Model Legislation for Prosecuting Extraterritorial Rape

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115th Congress
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To amend title 18, United States Code, with respect to the prosecution of extraterritorial rape.

IN THE SENATE OF THE UNITED STATES
February xx, 2017

A BILL

To amend title 18, United States Code, with respect to the prosecution of extraterritorial rape.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

The statute rests on the recognition that:

(a) Rape is a crime that is universally condemned;

(b) Women and girls account for a significant portion of those adversely affected by armed conflict and other forms of mass violence. They are particularly targeted by the

1 The words “universally condemned” is taken from 46 USC §70501 (Maritime Drug Law Enforcement Act). The words are important because, as it will be explained below, they create grounds on which jurisdiction can be extended to offenders of extraterritorial rape.
use of sexual violence including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group;\(^2\)
(c) Sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities;\(^3\)
(d) Rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide;\(^4\) and
(e) The United States’ international obligations entail complying with calls to prosecute persons responsible for acts of sexual violence and end impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation in conflict zones.\(^5\)

The purpose of the statute is to:
(a) Deny safe haven within the United States to those who committed acts of rape outside the United States;
(b) Implement fully international and human rights laws that protect women and girls during and after conflicts;\(^6\) and
(c) End impunity for violence against women during instances of mass violence against a civilian population.\(^7\)

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Extraterritorial Rape Act of 2017”.

**SECTION 2. ACCOUNTABILITY FOR EXTRATERRITORIAL RAPE.**

(a) In General.—Part 1 of title 18, United States Code, is amended by inserting after chapter xx the following:

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\(^2\) This language is borrowed directly from United Nations Security Council Resolutions (UNSCR) 1325 and 1820, both of which condemn the use of sexual violence as a tool of war. UNSCR 1325 was unanimously adopted in October 2000 and UNSCR 1820 was unanimously adopted in June 2008. The dates are significant because UNSCR 1325 was passed during the Clinton Administration while UNSCR 1820 was passed during Bush Administration. Bipartisan support will be important to the passage of the statute—the statute’s primary rationale will be based on language previously supported by both Democratic and Republican administrations.

\(^3\) UNSCR 1820.

\(^4\) UNSCR 1820. This language is particularly relevant because as explained later, it serves as the basis for the threshold requirement of the statute.

\(^5\) UNSCR 1820.

\(^6\) UNSCR 1325.

\(^7\) UNSCR 1820.
CHAPTER XX—EXTRATERRITORIAL RAPE

Sec.

yyy. Extraterritorial rape.

§yyy. EXTRATERRITORIAL RAPE

(a) Offense. 8—It shall be unlawful for any person to9—

(1) By force or threat of force or coercion10 knowingly cause another person to engage in a sexual act;11 or conspire to cause another person to engage in a sexual act; or order, aid, or abet a person to cause another person to engage in a sexual act12—

(A) By using force against that other person; or

(B) By threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so;

(2) By other means knowingly13—

(A) Render another person unconscious and thereby engage in a sexual act with that other person; or

(B) Administer to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(i) Substantially impair the ability of that person to appraise or control conduct; and

(ii) Engage in a sexual act with that other person; or attempts to do so,

(C) Engage in a sexual act with another person if that other person is14—

(i) Incapable of appraising the nature of the conduct; or

(ii) Physically incapable of declining participation in, or communicating willingness to engage in, that sexual act;

(3) While serving as a superior commander who knew, had reason to know, or should have known, that a subordinate was about to commit acts described in subsection (a)(1) or (a)(2) or had done so—

(A) Fail to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.15

8 The Offense subsection combines language from a variety of existing statutes that address rape, sexual assault, and sexual abuse. Legislators may wish to subtract certain parts as a way of limiting the reach of the statute. In the alternative, these provisions may be directly incorporated by reference.

9 The new statute does not contain the “color of law” standard employed in 18 USC §2340 thereby removing a structural limitation that exists for prosecuting individuals for rape under the torture statute.

10 “Coercion” is taken from 18 USC §2441.

11 18 USC §2241.

12 The language includes prosecutorial forms of both conspiracy and accomplice liability.

13 18 USC §2241.

14 18 USC §2242.

15 10 USC §950(q) (Military Commission Act).
(b) **Penalty.**—Any person who violates subsection (a), or attempts or conspires to violate subsection (a)—
   (1) Shall be fined under this title, imprisoned not more than xx years, or both; and
   (2) If the death of any person results from the violation of subsection (a), shall be fined under this title and imprisoned for any term of years or for life.

(c) **Jurisdiction.**—There is jurisdiction over a violation of subsection (a) if
   (1) the alleged offender is a national of the United States or is a stateless person whose habitual residence is in the United States;
   (2) the alleged offender is found in the United States; or
   (3) the victim is a national of the United States.

(d) **Threshold.**—A violation of subsection (a) is prosecutable only if the violation occurred in the context of
   (1) An armed conflict;
   (2) A widespread or systematic attack against a civilian population;
   (3) The commission of war crimes;
   (4) The commission of crimes against humanity; or
   (5) The commission of genocide.

(e) **Threshold Certification.**—No prosecution for any offense described in this statute shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was committed in the context of [the chosen element(s) from subsection (d)]. A certification by the Attorney General under this subsection is not subject to judicial review.

(f) **Concurrent Jurisdiction and Prosecutorial Priority.**—
   (1) Extradition may be appropriate when—
      (A) The state seeking extradition shows that the alleged offender will be tried and punished “in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings”; and
      (B) The state “shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary.”

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16 The language is borrowed from 18 USC §2332F (b)(2) (addressing terrorist bombings); the language includes passive personality jurisdiction.
17 Congress has a number of options in choosing the threshold context. It can limit the reach of the statute to only cover acts of rape and sexual violence when they were committed in the following contexts.
18 The language mirrors 18 USC §2332 (d).
19 Id.
(2) The Attorney General, with the advice of the Human Rights and Special Prosecutions Section, shall make a determination about whether the state meets the standards listed in subsection (f)(1), considering, among other factors, the extent to which another state may have an interest in prosecuting the crime and the likelihood of conflict with prosecution by another state.22

(g) NONAPPLICABILITY OF CERTAIN LIMITATIONS.—Notwithstanding section 3282 of this title, in the case of an offense under this section, an indictment may be found, or information instituted, at any time without limitation.23

(h) DEFINITIONS.—In this subsection:

(1) The term “sexual act” means24—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(2) The term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;25

(3) The term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;26

(4) The term “genocide” has the meaning given this term under “Basic Offense” in section 1091 of this title.

(5) The term “crimes against humanity” means an act that is committed as part of a widespread and systematic attack directed against any civilian population.

(6) The term “war crimes” has the meaning given this term in section 2441 of this title.

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22 Restatement (Third) of the Foreign Relations Law §403.
23 18 USC §1091(f).
24 18 USC §2246.
25 18 USC §2246.
26 18 USC §2246.
Appendix: Explanatory Memorandum

1. Preamble

The preamble may discuss the policy rationale and justification behind the standalone extraterritorial rape statute. The language is drawn from existing laws and unanimous U.N. Security Council resolutions.

The new statute’s objective of enabling the government to more effectively prosecute mass atrocity crimes and of denying safe haven to offenders is consistent with the Presidential Study Directive on Mass Atrocities (PSD-10). The rape statute will fill gaps that currently exist in other atrocity-related statutes penalizing genocide, torture, war crimes, and the use of child soldiers.

2. Jurisdiction

A significant challenge to a standalone extraterritorial rape statute turns on whether courts would find the assertion of extraterritorial jurisdictional over such acts to be consistent with the Due Process Clause of the Fifth Amendment.

Other atrocity prevention statutes provide a number of jurisdictional bases for prosecution. The statutes against genocide (18 USC §1091); torture (18 USC §2340A); recruitment and use of child soldiers (18 USC §2442); bombings of places of public use, government facilities, public transportation systems and infrastructure facilities (18 USC §2332F); providing material support to designated foreign terrorist organizations (18 USC §2339B); peonage (18 USC §1581); forced labor (18 USC §1589); human trafficking (18 USC §1590); and sex trafficking (18 USC §1591), all enable federal courts to extend jurisdiction over an offense if the alleged offender is a national or resident of the United States, a standard basis of jurisdiction. The standalone rape statute’s jurisdiction subsection mirrors these statutes. In addition, the statute adopts passive personality jurisdiction mirroring the jurisdictional subsection of 18 USC §2332F.

All of the statutes listed above provide “present in” jurisdiction. In other words, the statutes enable the prosecution of alleged offenders who are within the United States, regardless of their nationality or residency status, even if the crimes were committed entirely outside the United States. The new statute will allow for “present in” jurisdiction.

Nexus Test

“Present in” jurisdiction may face constitutional challenges with respect to the Due Process Clause of the Fifth Amendment. There are currently two major views of how the Due Process Clause might regulate the exercise of extraterritorial jurisdiction. The Second and Ninth Circuits have adopted a test requiring a nexus between the defendant and the United States. However, other circuits have taken a different approach.

28 Citizenship of the alleged offender “is a well-established basis for exerting jurisdiction over an individual accused of committing a crime abroad.” Thomas J. Scott Prosecuting Charles Taylor’s Son for Torture: A Step toward the Domestication of International Law, 8 LOY. U. CHI. INT’L L.REV. 33, 46 (2010).
States to satisfy due process. The Second Circuit held, “For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.” Similarly, the Ninth Circuit stated, “In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States . . . so that such application would not be arbitrary or fundamentally unfair.”

Thus, in order for the rape statute to pass constitutional muster in any court that applies the nexus requirement, the government may be required to show that the defendant, who is merely present in the United States, is in some way connected to the United States, its citizens, or its interests beyond his mere presence in the country. Acts of extraterritorial rape in which American citizens or residents are the victims—crimes with a clear and direct nexus to the United States—should not require the exercise of present in jurisdiction as passive personality jurisdiction is available and easily satisfies any nexus test. Even in a case involving an extraterritorial criminal act not involving American citizens or residents, courts have been open to the argument that the United States’ interest in combating international crimes may provide a nexus sufficient for jurisdiction, especially when the interest in question is “paramount.” For example, in Goldberg v. UBS AG, the court held that “the existence of a sufficient nexus to the interest of the United States is . . . supported because of the United States’ interest in combating international terrorism.”

The following arguments outline a number of bases on which courts may find sufficient nexus between extraterritorial rape and American interests.

A) National Security

The government has been successful in prosecuting alleged terrorists, even when the conduct occurred outside the United States, when the defendants were found to have provided material support to foreign terrorist organizations designated by the State Department. For an organization to be officially listed on the State Department’s Foreign Terrorist Organizations (FTO) list, the Secretary of State must find that “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” If the defendant, a member of a FTO, committed a sexual crime, his membership may provide the necessary jurisdictional hook to clear the way for prosecution.

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29 United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011). The defendant was extradited to the United States. The court held that the defendant’s conspiracy to sell arms to a terrorist organization “with the understanding that they would be used to kill Americans and destroy U.S. property” created a sufficient nexus between the crimes and the United States. Id. at 119.

30 United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990) (citation omitted). The defendant was arrested off the coast of California while attempting to smuggle marijuana into the United States.


34 8 USC §1189 (1).
Even if the defendant was not a member of a FTO at the time of the crime, membership at the
time of prosecution would still create a jurisdictional nexus to the United States.

B) Government Functions

A similar list is published by the Treasury Department is the Office of Foreign Assets
Control (OFAC) sanctions list. Although the list is by its nature less security oriented than its
State Department counterpart, individuals sanctioned by Treasury may similarly be deemed to
sufficiently threaten American interests to fall within present in jurisdiction. The Restatement
Second of Foreign Relations, in describing the concept of protective jurisdiction, states that
jurisdiction is proper if the alleged offense “threatens the security or government functions
of the United States.”35 Sanctuary from prosecution for offenders who are financially sanctioned
may be considered a sufficient threat to the operation of the Treasury Department and the
government that courts may be willing to extend protective jurisdiction even in the context of
extraterritorial rape.

C) Public Safety

Without clear links between the alleged offender and American interests, the
government may still be able to argue that the offender continues to pose a threat to those in
the United States thereby framing the jurisdictional reach as a matter of public safety. As
UNSCR 1820 noted, “sexual violence perpetrated [in the context of armed conflicts] may in
some instances persist after the cessation of hostilities.”36 This argument would be particularly
relevant if the alleged offender arrived in the United States and spent time with or was in the
vicinity of members of the victim group against which he may be accused of committing
crimes outside the United States.

Similarly, if the offender continues to pose a threat to those outside the United States
and is using the United States as a safe harbor to plan future crimes, existing case law may
provide support for exercising present in jurisdiction over the offender. In United States v.
Medjuck, the defendant’s “contact with the United States was not extensive . . . .”37 However,
the court held that because the defendant “deliberately and repeatedly used the United States
to plan and carry out” crimes targeting a foreign country, his actions created a sufficient nexus
to the United States to warrant present in jurisdiction.38 If the alleged offender of rape uses his
stay in the United States to plan or prepare for future crimes outside the country, the offender
may be subject to the jurisdiction of the new statute.

D) Safe Harbor

Another argument would be to link American interests to the denial of safe haven to
offenders of rape. In a concurring opinion, Justice Breyer stated that a defendant’s actions
could “substantially and adversely affect[] an important American national interest . . . in
preventing the United States from becoming a safe harbor (free of civil as well as criminal
liability) for a torturer or other common enemy of mankind.”39 Even without any direct links

35 § 33.
36 UNSCR 1820.
38 Id. at 1390-91.
to national security or public safety, the presence of individuals who committed rape in the context of mass violence or armed conflict may create the appearance that the United States is a safe harbor for the very acts that contradict both American and international norms. The mere fact that an alleged offender is present in the United States would offend the important American interest of projecting an image that it is not a refuge or safe harbor for offenders of sexual violence and thus may provide the sufficient nexus.

E) International Obligations

The United States also has an important interest in enforcing its international obligations—such an interest may provide sufficient nexus between the criminal acts and the United States. For instance, UNSCR 1325, approved in 2000, “[e]nhances responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls . . . .” Resolution 1820, passed eight years later, again “calls upon Member States to comply with their obligations for prosecuting persons responsible for [acts of sexual violence and] ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice . . . .” As a permanent member of the Security Council, the United States has an important interest in upholding and modeling compliance with the Council’s resolutions, and the extraterritorial rape statute offers a prosecutorial tool for ending impunity for sexual violence when the offender is found inside the United States.

Notice Test

The other view on the application of the Due Process Clause to extraterritorial prosecutions involves the notice test adopted by the First, Third, Fifth, and Eleventh Circuits. If the conduct in question is “criminalized not only in the U.S. but also in” the country where the crime occurred, defendants would be “properly on notice that they might be prosecuted.” Case law involving the Maritime Drug Law Enforcement Act (MDLEA) provides a relevant illustration. In the statute, Congress explicitly finds and declares that drug trafficking on the high seas is “a serious international problem” and a crime that is “universally condemned.” A Fifth Circuit court in United States v. Suerte noted this fact in holding that the Due Process Clause did not require a nexus for the extraterritorial application of the MDLEA. Similarly, a Third Circuit court in United States v. Martinez-Hidalgo held that extraterritorial jurisdiction under the MDLEA does not violate due process “[i]nasmuch as the trafficking of narcotics is condemned universally by law-abiding nations . . . .” Under the notice test, the defendant may have sufficient notice that he may be prosecuted for his crimes even outside the country where the act was perpetrated due to his knowledge that the act is globally condemned and criminalized. So

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40 UNSCR 1325 Paragraph 11 (emphasis added).
41 UNSCR 1820 Paragraph 4.
44 46 USC §70501.
45 291 F.3d 366, 377 (5th Cir. 2002).
46 993 F.2d 1052, 1056 (3d Cir. 1993).
long as this notice test is satisfied, it would be unnecessary to demonstrate a direct nexus to the United States to satisfy the Due Process Clause.

At first glance, the notice test may appear to pave the way for the simpler inclusion of present in jurisdiction in the rape statute. After all, rape is penalized by every country in the world. As such, the prohibition of rape constitutes a general principle of law and its global domestic prohibition gives rise to notice that any offender may be subject to extraterritorial prosecution of rape anywhere in the world.

However, so far, the application of the notice test to Due Process jurisdictional challenges seems to have been limited entirely to maritime cases involving drug trafficking. One possible interpretation for this is the courts’ view that the Due Process Clause “does not impose a nexus requirement on legislation enacted pursuant to the Piracies and Felonies Clause because the Clause specifically grants Congress the power to legislative extraterritorially as to conduct occurring on the high seas.” Thus, while many courts have found the notice test to be sufficient for interpreting the Due Process Clause when the statute in question addressed illicit activities on the high seas, it is uncertain whether courts would be willing to apply the same test to rape, which has never been prosecuted solely under present in jurisdiction in the United States when a nexus does not exist between the crime and the United States.

3. Threshold

The purpose of the extraterritorial rape statute is not to prosecute all types of rape that occur outside the United States. The proposed threshold clause will act as a structural limitation to the scope of the statute.

As discussed above in the preamble, sexual violence, “when used or commissioned as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic}

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48 See UNSCR 1325, 1820 cited supra note 2. See also Rome Statute of the International Criminal Court (1998) (listing rape as a crime that may constitute crimes against humanity or war crimes).
49 See, e.g., United States v. Ibarguen-Mosquera, 634 F.3d 1370 (11th Cir. 2011); United States v. Suerte, 291 F.3d 366 (5th Cir. 2002); United States v. Perez-Oviedo, 281 F.3d 400 (3d Cir. 2002); United States v. Cardales, 168 F.3d 548 (1st Cir. 1999).
50 Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 HARV. INT'L L.J. 121, 173-74 (2007). The Define and Punish Clause, which immediately precedes the Piracies and Felonies Clause, empowers Congress to “define and punish” piracy crimes committed on the high seas. U.S. CONST. art. I, § 8, cl. 10. It remains to be seen how expansive courts consider Congress’s powers under the Define and Punish Clause to be. For example, in al Bahlul v. United States, the D.C. Circuit Court of Appeals will consider the scope of Congress’s authority to define and punish conspiracy to commit war crimes. An expansive interpretation may open the door for creating the jurisdictional hook for the rape statute.
51 The government does not seem to have prosecuted terrorism exclusively under present in jurisdiction without any nexus to the United States or its interests.
attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security . . . “. Therefore, a reasonable approach to setting a threshold requirement would be to limit the statute to cover acts of sexual violence that take place in the broader context of armed conflicts and other forms of mass violence. While the draft language of the statute enumerates a few threshold requirements, Congress may choose to follow Presidential Proclamation 8697 and adopt a broader definition of mass violence to include “widespread or systematic violence against any civilian population based in whole or in part on race, color, descent, sex, disability, membership in an indigenous group, language, religion, political opinion, national origin, ethnicity, membership in a particular social group, birth, or sexual orientation or gender identity.”

4. Threshold Certification

The threshold requirement does not create an additional element of the crime that the prosecution must prove. If it did, the government would have an unreasonable double burden, under the new statute, of prosecuting both the threshold crime in addition to the rape itself.

The extraterritorial rape statute will contain a subsection explaining the certification process. In essence, the Attorney General, or her designee, will certify that the threshold requirement has been met, thereby clearing the path for prosecution under the new statute. Such a certification requirement would mirror 18 USC §2332, which covers terrorist attacks abroad committed against U.S. nationals. In United States v. Yousef, the court upheld the constitutionality of the 18 USC §2332 certification subsection stating that it did “not delegate any legislative power to the Attorney General. Rather, it merely set[] limits on how the Attorney General [could] exercise his discretion to prosecute.” The final provision of the subsection makes the Attorney General’s certification a non-justiciable issue.

5. Concurrent Jurisdiction and Prosecutorial Priority

The new statute will suggest that the Department of Justice give prosecutorial priority to the nation-state in which the crime was committed. Such deference will allow the government to preserve valuable resources while reinforcing the relationships that may exist between the United States and other countries that might reasonably exercise jurisdiction and with which the United States maintains an extradition treaty. The statute can adopt guidance for concurrent jurisdiction provided by the Princeton Principles and the Restatement (Third) of Foreign Relations.

6. Nonapplicability of Certain Limitations

This subsection containing nonapplicability of the statute of limitations under 18 USC §3282 mirrors the language of 18 USC §1091—the law against genocide. This subsection will maximize the prosecutorial force under the new statute.

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52 UNSCR 1820.
54 327 F.3d 56, 116 (2nd Cir. 2003).