occurred with sufficient coherence to warrant international condemnation.

An analysis of whether the term “directed” adds any substantial meaning to the definition of CAH is incomplete without reviewing how this word’s omission from the International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone (SCSL) statutes affected these tribunals’ CAH jurisprudence. Like Article 300, both statutes merely refer to an attack “against” a civilian population.²⁰⁹ These tribunals have nevertheless interpreted their statutes’ respective CAH definitions as creating no distinction between an attack that is “directed” against a civilian population and one that is “against” a civilian population.²¹⁰ Thus, the ultimate impact

204. See Guénaél Mettraux, *The Definition of Crimes Against Humanity and the Question of a “Policy” Element*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 142, 153 (Leila Sadat ed. 2011) (“If the phrase ‘widespread or systematic attack against a civilian population’ is given its due meaning, it seems that all or most of the concerns expressed by the supporters of the requirement of ‘policy’ dissipate or become quite insignificant.”).

205. See *id.* at 144 (explaining the difficulties a prosecutor would face if courts required proof of a “policy” element).

206. See P.R. LAWS ANN. tit 33, § 4934 (2012) (stating that the “attack” merely be “against a civilian population,” not that it must be “directed at a civilian population”).

207. See Mettraux, *supra* note 204, at 172–73 (implying that if an act is “directed” it comes from an authority, such as a government, organization, or group).

208. Rome Statute, *supra* note 15, art. 7(2)(a).

209. S.C. Res. 955, art. 3 (Nov. 8, 1994); S.C. Res. 1315, art. 2 (Jan. 16, 2002).

210. *Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, ¶ 269 (May 20, 2005) (emphasis added) (footnote omitted) (“[A]lthough the existence of a policy or plan may be useful to establish that the attack was *directed* against a civilian population and that it was widespread and systematic, it is not an independent legal element.”); *Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, ¶ 355 n. 604 (Nov. 16, 2001) (emphasis added) (quoting the Prosecution’s claim that “the category of crimes against humanity . . . focuses on a broad spectrum of inhumane acts, but they need to be *directed* at any civilian population on a widespread and systematic basis” to hold that proof of a crime against humanity requires that the constitutive act form part of a widespread or systematic attack *against* a civilian population); *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgement, ¶¶ 235–36 (May 28,

of this phrasing on Article 300 would likely be determined by how Puerto Rican or federal courts interpret the state of customary international law (if they even embark on this discussion).

These concerns are not purely academic. Charges of CAH brought before the ICTY, for example, have hinged on the term “directed against.”²¹¹ In one such case, the Trial Chamber declined to convict several members of the Kosovo Liberation Army (KLA) of CAH because the prosecution failed to establish that their conduct constituted an “attempt to target a civilian population as such.”²¹² Though the Chamber acknowledged the KLA’s detention and abuse of many suspected Serbian collaborators, it could not conclude that these civilians were targeted on a large-scale²¹³ or discriminatory²¹⁴ basis by nature of their civilian status.²¹⁵ The Chamber derived these criteria from ICTY precedent, which holds that “[t]he expression ‘directed against’ is an expression which ‘specifies that in the context of a crime against humanity the civilian population is the primary object of the attack.’”²¹⁶

CAH charges may be more available to prosecutors in Puerto Rico, who need not establish that civilians are the “primary object” of a given attack. This means that CAH committed in the context of armed conflict may face fewer hurdles in court. It could also discourage courts from feeling obliged to identify a particular subset of a civilian population that was targeted as such, as was the case in *Limaj*.²¹⁷ Nevertheless, courts may simply heed the

2008) (holding that a CAH must be committed as part of a widespread or systematic attack “directed” against a civilian population).

211. *See Fofana*, SCSL-04-14-A at ¶¶ 237–38 (providing an example where an attack was not “directed against” a civilian population, resulting in an acquittal); *see also* Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, ¶ 92 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (interpreting the phrase “directed against” to mean that the civilian population subject to attack was the primary, rather than incidental, target of the attack).

212. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶ 211 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

213. *Id.* ¶ 225.

214. *Id.* ¶¶ 226–27.

215. *Id.* ¶ 228.

216. *Id.* ¶ 185 (citation omitted) (quoting Prosecutor v. Kunarac et al., Case No. IT-96-23/1-A, Judgement, ¶ 91 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002)).

217. *See id.* ¶ 225 (holding that the class or category of the civilian population subject to the attack must be discernible enough so as to constitute a population). The judges were careful to avoid creating a new CAH element by requiring evidence of discrimination against a particular civilian group. *See id.* ¶ 226 (“The evidence does not enable any conclusion as to the overall proportion of civilians abducted and detained by the KLA as between Serbian and Kosovo Albanian victims . . .”). However, the Chamber’s analysis of the evidence may have placed undue weight on the distinction between Serb and Kosovar victims. *See id.* ¶ 215 (“The evidence does not establish, or even indicate, a general policy of targeting civilians as such, whether Serbian or Kosovo Albanian.”). This inquiry is more pertinent to the

approach established by the ICTR and SCSL and ignore this discrepancy altogether.

The omission of the word “directed” in Article 300 presents an additional issue worthy of some attention. While the Rome Statute’s authoritative English, French, and Arabic translations all require that an attack be “directed” against a civilian population,²¹⁸ its Spanish version, after which Article 300 was modeled, and the Russian version do not.²¹⁹ It is unclear whether this fact is dispositive when interpreting the plain meaning of Article 300 per the canons of statutory interpretation that characterize Puerto Rico’s civil law tradition. This inquiry will be important to any future prosecutions of human trafficking as a CAH under the Penal Code, but such a discussion lies beyond the scope of this analysis.

2. Human Trafficking as a CAH

Unlike any other national or international instrument, the Puerto Rican Penal Code incorporates human trafficking into its definition of CAH.²²⁰ Every definition of CAH since the adoption of the Nuremberg Charter has acknowledged “enslavement” as a CAH,²²¹ but Article 300 is unique in that

genocide definition, which requires intent to destroy a particular group “as such,” rather than the definition of CAH. See Rome Statute, *supra* note 15, art. 6.

218. Rome Statute, *supra* note 15, art. 7(1) (emphasis added) (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack *directed* against any civilian population, with knowledge of the attack”); Statut de Rome de la Cour Pénale Internationale art. 7(1), July 17, 1998, 2187 U.N.T.S. 159 (entered into force July 1, 2002) (emphasis added) (authentic French text) (“Aux fins du présent Statut, on entend par crime contre l’humanité l’un quelconque des actes ci-après lorsqu’il est commis dans le cadre d’une attaque généralisée ou systématique *lancée* contre toute population civile et en connaissance de cette attaque”); Nizām Rūmā Al-Asāsī Lilmahkama Al-Jinā’īa Al-Dūalīa, art. 7(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (internal quotations omitted) (emphasis added) (authentic Arabic text) (لغرض هذا) ضد الإنسانية متى ارتكب في إطار هجوم واسع النطاق أو منهجي موجه ضد “النظام الأساسي، يشكل أي فعل من الأفعال التالية جريمة (أيه مجموعة من السكان المدنيين، وعن علم بالهجوم

219. Estatuto de Roma, *supra* note 141, art. 7(1) (“A los efectos del presente Estatuto, se entenderá por ‘crimen de lesa humanidad’ cualquiera de los actos siguientes cuando se cometa como parte de un ataque generalizado o sistemático contra una población civil y con conocimiento de dicho ataque”); Римский статут Международного уголовного суда art. 7(1), July 17, 1998, 2187 U.N.T.S. 230 (entered into force July 1, 2002) (authentic Russian text) (“Для целей настоящего Статута “преступление против человечности” означает любое из следующих деяний, когда они совершаются в рамках широкомасштабного или систематического нападения на любых гражданских лиц, и если такое нападение совершается сознательно”).

220. P.R. LAWS ANN. tit. 33, § 5402(1)(d) (2012).

221. U.N. Charter of the International Military Tribunal § II, art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284; S.C. Res. 955, art. 3(c) (Nov. 8, 1994); Rep. of the S.C. on the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 5(c) (May 3, 1993); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the

it captures the fundamental differences between human trafficking and other crimes such as slavery.²²² This part compares Puerto Rico's definition of human trafficking, located in Article 160 of the Penal Code, to the internationally-accepted definition adopted by the Palermo Protocol.²²³ The differences between the Palermo Protocol's and the Penal Code's respective wordings impact the elements that would be required for proving human trafficking as a CAH in Puerto Rican courts.

a. Article 160 and the Palermo Protocol in Comparison

Article 300 of the Puerto Rico Penal Code does not define human trafficking, but rather cross-references the definition provided by Article 160.²²⁴ Like Article 300's human trafficking provision, Article 160 arose from a bill introduced by former Representative Jenniffer González to amend the Penal Code.²²⁵ Her efforts were eventually incorporated into the 2012 project to revise the Penal Code.²²⁶ The available legislative record does not explicitly indicate that the Palermo Protocol definition was used as a model for Article 160, but similarities between the two texts suggest that this may have been the case.²²⁷ Nevertheless, Article 160 represents a drastic departure from the Palermo definition, as illustrated by Figure 1. While Article 160 preserves much of the Palermo Protocol's language, the Penal Code rearranges the terms common to both definitions in such a way that completely alters the elements of the crime.

Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended, No. NS/RKM/0801/12 art. 5 (Aug. 10, 2001) (Cambodia); S.C. Res. 1315, art. 2(c) (Jan. 16, 2002).

222. P.R. LAWS ANN. tit. 33, § 4934.

223. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3 (Nov. 15, 2000) [hereinafter Palermo Protocol], https://www.ohchr.org/en/professional_interest/pages/protocoltraffickinginpersons.aspx.

224. P.R. LAWS ANN. tit. 33, § 5402(1)(d).

225. H.B. 2531, 16th Leg. Assemb., 3d Reg. Sess., at 1 (P.R. 2010).

226. INFORME NEGATIVO, *supra* note 185.

227. Compare Palermo Protocol, *supra* note 223, art. 3 (listing the elements for human trafficking under the Palermo Protocol), with P.R. PENAL CODE art. 160 (2012) (listing the elements for human trafficking under Article 160 of Puerto Rico's Penal Code).

	Palermo Protocol	P.R. Penal Code
Acts	<ul style="list-style-type: none"> • Recruitment, • Transportation, • Transfer, • Harboring, or • Receipt (of persons) 	<ul style="list-style-type: none"> • Offering or receiving the concession or receipt of payments or benefits
Means	<ul style="list-style-type: none"> • Threat or use of force or other forms of coercion, • Abduction, • Fraud, • Deception, • Abuse of power or of a position of vulnerability, or • Giving or receiving of payments or benefits to achieve the consent of a person having control over another person 	<ul style="list-style-type: none"> • Recruitment, • Transportation, • Transfer, • Harboring, or • Receipt (of persons), • [AND] • The use of: • Force, • Intimidation, • Coercion, • Kidnapping, • Fraud, • Deception, • Abuse of power, or • Other situations of vulnerability
Purpose	<ul style="list-style-type: none"> • Exploitation, including at a minimum: • Prostitution, • Other forms of sexual exploitation, • Forced labor or services, • Slavery or practices similar to slavery, • Servitude, or • Removal of organs 	<ul style="list-style-type: none"> • Obtaining the consent of a person who has authority over another so that [the latter may] practice: • Begging, • Any kind of sexual exploitation, • Pornography, • Forced labor or service, • Debt bondage, • Servile marriage, • Irregular adoption, • Slavery or its analogous practices, • Servitude, or • Organ removal (even with the consent of the victim)

Figure 1.

First, the *actus reus* shifts from the “recruitment, transportation, transfer, harbouring or receipt of persons”²²⁸ to “offer[ing] or receiv[ing] the concession or receipt of payments or benefit.”²²⁹ The former reflects the broad scope of human trafficking and acknowledges the phenomenon as a process involving multiple tiers of abuse. The latter, however, focuses on a transaction that only captures one component of one form of trafficking. This language appears to originate from one of the “means” listed under the Palermo Protocol.²³⁰ Requiring proof of payment relegates human trafficking to a financial crime, which introduces a prohibitively narrow view of the suffering experienced by trafficking survivors.²³¹ Additionally, it imposes an undue burden of proof on prosecutors. The Palermo definition would allow a court to consider a broader scope of evidence from a wide range of qualifying acts, whereas Article 160 likely requires evidence in the form of written agreements, payment receipts, or audio or visual evidence of the exchange.

The poor drafting of the *actus reus* language obscures what acts would qualify as human trafficking under Article 160. For instance, the difference between “offering the concession of payments”²³² and “offering the receipt of payments,”²³³ or the distinction between “receiving the concession of payments”²³⁴ and “receiving the receipt of payments,”²³⁵ is unclear. At best, this language is merely redundant. But at worst, the applications of the law could be susceptible to a constitutional challenge on the basis of vagueness.²³⁶

Second, the Penal Code inexplicably converts the “acts” originally specified by the Palermo definition into the “means.”²³⁷ On the one hand, retaining this language as a requisite element of the crime—regardless of its classification—may still serve the purpose of preserving the Palermo Protocol’s recognition of human trafficking as a complex series of abusive actions. However, it is difficult to conceive how “offering or receiving the

228. Palermo Protocol, *supra* note 223, art. 3.

229. P.R. LAWS ANN. tit. 33, § 5226.

230. Palermo Protocol, *supra* note 223, art. 3.

231. P.R. PENAL CODE art. 160 (2012).

232. P.R. LAWS ANN. tit. 33, § 5226.

233. *Id.*

234. *Id.*

235. *Id.*

236. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”).

237. P.R. PENAL CODE art. 160 (2012).

concession or receipt of payments or benefits”²³⁸ may be committed *by means of* the “recruitment, transportation, transfer, harboring, or receipt”²³⁹ of persons. The only way to reconcile these two elements of the Article 160 definition is to interpret these means as additional acts that may qualify as human trafficking—otherwise, Article 160 is rendered incoherent. However, it is uncertain whether a court would be willing to interpret the plain language of the law so loosely.

Additionally, Article 160’s means requirement is more stringent than that of the Palermo Protocol. It creates two categories of means that are linked by the conjunction “and.”²⁴⁰ As discussed above, the first set includes the “recruitment, transportation, transfer, harboring, *or* receipt”²⁴¹ of persons. Because the “or” is disjunctive, only one of these means must be proven.²⁴² The second set of means is the same list provided by the Palermo Protocol. It includes the use of “force, intimidation, coercion, kidnapping, fraud, deception, abuse of power, *or* other situations of vulnerability.”²⁴³ Thus, the means element is only satisfied if the prosecution can demonstrate that the defendant resorted to at least one means from each category.²⁴⁴

Likewise, this second category of means may not be reconcilable with the acts defined by Article 160. A plain reading of the acts requirement, in conjunction with the purpose requirement analyzed below, suggests that the impugned transaction must take place between two individuals, at least one of whom *already* exercises ownership or power over another human being.²⁴⁵ If this is the case, it does not follow that the transaction could be completed by means of force, intimidation, or other means. Rather, the transaction is most likely to be a mutually-beneficial exchange between two or more traffickers. Again, this inconsistency can only be reconciled if these means requirements are liberally interpreted as additional acts that could be proven.

Article 160 also establishes a distinct purpose requirement that reads like yet another misinterpretation of the original Palermo Protocol definition of human trafficking. The Protocol defines this purpose as exploitation committed in one of various forms, including: prostitution, sexual exploitation, forced labor, slavery, servitude, or organ harvesting.²⁴⁶ Article 160, however, defines the necessary purpose as “obtaining the consent of a

238. P.R. LAWS ANN. tit. 33, § 5226.

239. *Id.*

240. P.R. PENAL CODE art. 160.

241. P.R. LAWS ANN. tit. 33, § 5226 (emphasis added).

242. *Or*, BOUVIER’S LAW DICTIONARY (8th ed. 1914).

243. P.R. LAWS ANN. tit. 33, § 5226 (emphasis added).

244. P.R. PENAL CODE art. 160.

245. *Id.*

246. Palermo Protocol, *supra* note 223, art. 3.

person who has authority over another so that [the latter may] practice begging, any kind of sexual exploitation, pornography, forced labor or service, debt bondage, servile marriage, irregular adoption, slavery or its analogous practices, servitude, or organ removal.”²⁴⁷ To be sure, the Puerto Rican definition includes an even more expansive list of exploitation forms. These may reduce the likelihood of an individual charged with trafficking from escaping conviction on the basis of an overly narrow conceptualization of exploitation.²⁴⁸ Nevertheless, Article 160’s approach to defining the purpose of human trafficking is ultimately a regressive departure from international standards.

Like the *actus reus* described previously, Article 160’s purpose component prioritizes a limited conceptualization of human trafficking.²⁴⁹ The Palermo Protocol recognizes that the exercise of authority over an individual is only one of various means by which traffickers may achieve their ends.²⁵⁰ Article 160, however, transforms a single means of trafficking into the requisite objective of the crime, qualifying the enumerated forms of exploitation.²⁵¹ The purpose of human trafficking as defined by Article 160 reaffirms the transactional nature of the *actus reus* and restricts the scope of otherwise prosecutable conduct. Whereas *exploitation* encompasses a wide range of abuses, “obtaining the consent of a person who has authority over another” fails to capture instances of trafficking where the consent of a person in a position of authority is not a consideration (e.g., the use of force, abduction, or other forms of coercion).²⁵²

Lastly, Article 160 fails to emulate the Palermo Protocol’s added protection of child victims. The Protocol stipulates: “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article”²⁵³ The Protocol’s framers eliminated the means requirement with respect to children in acknowledgement of their heightened vulnerability to various forms of exploitation.²⁵⁴ While the *travaux préparatoires* on this point are meager, it is likely that the working group tasked with drafting the Protocol

247. P.R. LAWS ANN. tit. 33, § 5226.

248. P.R. PENAL CODE art. 160.

249. *Id.*

250. Palermo Protocol, *supra* note 223, art. 3.

251. P.R. PENAL CODE art. 160.

252. *Id.*

253. Palermo Protocol, *supra* note 223, art. 3.

254. Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Ninth Sess., at 6 n. 26, U.N. Doc A/AC.254/4/Add.3/Rev.6 (Apr. 4, 2000).

was concerned about children's inherent inability to consent to potentially harmful conduct.²⁵⁵ It is troubling that Article 160 fails to address this vulnerability and afford a correspondingly robust protection scheme for children.

The elements of human trafficking as defined by Article 160 directly impact the viability of a prosecution for human trafficking as a CAH under the Puerto Rico Penal Code. The CAH of human trafficking cannot be proven without first establishing the elements set forth in Article 160.²⁵⁶ To secure a conviction for human trafficking as a CAH under the Penal Code, prosecutors would have to demonstrate that the alleged criminal conduct satisfies the uniquely narrow acts, means, and purpose elements defined in Article 160.²⁵⁷ Even if a case of alleged human trafficking survived this threshold, it would then have to be shown that the trafficking was committed as part of a widespread or systematic attack.²⁵⁸ Limiting the scope of the definition of human trafficking decreases the likelihood that the alleged conduct could be prosecuted as a widespread or systematic attack. Thus, the Puerto Rican legislature undermined its groundbreaking decision to criminalize human trafficking as a CAH by defining human trafficking itself in excessively narrow terms.

IV. CHALLENGES TO EXTRATERRITORIAL ATROCITY CRIMES PROSECUTIONS UNDER STATE LAW

Title 5 of the Puerto Rico Penal Code is a one-of-a-kind tool for prosecuting perpetrators of atrocity crimes, but the path to any conviction under the Title's provisions might be frustrated by various constitutional challenges. These roadblocks raise thorny questions about preemption, federal power, due process, and Puerto Rico's territorial status. Unpacking every one of these issues would be a Herculean undertaking, so this part merely identifies several main challenges and argues how these statutes might still survive. The first three categories of challenges (express, conflict, and object preemption; field and dormant foreign affairs preemption; and prescriptive jurisdiction) apply equally to states and Puerto Rico, while the fourth (the Territorial Clause) deals with the latter.

255. *Id.*

256. P.R. PENAL CODE art. 160.

257. *Id.*

258. P.R. LAWS ANN. tit. 33, § 5402 (2012).

A. Express, Conflict, and Object Preemption

The Supremacy Clause of the U.S. Constitution declares that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”²⁵⁹ The Supremacy Clause empowers Congress to preempt any state law that conflicts with the exercise of its proper authority, either expressly by statute or impliedly.²⁶⁰ Implied forms include conflict preemption, which applies where “compliance with both federal and state regulations is a physical impossibility.”²⁶¹ Object preemption may invalidate a state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁶² Executive agreements and policy may also preempt state law expressly or by implication.²⁶³

Express, conflict, and object preemption may be generally dismissed as potential impediments to prosecutions under Article 300 of the Puerto Rico Penal Code, or any comparable state statute, because no federal law or executive policy runs counter to the atrocity crimes statute. Indeed, in issuing Presidential Study Directive No. 10 (PSD-10), the Obama administration announced that preventing mass atrocity is a “core national security interest and a core moral responsibility of the United States.”²⁶⁴ The Trump administration has given no indication that PSD-10 no longer represents U.S. policy.²⁶⁵ Furthermore, state initiatives to codify atrocity crimes only stand to complement federal law, rather than obstruct it. It is well accepted, after all, that an individual may be tried under state and federal law for the same

259. U.S. CONST. art. VI.

260. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

261. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

262. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

263. *See American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 398 (2003) (“Generally, then, valid executive agreements are fit to preempt state law . . .”).

264. Memorandum from President Barack Obama to the Vice President et al., Presidential Study Directive 10: Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review (Aug. 4, 2011) (on file with the Homeland Security Digital Library).

265. For example, President Trump, in signing the Iraq and Syria Genocide Relief and Accountability Act of 2018, stated, “This bill continues my administration’s efforts to direct U.S. assistance toward persecuted communities, including through faith-based programs. It also allows the government agencies to assist a range of entities in investigating and prosecuting ISIS’s despicable acts.” Donald J. Trump, Remarks by President Trump at the Signing Ceremony for H.R. 390, Iraq and Syria Genocide Relief and Accountability Act of 2018 (Dec. 11, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-h-r-390-iraq-syria-genocide-relief-accountability-act-2018/>.

criminal act.²⁶⁶ Moreover, conflict preemption by its nature has less to say about state atrocity crimes legislation. It is difficult to conceive how complying with a criminal prohibition against genocide, for example, could ever render compliance with federal law or policy “a physical impossibility.”²⁶⁷

Theoretically, Congress could attempt to pass legislation removing state authority to define and punish *extraterritorial* offenses against the law of nations.²⁶⁸ However, this approach could raise potentially fatal Tenth Amendment concerns, as “States possess primary authority for defining and enforcing the criminal law.”²⁶⁹ Regardless, extraterritorial human rights prosecutions in state courts are bound to generate an ample number of constitutional questions that will render federal appellate courts the final arbiters of individual cases. It would be unreasonable for Congress to kill a fly with a cannonball when federal courts would still maintain their role as bulwarks against the extreme minority of prosecutions that might realistically impinge on foreign relations.

B. Field Preemption and Dormant Foreign Affairs Preemption

Properly identifying field preemption and dormant foreign affairs preemption (DFAP) requires a greater degree of abstraction than is the case for other implied theories of preemption, especially in the realm of foreign affairs.²⁷⁰ In terms of field preemption, the Supreme Court ruled, “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”²⁷¹ A challenge to Puerto Rico’s atrocity crimes legislation, or a

266. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1871 (2016).

267. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

268. Julie Rose O’Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1029 (2018).

269. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982))).

270. See Joseph B. Crace, Jr., *Gara-Mending the Doctrine of Foreign Affairs*, 90 CORNELL L. REV. 203, 208 (2004) (stating that forms of statutory preemption are “somewhat less abstract than . . . dormant [preemption]” and that field preemption serves as a boundary between statutory and dormant preemption—requiring a certain level of presumption in order to establish that the federal government occupies a specific field).

271. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citation omitted). “Absent explicit preemptive language, Congress’ intent to supersede state law altogether may be found from a ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ because ‘the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same

similar state statute, on the basis of field preemption would hinge on the determination that such legislation falls within a pervasive scheme of federal regulation pertaining to a dominant federal interest.²⁷²

Congress has failed to legislate on atrocity crimes pervasively enough to supplant states' traditional power to enact criminal law. As illustrated in Part II.A, Congress has left serious gaps in the implementation of a fully comprehensive atrocity crimes framework.²⁷³ Furthermore, if "Congress legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."²⁷⁴ While it could be said that states have not traditionally occupied the field of atrocity crimes, the issue is better framed as whether states have traditionally legislated criminal law generally. The Supreme Court has upheld this broad reserve of state power, designating "criminal law enforcement" as an "area[] . . . where States historically have been sovereign."²⁷⁵ Indeed, "States possess primary authority for defining and enforcing the criminal law."²⁷⁶ Given this presumption against preemption, and provided the frequency with which state criminal law operates in tandem with federal law, Congress cannot be said to occupy any field pervasively enough to assume any intent to preempt state atrocity crimes statutes.

DFAP, however, entails an even broader federal authority to *exclusively* regulate foreign relations.²⁷⁷ DFAP's proponents argue that its basis rests on "[t]he language, the spirit, and the history of the Constitution [to] deny the states authority to participate in foreign affairs."²⁷⁸ Supporters of this view cite *Zschernig v. Miller*,²⁷⁹ in which the Court held: "That kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by

subject" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983) (alteration in original) (quoting *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

272. See *Pac. Gas & Elec. Co.*, 461 U.S. at 203–04 (quoting *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153).

273. See *supra* Part II.A.

274. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted).

275. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

276. *Id.* at 561 n. 3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

277. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 75 (2007) (describing the Supreme Court's "insist[ence]" on the exclusivity of national power based on general assertions of the risk of potential harms" if the issue at stake "could affect how the United States manage[s] its interaction with other nations").

278. GLENNON & SLOANE, *supra* note 44, at 88 (emphasis in original) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 150 (2d ed. 1996)).

279. *Zschernig v. Miller*, 389 U.S. 429, 436 (1968).

Clark v. Allen.²⁸⁰ “That” *involvement* refers to state action that produces more than “some incidental or indirect effect in foreign countries.”²⁸¹ *Zschernig* theoretically proscribed only state action that produces effects on foreign policy that are more than “incidental or indirect,” casting doubt on whether the decision truly supports the notion of federal exclusivity over foreign affairs.²⁸² Nevertheless, the Court struck down the state law in question even though the Solicitor General had stated as *amicus curiae* that “the Government does not ‘contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States’ conduct of foreign relations.’”²⁸³ It appears, then, that these effects need only be hypothetical in the view of the *Zschernig* court.²⁸⁴

Decades later, the Supreme Court revived this dubious ruling²⁸⁵ in *American Insurance Association v. Garamendi*.²⁸⁶ The majority interpreted *Zschernig* to hold that “the *likelihood* that state legislation will produce something more than incidental effect *in conflict* with *express* foreign policy of the National Government would require preemption of the state law.”²⁸⁷ The Court found that an “express federal policy” in the form of an executive agreement and a

clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government’s favor, given the weakness of the State’s interest, against the backdrop of traditional state legislative subject matter.²⁸⁸

The Court declined to reach the question of whether the federal government’s foreign policy powers are exclusive, but it did conclude that a mere executive agreement could be sufficient to preempt state action in the realm of its traditional competence so long as the state’s interest in the matter is weak.²⁸⁹

280. *Id.*

281. *Clark v. Allen*, 331 U.S. 503, 517 (1947).

282. *Zschernig*, 389 U.S. at 433 (quoting *Clark*, 331 U.S. at 517).

283. *Id.* at 443 (Stewart, J., concurring) (citation omitted).

284. *Id.* at 433–35.

285. See GLENNON & SLOANE, *supra* note 44, at 103–20 for a thorough critique of *Zschernig*.

286. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003).

287. *Id.* (emphasis added).

288. *Id.* at 425.

289. *See id.* at 419–20 (declining to answer whether the executive has absolute authority in foreign affairs, but holding that federal law trumps state law when the laws are conflicting).

Even the strongest precedents in favor of DFAP do not clearly prove that it exists, at least in its purest form.²⁹⁰ Regardless, state atrocity crimes laws should prevail under a DFAP analysis, because, firstly, they do not conflict with any clear federal policy.²⁹¹ As illustrated previously, state atrocity crimes legislation does not conflict with federal law or policy.²⁹² Second, atrocity crimes legislation would be enacted on the basis of states' sufficiently strong interest in prescribing criminal law.²⁹³ That this interest implicates international human rights does not, however, imply that federal foreign policy powers are even at issue. After all, a criminal conviction requires indictment of the individual, not of the country.²⁹⁴ While this line may blur when state actors themselves commit atrocities, even the indictment by a state court of an individual connected to a sitting foreign government is less likely to obstruct U.S. foreign policy—an individual accused of atrocity crimes under state law could already face some form of criminal or civil liability under federal law, reducing the chance of the individual traveling to the United States to begin with.²⁹⁵ If the federal government was still concerned about the possibility of exceptional cases slipping through cracks, Congress or the President may respectively legislate or issue executive orders on the matter to affirmatively preempt the state law.²⁹⁶

To be sure, statutes that permit the extraterritorial application of state criminal law not just beyond states' own borders, but also beyond the borders of the United States, might be construed as an intrusion into foreign policy that could potentially obstruct federal foreign relations. However, completely restricting states' power to define the jurisdictional reach of their criminal laws would constitute an impermissible abrogation of their inherent

290. *Id.* at 398.

291. *See supra* notes 269, 282–84 and accompanying text (providing cases that highlight state atrocity crime laws do not conflict with clear federal policies).

292. *See supra* Part IV.A (illustrating express, conflict, and object preemption).

293. *See infra* Part IV.C (arguing that states' concrete interest in enacting criminal law outweighs abstract concerns about states' intrusion into foreign affairs via their criminal laws).

294. *See* FED. R. CRIM. P. 7 (emphasis added) (requiring that a criminal offense “must be prosecuted by an indictment” and that “the indictment . . . must give . . . the statute, rule, regulation, or other provision of law that the *defendant* is alleged to have violated”); *see also Defendant*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added) (defining “defendant” as “a [p]erson . . . accused in a criminal proceeding”).

295. *See supra* Parts II.A–B. This assumes that states would only exercise “present-in” jurisdiction over atrocity crimes, rather than “pure” universal jurisdiction.

296. Preemptive federal legislation could define limits on state jurisdiction over atrocity cases that affect foreign relations, such as those that involve foreign government officials or those that might require potentially sensitive factual determinations that run counter to State Department policy (e.g., state recognition). This is not to say that such limitations are wise or represent the best interests of the U.S. government or victims. However, the federal government clearly possesses sufficient means for avoiding conflicts with state atrocity crimes legislation if it so chooses, obviating the need for a blanket ban.

sovereignty. Just as states' organic police powers grant them the fundamental right to prescribe substantive criminal law, these police powers also allow states to define the jurisdictional reach of these laws, so long as they conform to constitutional limitations.²⁹⁷ Erasing a state's power to define such a fundamental element of its criminal law is too great a violation of state sovereignty to be justified on the basis of the ill-defined theory of foreign affairs preemption.

C. Extraterritorial Application of State Criminal Law

Regardless of whether the extraterritorial application of state atrocity crimes legislation conflicts with federal foreign affairs powers, it still may exceed states' power to prescribe extraterritorial jurisdiction for crimes that

297. Because states rarely exercise criminal jurisdiction over acts committed wholly without their boundaries, there is little consensus over the true extent of states' power to prescribe subject-matter jurisdiction over extraterritorial conduct. In one case, the Supreme Court considered whether the State of Oregon, by nature of its concurrent jurisdiction over the Columbia River with the State of Washington, could prosecute a citizen of Washington for conduct that was prohibited in Oregon, but authorized by Washington. See *Nielsen v. Oregon*, 212 U.S. 315, 315 (1909) (discussing whether a state can hold someone liable for an act subject to concurrent jurisdiction where the act is illegal in one jurisdiction, but not in the other). The Court concluded that it could not "practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do." *Id.* at 321. However, this precedent has little to say about state prosecutions for *jus cogens* crimes on the basis of universal jurisdiction. Because atrocity crimes are universally prohibited, no conflict should normally arise when one state applies its criminal law to such crimes committed on foreign territory. *Nielsen* offers no guidance here as the Court specifically stated: "Whether, if the act of the plaintiff in error had been done within the [exclusive] territorial limits of the State of Oregon, it would make any difference we need not determine, nor whether, in the absence of any legislation by the State of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia." *Id.* These questions apply more clearly to the hypothetical exercise of a state's criminal law over acts committed outside the United States. Moreover, the act in question was not extraterritorial given that Oregon exercised concurrent jurisdiction over the river with Washington, per an act of Congress. To be sure, similarly dated case law would seem to suggest that state criminal law must be purely territorial. See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (quoting *Rafael v. Verelst*, 96 Eng. Rep. 621, 622 (K.B. 1776)) ("Crimes are in their nature local, and the jurisdiction of crimes is local."); *United States v. Nord Deutscher Lloyd*, 223 U.S. 512, 517 (1912) ("[A] statute, of course, has no extraterritorial operation, and the defendant cannot be indicted here for what he did in a foreign country."). However, these statements "must be qualified today by the realization that there are some substantive crimes and theories of jurisdiction which provide legislative or judicial jurisdiction." Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1117 n. 18 (1982). To the extent that an analogy to personal jurisdiction over civil suits is relevant, "while abandoning the shibboleth that '[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,' . . . we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government,' . . . and stressed that the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980) (alteration in original) (citations omitted).

lack any nexus to the forum state.²⁹⁸ Historically, criminal law was considered a purely local matter.²⁹⁹ However, states have since enacted statutes permitting limited forms of extraterritorial jurisdiction over criminal acts, such as when elements of the crime were committed or consummated within the state.³⁰⁰ Ultimately, “[t]he constitutional limitations aside, and in the absence of federal legislative action . . . ‘the question . . . is one of whether the state actually intended to legislate extraterritorially, not whether it has the power to do so.’”³⁰¹

Indeed, the Supreme Court reasoned:

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.³⁰²

Therefore, if the United States may regulate the extraterritorial conduct of foreign nationals who violate *jus cogens* norms of international criminal law,³⁰³ there is no reason the several states may not likewise legislate against such conduct absent any federal conflict.

298. That is to say, the crime is committed outside state borders, the perpetrator and victim(s) are foreign nationals, and the crime produces no substantial effects within the state.

299. “Crimes and offences against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive, or judicial, of other States take no action with regard to them except by way of extradition to surrender offenders to the State whose laws they have violated, and whose peace they have broken.” *Huntington*, 146 U.S. at 669.

300. CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 21–22 (2016).

301. *Id.* at 21 (alteration in original) (quoting B.J. George, Jr., *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 617 (1966)).

302. *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

303. *See, e.g.*, 18 U.S.C. § 1091(e) (2012) (establishing extraterritorial jurisdiction over genocide). Granted, one could argue that federal jurisdiction over these crimes is solely based on federal treaty-making power, which states obviously lack, rather than the power to define and punish offenses against the laws of nations. Indeed, the federal genocide statute was enacted through the Genocide Convention Implementation Act, whose stated purpose is to “implement the International Convention on the Prevention and Punishment of Genocide.” Genocide Convention Implementation Act of 1987 (Proxmire Act), Pub. L. No. 100-606, § 2(a), 102 Stat. 3045, 3045 (codified at 18 U.S.C. § 1091). This is implausible, however, given that treaties that establish criminal offenses may not be self-executing, William S. Dodge, *Guest Post: Self-Executing Treaties, Criminal Law, and Bond v. United States*, OPINIOJURIS (Aug. 11, 2013), <http://opiniojuris.org/2013/11/08/guest-post-self-executing-treaties-criminal-law-bond-v-united-states/>, and given that all implementing legislation “must be read consistent with principles of federalism inherent in our constitutional structure.” *Bond v. United States*, 572 U.S. 844, 856 (2014). Moreover, in the example of the federal genocide statute, Congress explicitly stated: “Nothing in this chapter shall be construed as precluding the application of State or local laws to the

As the Court stressed in *Skiriotos*, the extraterritorial application of state criminal law is valid, provided a legitimate state interest and the absence of federal preemption.³⁰⁴ As previously discussed, federal law currently poses no preemption obstacle to extraterritorial state atrocity crimes laws.³⁰⁵ The legitimate interest requirement is satisfied by states' clear stake in preventing impunity on their territory for grave crimes against the international community of which, subject to constitutional limitations, they form part.³⁰⁶ Crucially, these constitutional limitations include the principle of fairness protected by the Due Process clause of the Fourteenth Amendment.³⁰⁷ Under Fifth Amendment due process jurisprudence, the extraterritorial application of federal criminal law does not violate principles of fairness or proper notice if the crime is subject to universal jurisdiction or violates customary international law.³⁰⁸ Therefore, a state atrocity crimes law should survive a Fourteenth Amendment challenge, because it would only cover universally prohibited violations of customary international law—crimes for which all individuals are on notice that they may face prosecution, whether in the United States or anywhere else in the world.

One caveat should be mentioned with respect to Puerto Rico's CAH statute.³⁰⁹ In a departure from international norms, the statute includes human trafficking as an enumerated act under the CAH definition.³¹⁰ As progressive as it may be, a prosecution for human trafficking as a CAH may violate the defendant's right to due process. Puerto Rico's extraterritorial jurisdiction over atrocity crimes is contingent upon the theory of universal jurisdiction

conduct proscribed by this chapter . . .” 18 U.S.C. § 1092 (2012). This is further evidence that Congress did not rely on its exclusive treaty-making power to implement atrocity crimes legislation.

304. *Skiriotos*, 313 U.S. at 77.

305. See *supra* Part II.A.1 (discussing that no current federal laws preempt state atrocity crimes).

306. See Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 129 (2007) (alteration in original) (footnote omitted) (quoting MODEL PENAL CODE § 1.03(1)(f) (2002) (“[T]he Model Penal Code provides for jurisdiction over conduct occurring outside the state but which ‘bears a reasonable relation to a legitimate interest of th[e] State and the actor knows or should know that his conduct is likely to affect that interest.’”)).

307. U.S. CONST. amend. XIV.

308. See Brian M. Kelly, *Due Process, Choice of Law, and the Prosecution of Foreign Nationals for Providing Material Support to Terrorist Organizations in Conflicts Abroad*, 2015 HARV. L. SCH. ADDISON BROWN STUDENT WRITING PRIZE 1, 2, 17, 19, 21, 22, 24, <https://dash.harvard.edu/handle/1/16645037> (showing First, Third, Fifth, and Eleventh Circuits' approaches to determining whether a foreign defendant in a CAH case receives Fifth Amendment protections).

309. See *supra* Part III (discussing how human trafficking became a CAH in Puerto Rico).

310. See *supra* note 134 and accompanying text (explaining that Article 300 lists human trafficking as a CAH).

over grave violations of international criminal law.³¹¹ Universal jurisdiction is only constitutionally permissible under the Fifth and Fourteenth Amendments, because it is assumed that every individual across the globe is, or should be, aware that they are subject to prosecution for such violations.³¹² However, this crucial assumption does not necessarily hold for human trafficking as a CAH, because it has not been recognized as a universal norm by any other body or court.³¹³ Thus, a prosecution under this provision may not respect substantive due process for lack of fair notice.³¹⁴

Nevertheless, Puerto Rico's human trafficking provision may still pass constitutional muster. Under Puerto Rican and international law, any "[o]ther inhumane acts" that are committed as part of a widespread or systematic attack against a civilian population may be tried as a CAH.³¹⁵ By definition, human trafficking prosecuted under Puerto Rico's CAH statute must amount to such a widespread or systematic attack.³¹⁶ Thus, any act of human trafficking that fulfills the chapeau elements of CAH under Puerto Rican and international law could already be considered an inhumane act and therefore satisfy due process requirements.

D. Puerto Rico and the Territorial Clause

1. Preemption

While states retain a substantial degree of sovereignty under the Constitution's federalist structure and through the Tenth Amendment, Puerto Rico enjoys no such luxury. As detailed previously,³¹⁷ Puerto Rico "is a territory appurtenant and belonging to the United States, but not a part of the United States."³¹⁸ Whereas Congress may only preempt state law through the valid exercise of its legislative powers (whether exclusive or concurrent with states),³¹⁹ Congress's power to preempt Puerto Rican law is nearly

311. Caroline A. Fish, *Extraterritorial Human Trafficking Prosecutions: Eliminating Zones of Impunity within the Limits of International Law and Due Process*, 91 ST. JOHN'S L. REV. 529, 545–48 (2017).

312. *Id.*

313. *See supra* Part III.E.2 (showing that human trafficking is not a universal CAH).

314. *See supra* Part III.E.1 (explaining due process complications for CAH prosecutions at the state level).

315. P.R. LAWS ANN. tit. 33, § 5402(1)(l) (2012); Rome Statute, *supra* note 15, art. 7(1)(k).

316. P.R. LAWS ANN. tit. 33, § 5402(1).

317. *See* Part III.A (explaining Puerto Rico's complex legal relationship with the United States).

318. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

319. *See* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 48 (2012) (footnote omitted) ("In most of the decided cases that have evaluated Congress's ability to regulate commercial activity under the Commerce

limitless.³²⁰ David Helfeld, the former Dean of the University of Puerto Rico School of Law, as quoted by Judge Juan Torruella, framed the issue well enough to reproduce in full:

Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of [c]onstitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress. The compact is not a contract in a commercial sense. It expresses a method Congress chose to use in place of direct legislation Constitutionally, the most meaningful view of the Puerto Rican Constitution is that it is a statute of the Congress which involves a partial and non-permanent abdication of Congress[’s] territorial power.³²¹

Congress’s plenary power over Puerto Rico’s affairs derives from a constitutional provision that is inapplicable to states: the Territorial Clause.³²² As the U.S. District Court for the District of Puerto Rico succinctly put it, “Congress giveth, Congress taketh away.”³²³ For instance,

Clause . . . the essential issue has been whether the object of the regulation in question is reserved to the states, reserved to Congress, or to be shared by some combination thereof.”).

320. Torruella, *supra* note 124, at 84.

321. *Id.* (alterations in original) (citation omitted).

322. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

323. *Centro de Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, No. CV 17-1743 (JAG), 2018 WL 2094375, at *1 (D.P.R. May 4, 2018) (footnote omitted) (substantiating this point at length, “[t]he Supreme Court has interpreted [the Territorial] [C]lause to give Congress plenary powers over the territories”); *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (noting that pursuant to U.S. Const., art. IV, § 3, cl. 2, “Congress has broad latitude to develop innovative approaches to territorial governance”); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (finding that, under the powers vested in art. IV, § 3, cl. 2, Congress “may treat Puerto Rico differently from States so long as there is a rational basis for its actions”); *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979) (citation omitted) (“Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling.”); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 586 n. 16 (1976) (citations omitted) (“The powers vested in Congress by Const., Art. IV, § 3, cl. 2, to govern Territories are broad.”); *Palmore v. United States*, 411 U.S. 389, 403 (1973) (citation omitted) (“In legislating for [territories], Congress exercises the combined powers of the general, and of a state government.”); *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (citation omitted) (“Congress ‘has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.’”); *United States v. Kagama*, 118 U.S. 375, 379–80 (1886) (noting that the powers

“Congress . . . may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”³²⁴ The federal government recently demonstrated its willingness to exercise its plenary power by passing the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA),³²⁵ which allows an unelected Financial Oversight and Management Board to unilaterally abrogate and replace the Puerto Rican government’s annual budget if the Board deems it to be noncompliant.³²⁶ These examples illustrate the ease with which Congress could decide to repeal Puerto Rico’s atrocity crimes statute. While such a measure may have to pass rational basis review if challenged, history suggests that the federal judiciary will afford little deference to the will of Puerto Ricans and their institutions.

2. Double Jeopardy

Normally, the Fifth Amendment bars multiple prosecutions for the same criminal conduct.³²⁷ However, it is well established that the Double Jeopardy Clause does not apply to successive prosecutions by separate sovereigns (i.e., federal, state, and tribal governments).³²⁸ Territories, by contrast, are not separate sovereigns because the “ultimate source” of their prosecutorial power derives from Congress, rather than any inherent sovereignty.³²⁹ Thus, a prosecution for genocide under Title 18 initiated by the federal Department

conferred to a territorial government by Congress could “be withdrawn, modified, or repealed at any time”); *United States v. Gratiot*, 39 U.S. 526, 537 (1840) (noting that “power over [the territories] is vested in Congress [by the Constitution] without limitation”).

324. *See Harris*, 446 U.S. at 651–52 (holding that a federal aid program may provide less assistance to Puerto Rico than to states).

325. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016).

326. *Id.* §§ 202(e)(3)(A)–(C). The revised budget submitted by the Board to the Puerto Rico Governor and Legislature shall be “in full force and effect beginning on the first day of the applicable fiscal year.” *Id.* § 202(e)(3)(C).

327. U.S. CONST. amend. V (“No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . .”).

328. *See, e.g., United States v. Lanza*, 260 U.S. 377, 382 (1922) (“[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.”); *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (citation omitted) (“[W]hen the same act transgresses the laws of two sovereigns, ‘it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences . . .’”). “In sum, the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos’ primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.” *United States v. Wheeler*, 435 U.S. 313, 328 (1978) (footnotes omitted).

329. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016); *see also Wheeler*, 435 U.S. at 319 (footnote omitted) (“Territories are subject to the ultimate control of Congress . . .”).

of Justice would bar parallel or subsequent prosecution against the individual pursuant to Article 299 of the Puerto Rico Penal Code. However, federal law does not codify CAH.³³⁰ This means that, if federal prosecutors indicted an individual within Puerto Rico's jurisdiction for any similar crime, prosecution by Puerto Rican authorities for CAH, *even arising from the same facts*, would not be barred because CAH comprise distinct legal elements.³³¹

CONCLUSION

The proposition that state courts may serve as effective forums for international justice has gained significant, well-deserved acceptance among commentators since *Kiobel*.³³² However, the role of states has largely been siloed within the civil realm. While this approach provides a measure of justice for victims and nicely fits the contours of existing tort law, it is no substitute for criminal proceedings. States are empowered to enact criminal legislation proscribing atrocity crimes committed both within their boundaries and extraterritorially, if they elect to do so. Despite its curious position as an unincorporated territory, Puerto Rico has led the charge on this front, and its penal code serves as a model for other states that wish to chart a new path toward ending impunity for the world's most horrific crimes.

This road may be fraught with legal challenges that speak to core questions about the federalist structure of the United States government. Other potential challenges to atrocity crimes prosecutions in Puerto Rico and the several states include questions of legal immunity, access to evidence, institutional capacity, and the opportunity (or lack thereof) to arrest perpetrators. But these obstacles are far from fatal, and they are well worth overcoming in the pursuit of individual justice and for the sake of accepting collective responsibility for upholding the global human rights regime.

Whether states choose to exercise their prerogative to codify atrocity crimes is an entirely non-legal question. Depending on the political context of each state, a proposal to penalize atrocity crimes may provoke lively debate, or it could pass without controversy, as was the case in Puerto Rico. Regardless, it is for the states to decide whether and how to incorporate

330. See *supra* Part II.A.1.

331. See *Blockburger v. United States*, 284 U.S. 299, 300 (1932) (holding that separate sovereigns can prosecute a single criminal act if one sovereign's law requires an element not required by the other); see also *United States v. Dixon*, 509 U.S. 688, 696–97 (1993) (applying the *Blockburger* test, where "subsequent prosecution" for the same criminal act is not barred, because the two criminal offenses require separate and distinct elements).

332. See, e.g., Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1146 (2014) (describing the benefits of transnational tort litigation).

atrocities into their domestic legislation. If they choose to do so, states could usher in a new era of atrocity law litigation characterized by its independence from the whims of Congress.