

ARTICLE

LEGISLATING ATROCITY PREVENTION

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Despite promises made by the international community after the Holocaust to “never again” allow genocide, war crimes, and crimes against humanity to be committed, these “atrocious crimes” have been perpetrated again and again. To-

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While serving on the U.S. Senate Foreign Relations Committee (“SFRC”) staff in 2016-17 as a Council on Foreign Relations International Affairs Fellow, the author drew on his book, *United States Law and Policy on Transitional Justice: Principles, Politics, and Pragmatics* (Oxford University Press, 2016), to work as a lead architect of both the Elie Wiesel Genocide and Atrocities Prevention Act and the Syrian War Crimes Accountability Act. The author has subsequently advised the White House National Security Council (“NSC”) and SFRC on implementing both laws.

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day—from Syria and South Sudan to Myanmar and Yemen—such catastrophes still rage around the world, and many more may erupt. This is therefore a crucial time to consider new initiatives to address existing and future humanitarian crises.

In addition to political, normative, and technological advancements, novel legal developments in the United States hold great potential to help address atrocity crimes. Two such pieces of legislation—the Syrian War Crimes Accountability Act and the Elie Wiesel Genocide and Atrocities Prevention Act—recently became law in the United States. These landmark acts unprecedentedly enshrine “atrocity prevention” and define “transitional justice” in U.S. law. In addition, for the first time, one of the acts refers to the Atrocities Prevention Board—an interagency body established by executive order—in a non-appropriations law, ending this entity (and its successor) with greater congressional support and legitimacy. Amid an era in the United States that is more polarized than at any time since the Civil War, that each law garnered overwhelming support from both Democratic and Republican officials demonstrates that Americans can still agree on at least some basic principles. This Article provides the first comprehensive analysis of these groundbreaking laws and how they relate to other scholars’ and my own studies on atrocity prevention and transitional justice.

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“We must take sides. Neutrality helps the oppressor, never the victim.
Silence encourages the tormentor, never the tormented.
Sometimes we must intervene.”

—Elie Wiesel¹

I. INTRODUCTION

Despite promises made by the international community after the Holocaust to “never again” allow genocide, war crimes, and crimes against humanity to be committed, these “atrocity crimes”² have been perpetrated again and again.³ Today—from Syria and South Sudan to Myanmar and

¹ Elie Wiesel, 1986 Nobel Peace Prize Acceptance Speech in Oslo, Norway (Dec. 10, 1986), <https://eliewieselfoundation.org/elie-wiesel/nobelprizespeech/> [<https://perma.cc/78WF-EBUP>].

² For a definition and discussion of the term “atrocity crimes,” see David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT’L L. REV. 389, 398–400 (2002) (“plead[ing] for a new crimes category that would be called ‘atrocity crimes’” and describing criteria for crimes that would qualify); David J. Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 229 (2006) (proposing the term “atrocity crimes” to collectively describe genocide, crimes against humanity (including ethnic cleansing), and war crimes); David J. Scheffer, *The Merits of Unifying Terms: “Atrocity Crimes” and “Atrocity Law”*, 2 GENOCIDE STUD. & PREVENTION 91, 91 (2007) (responding to critiques of the term “atrocity crimes”). For a definition and discussion of an alternate term, “mass atrocity,” see SCOTT STRAUS, FUNDAMENTALS OF GENOCIDE AND MASS ATROCITY PREVENTION 29–41 (2015) [hereinafter STRAUS, FUNDAMENTALS].

³ Kelly Dawn Askin, “Never Again” Promises Broken Again. Again. And Again., 27 CARDOZO L. REV. 1723, 1723 (2006) (“The world is now well aware that the promise of ‘never again’ after the Holocaust was an empty one. Or perhaps the promise itself was not empty, as it

Yemen—such catastrophes still rage around the world,⁴ and many more may erupt.⁵ This is therefore a crucial time to consider new initiatives to address existing and future humanitarian crises.

In addition to political,⁶ normative,⁷ and technological⁸ advancements, novel legal developments in the United States hold great potential to help address atrocity crimes. Two such pieces of legislation—the Syrian War Crimes Accountability Act⁹ (“Syrian Accountability Act”) and the Elie

was likely made with true conviction to never again fail to respond to mass atrocity. But the fact is that the pledge has been repeatedly broken over the past sixty years.”).

⁴ See, e.g., Zachary D. Kaufman, *The Prospects, Problems, and Proliferation of Recent UN Investigations of International Law Violations*, 16 J. INT’L CRIM. JUST. 93 (2018) (discussing atrocity crimes in Burundi, Iraq, Myanmar, Syria, and Yemen) [hereinafter Kaufman, *Recent UN Investigations*]; Nick Cumming-Bruce, *Oil Industry May Be Tied to “Astonishing Brutality” in South Sudan, Panel Says*, N.Y. TIMES, Feb. 21, 2019, at A4 (observing that “mass atrocities continue in South Sudan”); Human Rights Council, Rep. of the Comm. on Human Rights in S. Sudan, U.N. Doc. A/HRC/37/71 (2018) (concluding that some of the human rights violations in South Sudan “may amount to war crimes and crimes against humanity”).

⁵ U.S. HOLOCAUST MEMORIAL MUSEUM, EARLY WARNING PROJECT, <https://earlywarning-project.ushmm.org/ranking-of-all-countries> [<https://perma.cc/FUX3-6KLC>] (assessing the risk of mass atrocities in countries around the world and finding the Democratic Republic of Congo, Afghanistan, Egypt, South Sudan, and Pakistan to be the top five countries at greatest risk).

⁶ In 2004, the UN Secretary-General appointed Juan Méndez as the first Special Adviser on the Prevention of Genocide. Press Release, United Nations, Juan E. Méndez of Argentina Appointed Special Adviser on Prevention of Genocide (July 14, 2004), <https://www.un.org/press/en/2004/sga880.doc.htm> [<https://perma.cc/LZ94-ZV6C>].

⁷ In 2005, the UN General Assembly unanimously adopted a resolution, the 2005 World Summit Outcome, part of which declared “the Responsibility to Protect” doctrine in the context of atrocity crimes. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005) [hereinafter 2005 World Summit Outcome]. For discussion of this doctrine, see, for example, MADELEINE K. ALBRIGHT & RICHARD S. WILLIAMSON, *THE UNITED STATES AND R2P: FROM WORDS TO ACTION* (2013), <https://www.brookings.edu/wp-content/uploads/2016/06/23-united-states-responsibility-protect-albright-williamson.pdf> [<https://perma.cc/RYJ6-8U4W>]; INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001), <https://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/5WYD-H2FC>]; STRAUS, *FUNDAMENTALS*, *supra* note 2, at 119–23; DAVID W. YANG, *THE “RESPONSIBILITY TO PROTECT” AND INTERNATIONAL DEVELOPMENT* (2018), https://ushmm.org/m/David_Yang_Fellowship_Report_021418.pdf [<https://perma.cc/N5NL-CELK>]; Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703 (2006); Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT’L L. 247 (2014); Zachary D. A. Hingst, *Libya and the Responsibility to Protect: Building Block or Roadblock?*, 22 TRANSNAT’L L. & CONTEMP. PROBS. 227 (2013); Christopher C. Joyner, *“The Responsibility to Protect”: Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT’L L. 693 (2007); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT’L L. 319 (2012); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT’L L. 99 (2007).

⁸ See, e.g., Christopher Tuckwood, *The State of the Field: Technology for Atrocity Response*, 8 GENOCIDE STUD. & PREVENTION 81 (2014) (providing an overview of technological tools governments and non-state actors can use to “gather, analyze, and communicate information for the sake of predicting, preventing, and mitigating atrocities”); Susan Bell, *Spatial Scientists Use Satellite Technology to Detect and—Eventually—Prevent Genocide*, USC DORNSIFE (Feb. 1, 2019), <https://dornsife.usc.edu/news/stories/2943/spatial-science-prevent-ing-genocide/> [<https://perma.cc/6U29-585D>].

⁹ The Syrian War Crimes Accountability Act of 2017 was incorporated into the John S. McCain National Defense Authorization Act for Fiscal Year 2019 as section 1232. See John S.

Wiesel Genocide and Atrocities Prevention Act¹⁰ (“Elie Wiesel Act”)—recently became law in the United States.¹¹ These landmark acts unprecedentedly enshrine “atrocity prevention”¹² and define “transitional justice”¹³ in U.S. law. In addition, for the first time, one of the acts refers to the Atrocities Prevention Board¹⁴—an interagency body established by executive order—in a non-appropriations law, endowing this entity (and its successor) with greater congressional support and legitimacy. Amid an era in the United States that is more polarized than at any time since the Civil War,¹⁵ that each law garnered overwhelming support from both Democratic and Republican officials demonstrates that Americans can still agree on at least some basic principles.¹⁶

McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, § 1232, 132 Stat. 1636, 2035 (2018).

¹⁰ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, 132 Stat. 5586 (2019).

¹¹ During this period, President Trump also signed into law two other pieces of legislation concerning atrocity crimes. Women, Peace, and Security Act of 2017, Pub. L. No. 115-68, 131 Stat. 1202 (2017); Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L. No. 115-330, 132 Stat. 4390 (2018). However, while these laws are important, they are outside the scope of this Article.

In addition, in 2016, President Obama signed into law the Global Magnitsky Human Rights Accountability Act, Pub. L. No. 112-208, 126 Stat. 1496 (2012), which authorizes the President to impose sanctions on foreign persons who are responsible for serious human rights violations. This Act was incorporated into the National Defense Authorization Act for Fiscal Year 2017 as Subtitle F. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, tit. X, 130 Stat. 2000, 2533 (2016). The following year, President Trump issued an executive order launching a new sanctions regime to build on this legislation. Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017). While—like the Women, Peace, and Security Act of 2017, and the Iraq and Syria Genocide Relief and Accountability Act of 2018—the Global Magnitsky Human Rights Accountability Act and related Executive Order (“EO”) are significant, they are also outside the scope of this Article. For discussion of the Global Magnitsky Human Rights Accountability Act and EO 13,818, see Samantha Sultoon, *Global Magnitsky Sanctions: Raising the Human Rights and Anti-Corruption Bar*, ATLANTIC COUNCIL (Nov. 2018), <https://www.atlanticcouncil.org/images/publications/Global-Magnitsky-Sanctions-Raising-the-Human-Rights-and-Anti-Corruption-Bar.pdf> [https://perma.cc/7724-K75E]; Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win. No, Really.*, JUST SECURITY (Jan. 10, 2018), <https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really/> [https://perma.cc/RBF5-QQRA]; and Nahal Toosi, *U.S. Slaps Sanctions on Myanmar for “Atrocities”*, POLITICO (Aug. 17, 2018), <https://www.politico.com/story/2018/08/17/us-sanctions-myanmar-783098> [https://perma.cc/5R5H-BH4Q].

¹² For a definition and discussion of the term “atrocity prevention,” see STRAUS, *FUNDAMENTALS*, *supra* note 2, at 113–84.

¹³ For a definition and discussion of the term “transitional justice,” see *infra* Part IV.B.1.

¹⁴ For a description and discussion of the Atrocities Prevention Board, see *infra* notes 99–112 and accompanying text and Part IV.B.2.

¹⁵ See Laura Paisley, *Political Polarization at its Worst Since Civil War*, USC NEWS (Nov. 8, 2016), <https://news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/> [https://perma.cc/7VZ6-JWW2]; *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [https://perma.cc/C8D9-TJ98].

¹⁶ See Janelle Johnson, *Can Democrats and Republicans Agree? They Can When It Comes to Atrocity Prevention*, MEDIUM (updated Jan. 2019), <https://medium.com/@HolocaustMuseum/can-democrats-and-republicans-agree-they-can-when-it-comes-to-atrocity-prevention-ea-f299ba907> [https://perma.cc/LZF8-JWLT].

This Article provides the first comprehensive analysis of these groundbreaking laws and how they relate to other scholars' and my own studies on atrocity prevention and transitional justice. Part II briefly describes the U.S. government's pre-enactment approach to preventing and responding to atrocity crimes. While the U.S. government had taken no principled or consistent approach to addressing these offenses, it had already made some progress in its legal, normative, conceptual, and infrastructure commitments to doing so. Part III provides an overview of the Elie Wiesel and Syrian Accountability Acts, summarizing how these laws seek to prevent and respond to atrocity crimes in Syria and beyond. Part IV reflects on the laws' significance. These acts constitute a radical departure from past law by recognizing atrocity prevention as in the U.S. national interest, mainstreaming aspects of atrocity prevention in U.S. policymaking, promoting domestic and international cooperation, demonstrating bipartisanship, conveying preferred transitional justice options, and prodding similar legislation abroad. Part V considers potential criticisms of the laws. The final Part concludes by suggesting cautious optimism and continued oversight. As this year is the twenty-fifth anniversary of the Genocide against the Tutsi in Rwanda,¹⁷ this Article draws in part on lessons about atrocity prevention and response from that avoidable tragedy.¹⁸

II. U.S. PROGRESS ON ATROCITY PREVENTION

The U.S. government has often responded too late or ineffectively, if at all, to atrocity crimes,¹⁹ including the Holocaust; genocides in Armenia, Bosnia, Cambodia, Darfur, Iraq, and Rwanda; and recent crises in Myanmar, South Sudan, Syria, Venezuela, and Yemen.²⁰ Yet over time the U.S. govern-

¹⁷ The seminal literature on the 1994 Genocide against the Tutsi in Rwanda includes: AFRICAN RIGHTS: DEATH, DESPAIR, AND DEFIANCE (rev. 1995); MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA (2002); ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2003); ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999); PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (1998); ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA (2001); LINDA MELVERN, A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE (2d ed. 2009); LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (rev. 2006); GÉRARD PRUNIER, THE RWANDA CRISIS, 1959-94: HISTORY OF A GENOCIDE (2d ed. 1998); SCOTT STRAUS, THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA (2006). For discussion of the term "Genocide against the Tutsi in Rwanda," see Zachary D. Kaufman, *Lessons from Rwanda: Post-Genocide Law and Policy*, 31 STAN. L. & POL'Y REV. ONLINE 1, 1 n.1 (2019) [hereinafter Kaufman, *Lessons from Rwanda*].

¹⁸ See, e.g., Kaufman, *Lessons from Rwanda*, *supra* note 17.

¹⁹ See MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS 94 (2008), <https://ushmm.org/m/pdfs/20081124-genocide-prevention-report.pdf> [<https://perma.cc/SNX4-NQDM>] ("Too often, the United States has failed to act in a timely fashion and has engaged in counterproductive finger-pointing and denial.").

²⁰ See *supra* note 4 and accompanying text; see also Org. of Am. States Secretary General & Panel of Indep. Int'l Experts, *Rep. on the Possible Commission of Crimes Against Humanity*

ment has made some progress in its legal and normative commitments to, conceptualization of, and infrastructure for preventing such offenses.

A. *Laws and Norms on Atrocity Prevention*

Foundational domestic and international laws to which the U.S. government subscribes implicitly compel the U.S. government to prevent and respond to atrocity crimes. The inalienable rights to life and liberty recognized in the Declaration of Independence,²¹ the UN Charter,²² and the Universal Declaration of Human Rights²³ effectively include a right not to be victimized by genocide, war crimes, or crimes against humanity.

The U.S. government's explicit obligation to prevent at least one type of atrocity crime—genocide—was initially expressed through its eventual signing of a related treaty that was broadly endorsed in 1948. Almost forty years after the UN General Assembly unanimously adopted the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”),²⁴ and following 3,211 daily speeches over nineteen years by U.S. Senator William Proxmire urging U.S. ratification,²⁵ the U.S. Senate voted in 1986 to ratify the treaty, albeit with multiple caveats.²⁶ Two years later, the

in Venezuela, ix, OEA/Ser.D/XV.19 (May 29, 2018) (concluding “that there are reasonable grounds that satisfy the standard of proof required by Article 53 of the Rome Statute for considering that acts to which the civilian population of Venezuela was subjected to dating back to at least February 12, 2014, constitute crimes against humanity, in accordance with Article 7 of the Rome Statute of the ICC”).

²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

²² U.N. Charter pmb. (reaffirming “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”).

²³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .”).

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; *What is the Genocide Convention?*, UNITED NATIONS (Sept. 23, 2019), <https://ask.un.org/faq/232870> [<https://perma.cc/42SX-RY96>] (noting that “the General Assembly adopted the Genocide Convention by unanimous vote”).

²⁵ See Emily Backes, *On This Day: U.S. Fully Adopts Genocide Convention*, ENOUGH (Nov. 4, 2010), <https://enoughproject.org/blog/day-us-ratifies-genocide-convention> [<https://perma.cc/P9W7-99EA>].

²⁶ The caveats included two reservations, five understandings, and one declaration. See S. Res. on the Ratification of the Genocide Convention, 99th Cong. 2349 (Feb. 19, 1986) (enacted). For discussion of the reservations, understandings, and declaration, see Maria Frankowska, *The United States Should Withdraw its Reservations to the Genocide Convention: A Response to Professor Paust's Proposal*, 12 MICH. J. INT'L L. 141 (1990); Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 483–88 (1998); Marian Nash Leich, *Protection of Human Rights*, 80 AM. J. INT'L L. 612 (1986); Jordan J. Paust, *Congress and Genocide: They're Not Going to Get Away With It*, 11 MICH. J. INT'L L. 90 (1989); Jennifer A. Post, *The United States and the Genocide Treaty: Returning Genocide to Sovereign Concerns*, 13 SUF-

Senate passed implementing legislation (known as the “Proxmire Act”).²⁷ Upon signing the Proxmire Act, President Ronald Reagan called it “a strong and clear statement by the United States that it will punish acts of genocide with the force of law and the righteousness of justice.”²⁸ The Genocide Convention obligates the United States and 151 other parties to it²⁹ to prevent and punish genocide whether the crime is committed during peacetime or war.³⁰

Two decades later, the U.S. government explicitly committed itself to prevent atrocity crimes even beyond genocide. In 2005, UN member states, including the United States, unanimously adopted a UN resolution, the 2005 World Summit Outcome, part of which declared the “Responsibility to Protect” (“R2P”) doctrine.³¹ The United States and all other signatories pledged to defend their own people and, through the UN, foreign populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.³² In addition, all signatories declared that they “fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.”³³

B. Conceptualization of Atrocity Prevention

Nine years after the U.S. government ratified the Genocide Convention, and after multiple subsequent genocides and other atrocity crimes were perpetrated,³⁴ the Clinton administration more formally began articulating the government’s conceptualization of atrocity prevention. The 1997 National Security Strategy³⁵ (“NSS”) was the first such document³⁶ to mention the

FOLK TRANSNAT’L L.J. 686 (1990); Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 *FORDHAM INT’L L.J.* 286, 350–54 (1999).

²⁷ Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988); see Christopher C. Joyner, *United States: Genocide Convention Implementation Act of 1987*, 28 *INT’L LEGAL MATERIALS* 754, 755–56 (1989); Johnson, *supra* note 16; Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, *N.Y. TIMES*, Nov. 5, 1988, at A28.

²⁸ Roberts, *supra* note 27 (quoting Reagan).

²⁹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 (listing the 152 parties to the Genocide Convention).

³⁰ Genocide Convention, *supra* note 24, at art. I, 78 U.N.T.S. 280; see Björn Schiffbauer, *The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention*, 12 *GENOCIDE STUD. & PREVENTION* 83 (2018) (discussing requirements of the duty to prevent under the Genocide Convention).

³¹ 2005 World Summit Outcome, *supra* note 7, ¶¶ 138–40.

³² *Id.* ¶¶ 138–39. While genocide, war crimes, and crimes against humanity have been recognized as independent crimes under international law, ethnic cleansing has not. See *Ethnic Cleansing*, U.N. OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT (Sept. 23, 2019), <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml> [<https://perma.cc/W66T-TJHX>].

³³ 2005 World Summit Outcome, *supra* note 7, ¶ 140.

³⁴ For example, the Genocide against the Tutsi was perpetrated in 1994 and the genocide in Srebrenica was committed the following year. See generally *supra* note 17.

³⁵ THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1997), <https://nssarchive.us/NSSR/1997.pdf> [<https://perma.cc/DZ47-PKVK>] [hereinafter 1997 NSS].

word “genocide”³⁷ and include text that could be interpreted as officially considering atrocity prevention, although the language was tentative and only justified the policy with an appeal to values.³⁸ The NSS two years later advanced a more interest-based argument in favor of atrocity prevention; under a heading of “threats to U.S. interests,” the document asserted: “States that fail to respect the rights of their own citizens and tolerate or actively engage in human rights abuses, ethnic cleansing or acts of genocide not only harm their own people, but can spark civil wars and refugee crises and spill across national boundaries to destabilize a region.”³⁹ The NSS the following year pledged an even stronger dedication to atrocity prevention in such a document, rooted in both values and interests but conditioned on “serious national security concerns.”⁴⁰

Thus, by 2000, no NSS had articulated an *unqualified* commitment to atrocity prevention as *inherently* ingrained in *both* values and interests. Writing the following year—soon after widespread, systematic offenses against peoples in Rwanda and the Balkans—Samantha Power observed that the U.S. “national interest remains narrowly constructed to exclude stopping genocide.”⁴¹

³⁶ The 1986 Goldwater-Nichols Act requires the President to transmit to Congress an annual report on the U.S. national security strategy. Goldwater-Nichols Department of Defense Reorganization Act of 1986, 10 U.S.C. § 3043 (1986). President Reagan issued the first such report in 1987. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (1987), <https://nssarchive.us/NSSR/1987.pdf> [<https://perma.cc/Z8XZ-NXCJ>]; see DON M. SNIDER, THE NATIONAL SECURITY STRATEGY: DOCUMENTING STRATEGIC VISION 2 (2d ed. 1995) (indicating that President Reagan’s 1987 report was the first such report). Presidents have not always discharged this annual legal duty. See National Security Strategy Archive, *National Security Strategy Reports* (Sept. 23, 2019), <https://nssarchive.us> [<https://perma.cc/FCZ3-VNLZ>] (indicating that no reports were published in 1989, 1992, 1999, 2003, 2004, 2005, 2007, 2008, 2009, 2011, 2012, 2013, 2014, 2016, or 2018).

³⁷ 1997 NSS, *supra* note 35.

³⁸ *Id.* at 12 (“In the event of natural or manmade disasters or *gross violations of human rights*, our nation *may* act because our values demand it.” (emphases added)).

³⁹ THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 2 (1999), <https://nssarchive.us/NSSR/2000.pdf> [<https://perma.cc/WX3D-GWBZ>].

⁴⁰ THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A GLOBAL AGE 46–47 (2000), <https://nssarchive.us/NSSR/2001.pdf> [<https://perma.cc/58ZF-HJJA>] (“Ethnic conflict represents a great challenge to our values and our security. When it erupts in ethnic cleansing or genocide, ethnic conflict becomes a grave violation of universal human rights. We find it clearly opposed to our national belief that innocent civilians should never be subject to forcible relocation or slaughter because of their religious, ethnic, racial, or tribal heritage. Ethnic conflict can also threaten regional stability and may well give rise to potentially serious national security concerns. *When this occurs*, the intersection of our values and national interests make it imperative that we take action to prevent—and whenever possible stop—outbreaks of mass killing and displacement.” (emphasis added)).

⁴¹ Samantha Power, *Bystanders to Genocide*, THE ATLANTIC, Sept. 2001, at 106 [hereinafter Power, *Bystanders to Genocide*] (noting that “[o]fficials in the Bush Administration say the United States is as unprepared and unwilling to stop genocide today as it was seven years ago. ‘Genocide could happen again tomorrow,’ one said, ‘and we wouldn’t respond any differently’”). Power would later make the case that the United States should stop genocide for moral and enlightened self-interest reasons. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 512 (2013) [hereinafter POWER, “A PROBLEM FROM HELL”] (arguing that those who subscribed to the latter reason “warned that allowing geno-

Retreating from the 1999 and 2000 National Security Strategies (“NSSs”) that grounded atrocity prevention in at least a conditional interest-based justification, the George W. Bush administration’s inclusion of atrocity prevention in its two NSSs did not feature any such rationale. The 2002 NSS proclaimed atrocity prevention as imperative but offered no reasoning.⁴² Two years later, and for the first time during an ongoing crisis,⁴³ the Executive Branch characterized the atrocity crimes in Darfur as “genocide.”⁴⁴ No doubt inspired in large part by Darfur, the Bush administration’s only other NSS, in 2006, dedicated an entire subsection to the topic of genocide, articulating the longest declaration to that date in favor of atrocity prevention but basing it only on values.⁴⁵

Within just a few years, though, that notion of a values-only justification of atrocity prevention began to change. This evolution was partly because Power herself—who had earned wide acclaim, including a Pulitzer Prize,⁴⁶ for her writing on atrocity prevention—became an influential government official.⁴⁷ In 2008 (during the sixtieth anniversary of the Genocide Convention and the twentieth anniversary of the U.S. government’s ratification of it), a bipartisan group led by Democratic former Secretary of State

cide undermined regional and international stability, created militarized refugees, and signaled dictators that hate and murder were permissible tools of statecraft”).

⁴² THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), <https://nssarchive.us/NSSR/2002.pdf> [<https://perma.cc/8XDL-ZNZC>] (“[G]enocide . . . [is] behavior that no respectable government can condone or support and all must oppose.”).

⁴³ See TODD F. BUCHWALD & ADAM KEITH, BY ANY OTHER NAME: HOW, WHEN, AND WHY THE US GOVERNMENT HAS MADE GENOCIDE DETERMINATIONS 24, 59–63 (2019), https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf [<https://perma.cc/6QEU-X5J7>]; Rebecca Hamilton, *Inside Colin Powell’s Decision to Declare Genocide in Darfur*, THE ATLANTIC (Aug. 17, 2011), <https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/> [<https://perma.cc/7VNN-TCX6>].

⁴⁴ See *Powell Calls Sudan Killings Genocide*, CNN (Sept. 9, 2004), <https://www.cnn.com/2004/WORLD/africa/09/09/sudan.powell/> [<https://perma.cc/SAN7-HRPN>].

⁴⁵ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY 17 (2006), <https://nssarchive.us/NSSR/2006.pdf> [<https://perma.cc/MAB3-49NQ>] (“It is a moral imperative that states take action to prevent and punish genocide.”). The 2006 NSS explicitly notes the genocide in Darfur. *Id.* at 15.

⁴⁶ *The 2003 Pulitzer Prize Winner in General Nonfiction*, THE PULITZER PRIZES, <https://www.pulitzer.org/winners/samantha-power> [<https://perma.cc/9T6B-QSFG>].

⁴⁷ See CHARLES J. BROWN, THE OBAMA ADMINISTRATION AND THE STRUGGLE TO PREVENT ATROCITIES IN THE CENTRAL AFRICAN REPUBLIC, DECEMBER 2012 – SEPTEMBER 2014 17 (2016), <https://www.ushmm.org/m/pdfs/20161116-Charlie-Brown-CAR-Report.pdf> [<https://perma.cc/2JLH-HNGF>] (describing how Obama recruited Power to join his staff after reading her book, after which her “influence and access transcended her position”) [hereinafter BROWN, OBAMA ADMINISTRATION]; STEPHEN POMPER, ATROCITY PREVENTION UNDER THE OBAMA ADMINISTRATION 2 (2018) (characterizing Power, “who would become one of Obama’s closest advisors and serve eight years in his administration” as the “[m]ost prominent” among “leaders and thinkers whose work most directly informed the Obama Administration’s atrocity-prevention efforts” and describing her “*A Problem from Hell*” book as “the single most influential source of ideas framing the discussion of atrocity-prevention policy during the Obama administration”); SAMANTHA POWER, THE EDUCATION OF AN IDEALIST (2019) [hereinafter POWER, IDEALIST].

Madeleine Albright and Republican former Secretary of Defense William Cohen published “a blueprint for U.S. policymakers” on preventing genocide.⁴⁸ The Albright-Cohen report declared genocide to be “a crime that threatens not only our values, but our national interests.”⁴⁹ The report, building on and echoing Power’s writing,⁵⁰ observed that atrocity crimes “threaten core U.S. national interests” because they exacerbate related risks, cause refugee and regional crises, and compromise U.S. leadership.⁵¹ Breaking from the prior NSSs, this report thus described atrocity prevention as inherently ingrained in *both* U.S. values and interests.

The Albright-Cohen report’s quasi-governmental⁵² observation was soon embodied in a presidential study directive (“PSD”), NSS, and executive order (“EO”), all from President Barack Obama. In August 2011, President Obama (for whom Power was then working as a senior director on the National Security Council (“NSC”) and would later serve as Ambassador to the United Nations) issued a PSD on Mass Atrocities (“PSD-10”) declaring that “[p]reventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.”⁵³ This PSD, which Power co-drafted,⁵⁴ reiterated Power’s writing and the Albright-Cohen report.⁵⁵ While the Obama administration’s first NSS, in 2010, included a

⁴⁸ ALBRIGHT & COHEN, *supra* note 19.

⁴⁹ *Id.* at ix.

⁵⁰ See POMPER, *supra* note 47, at 3.

⁵¹ ALBRIGHT & COHEN, *supra* note 19, at xv (Atrocity crimes “feed on and fuel other threats in weak and corrupt states, with dangerous spillover effects that know no boundaries. If the United States does not engage early in preventing these crimes, we inevitably bear greater costs—in feeding millions of refugees and trying to manage long-lasting regional crises. In addition, U.S. credibility and leadership are compromised when we fail to work with international partners to prevent genocide and mass atrocities.”). U.S. leadership is currently conspicuously absent in addressing atrocity crimes. As Samantha Power notes: “Senior U.S. diplomacy is nowhere to be found in trying to mobilize the international community to combat atrocities in places like South Sudan, the Central African Republic, the Democratic Republic of the Congo, and beyond.” Ralph Ranalli, *The “Next Rwanda” Will Look Different: Samantha Power Reflects on What We’ve Learned and Forgotten 25 Years After the Genocide*, HARV. KENNEDY SCH. (Apr. 4, 2019), <https://www.hks.harvard.edu/faculty-research/policy-topics/human-rights-justice/samantha-power-reflects-what-weve-learned-and> [<https://perma.cc/YTG3-T85Z>] (quoting Power).

⁵² The Albright-Cohen report was issued by the Genocide Prevention Task Force, which was jointly convened by the U.S. Holocaust Memorial Museum, the American Academy of Diplomacy, and the U.S. Institute of Peace. ALBRIGHT & COHEN, *supra* note 19, at iv, 149. The U.S. Congress established the first and third of those organizations. See *Mission and History*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/information/about-the-museum/mission-and-history> [<https://perma.cc/7Q7F-C9WW>] (noting that the museum was chartered by a unanimous Act of Congress); *What We Do*, UNITED STATES INSTITUTE OF PEACE, <https://www.usip.org> [<https://perma.cc/3DPL-9VZH>] (“USIP is a national, nonpartisan, independent institute, founded by Congress.”).

⁵³ *Presidential Study Directive on Mass Atrocities*, THE WHITE HOUSE OFFICE OF THE PRESS SEC’Y (Aug. 4, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities> [<https://perma.cc/869U-W3NT>] [hereinafter PSD-10].

⁵⁴ POWER, IDEALIST, *supra* note 47, at 268.

⁵⁵ PSD-10, *supra* note 53 (“[U.S.] security is affected when masses of civilians are slaughtered, refugees flow across borders, and murderers wreak havoc on regional stability and

subsection on preventing genocide and other atrocity crimes that did not provide a justification,⁵⁶ the administration's only other NSS, five years later, did include a subsection that offered the first commitment to atrocity prevention in such a document unconditionally based on *both* values and interests.⁵⁷ Then, in 2016, President Obama issued EO 13,729 reinforcing his administration's view, initially articulated in PSD-10, that atrocity prevention is an American core national security interest *and* core moral responsibility.⁵⁸

While the Obama administration's pronouncements represent the zenith of the U.S. government's official conceptualization of atrocity prevention to date, the Trump administration's similar declarations, while sometimes unclear, are far from the nadir. In the Trump administration's only NSS to date, in 2017, the first item in a list of "priority actions" is to "support the dignity of individuals."⁵⁹ In this subsection, the Trump administration indicates that it will seek to address atrocity crimes, but does so through language that is tentative (indicating that it "may" use various tools⁶⁰), ambiguous (by invoking values and interests but not stating whether atrocity prevention qualifies as either⁶¹), and reactive (by declaring that it will pursue accountability for atrocity crimes but not mentioning prevention of such offenses⁶²). Moreover, while President Donald Trump has revoked at least twenty-one past EOs,⁶³ he has not rescinded EO 13,729, meaning its presidential declaration

livelihoods. America's reputation suffers, and our ability to bring about change is constrained, when we are perceived as idle in the face of mass atrocities and genocide.").

⁵⁶ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010), <https://nssarchive.us/NSSR/2010.pdf> [<https://perma.cc/99AY-D8NK>].

⁵⁷ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 22 (2015), <https://nssarchive.us/wp-content/uploads/2015/02/2015.pdf> [<https://perma.cc/MW8G-WP73>] ("The mass killing of civilians is an affront to our common humanity and a threat to our common security. It destabilizes countries and regions, pushes refugees across borders, and creates grievances that extremists exploit. We have a strong interest in leading an international response to genocide and mass atrocities when they arise, recognizing options are more extensive and less costly when we act preventively before situations reach crisis proportions.").

⁵⁸ Exec. Order No. 13,729, 81 Fed. Reg. 32,611 (May 18, 2016), <https://www.federalregister.gov/documents/2016/05/23/2016-12307/a-comprehensive-approach-to-atrocity-prevention-and-response> [<https://perma.cc/3C2V-4DK5>] [hereinafter EO 13,729].

⁵⁹ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 42 (2017), <https://nssarchive.us/wp-content/uploads/2017/12/2017.pdf> [<https://perma.cc/6RAL-NWYF>] [hereinafter 2017 NSS].

⁶⁰ *Id.* ("We may use diplomacy, sanctions, and other tools to isolate states and leaders who threaten our interests and whose actions run contrary to our values. We will not remain silent in the face of evil." (emphasis added)).

⁶¹ *Id.*

⁶² *Id.* ("We will hold perpetrators of genocide and mass atrocities accountable.").

⁶³ 2017 Donald Trump Executive Orders, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2017> [<https://perma.cc/7ET2-78UE>] (listing fifty-five EOs President Trump published in 2017, thirteen of which wholly or partially revoked past EOs); 2018 Donald Trump Executive Orders, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2018> [<https://perma.cc/8M68-ELJV>] (listing thirty-seven EOs President Trump published in 2018, six of which wholly or partially revoked past EOs); 2019 Donald Trump Executive Orders, FEDERAL REGISTER, <https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2019> [<https://perma.cc/M69X-4NY6>] (listing thirty EOs President Trump has published to date in 2019, two of which wholly or partially revoked past EOs).

of atrocity prevention as both “a core national security interest and a core moral responsibility of the United States”⁶⁴ still stands.⁶⁵ Consistent with that view, in 2017, President Trump pronounced a national security interest in combatting serious human rights abuses,⁶⁶ and the following year he referred to the prevention of at least one type of atrocity crime, genocide, as a “moral obligation.”⁶⁷ Currently, then, the Executive Branch implicitly continues to abide by the Obama administration’s view of atrocity prevention as core to both U.S. national security and ethical responsibility.

C. Infrastructure for Atrocity Prevention

Leaders of both major political parties have created infrastructure in the U.S. government to address atrocity crimes, significantly enhancing the government’s capabilities but not necessarily its political will. These bodies now exist within the White House as well as several Executive Branch departments and agencies.⁶⁸ This section describes such infrastructure by department.

The Treasury Department’s efforts to thwart atrocity crimes began on April 9, 1940, when then-Secretary of the Treasury Henry Morgenthau successfully requested that the Federal Reserve Bank of New York freeze the accounts of Denmark and Norway to block Adolf Hitler’s access to those funds.⁶⁹ While the Department does not have an office specifically dedicated to atrocity prevention, it does use its financial tools, including sanctions, to combat and deter atrocity crimes.⁷⁰ Among other measures, the Department

⁶⁴ EO 13,729, *supra* note 58.

⁶⁵ E-mail Interview with Nicole Widdersheim, former White House National Security Council and U.S. Agency for International Development Official (July 12, 2019) [hereinafter Widdersheim Interview].

⁶⁶ Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Dec. 20, 2017) (“I therefore determine that serious human rights abuse and corruption around the world constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and I hereby declare a national emergency to deal with that threat.”).

⁶⁷ On Yom HaShoah, or Holocaust Remembrance Day, in 2018, President Trump declared: “We have a responsibility to convey the lessons of the Holocaust to future generations, and together as Americans, we have a *moral obligation* to . . . prevent genocide.” Press Release, The White House, President Donald J. Trump Proclaims April 12 through April 19, 2018, as the Days of Remembrance of Victims of the Holocaust (Apr. 11, 2018) (emphasis added), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-april-12-april-19-2018-days-remembrance-victims-holocaust/> [<https://perma.cc/JND2-MCNY>].

⁶⁸ For further description of U.S. government agencies involved in atrocity prevention, see, for example, LEE FEINSTEIN & TOD LINDBERG, *ALLIES AGAINST ATROCITIES: THE IMPERATIVE FOR TRANSATLANTIC COOPERATION TO PREVENT AND STOP MASS KILLINGS* 21–25 (2017); STRAUS, *FUNDAMENTALS*, *supra* note 2, at 123–30.

⁶⁹ See Sigal P. Mandelker, Under Secretary of the Treasury for Terrorism and Financial Intelligence, Remarks at the 2019 Days of Remembrance (Apr. 29, 2019), <https://home.treasury.gov/news/press-releases/sm671> [<https://perma.cc/8PWE-P9EW>].

⁷⁰ E-mail Interview with Samantha Sultoon, former Senior Sanctions Policy Advisor, U.S. Dep’t of the Treasury Office of Foreign Assets Control (June 5, 2019) [hereinafter Sultoon Interview].

blocks the flow of money to and freezes assets of abusive regimes and individuals suspected of committing serious human rights violations.⁷¹ The Department's Office of Foreign Assets Control ("OFAC"), created in 1950, administers and enforces sanctions related to atrocity crimes and other human rights abuses.⁷²

The Carter administration's Justice Department created an Office of Special Investigations ("OSI") within the Criminal Division in 1979 to investigate and prosecute Nazis from World War II who emigrated to the United States.⁷³ The George W. Bush administration's Justice Department then established within the same Division the Domestic Security Section ("DSS") in 2002 to prosecute and promote policy on international human rights violations and certain other crimes.⁷⁴ Two years later, Congress expanded OSI's mandate to include investigating and seeking to revoke the citizenship of *any* naturalized U.S. citizen involved in genocide or certain other crimes.⁷⁵ Then, in 2010, the Obama administration's Justice Department combined OSI and DSS into a Human Rights and Special Prosecutions Section.⁷⁶

In 2009, the Obama administration's Federal Bureau of Investigation ("FBI") established a Genocide War Crimes Program in its Counterterrorism Division.⁷⁷ Five years later, that program was rearranged under the FBI's Criminal Investigative Division and renamed the International Human Rights Unit ("IHRU").⁷⁸ The IHRU plays a self-described "vital role in the U.S. government's coordinated efforts to identify, locate, investigate, and

⁷¹ See Press Release, White House, Office of the Press Sec'y, Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities (Apr. 23, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro> [<https://perma.cc/637S-2LJ5>] [hereinafter Comprehensive Strategy]; E-mail Interview with Anonymous Official #2, U.S. Dep't of State (July 24, 2019) [hereinafter Anonymous State Dep't Official #2 Interview].

⁷² See *About*, U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL ("OFAC"), <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx> [<https://perma.cc/9P4G-XRL8>] (last updated Apr. 5, 2019).

⁷³ See Bruce J. Einhorn et al., *The Prosecution of War Criminals and Violators of Human Rights in the United States*, 19 WHITTIER L. REV. 281, 283–84 (1997).

⁷⁴ See John R. Crook, *U.S. Department of Justice Creates New Unit for Human Rights Violations, War Criminals*, 104 AM. J. INT'L L. 510, 511 (2010).

⁷⁵ See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5505, 118 Stat. 3638 (2004); Press Release, U.S. Dep't of Justice, Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division (Mar. 30, 2010), <https://www.justice.gov/opa/pr/assistant-attorney-general-lanny-breuer-announces-new-human-rights-and-special-prosecutions> [<https://perma.cc/KP3Q-R6UY>] [hereinafter DoJ Press Release]; see also Zachary D. Kaufman, Letter to the Editor, *Hunting War Criminals*, N.Y. TIMES, Apr. 26, 2003, at A18.

⁷⁶ See Crook, *supra* note 74, at 510; DoJ Press Release, *supra* note 75.

⁷⁷ See *International Human Rights Violations*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/civil-rights/international-human-rights-unit> [<https://perma.cc/P3LV-T5FF>].

⁷⁸ *Id.*

prosecute perpetrators of genocide, war crimes, and other related mass atrocities.”⁷⁹

The Clinton administration’s State Department established the Office of War Crimes Issues (“S/WCI”) in 1997.⁸⁰ Later renamed the Office of Global Criminal Justice (“J/GCJ”), it advises senior State Department officials on issues related to atrocity crimes, particularly the prevention of, responses to, and accountability for these offenses.⁸¹ J/GCJ also counsels the U.S. and foreign governments on the development and use of transitional justice mechanisms.⁸² The inaugural head of this office, David Scheffer, established an Atrocities Prevention Interagency Working Group, which met monthly between 1998 and 2000 and served as a precursor to the Atrocities Prevention Board (“APB”).⁸³ (Scheffer has remarked on the significance and uniqueness of this position he first held.⁸⁴) In 2011, the Obama administration established the State Department’s Bureau of Conflict and Stabilization Operations (“CSO”).⁸⁵ CSO’s mission is “to anticipate, prevent, and respond to conflict that undermines U.S. national interests.”⁸⁶ CSO has officially become the focal point for atrocity prevention within the State Department and throughout the whole U.S. government.⁸⁷

⁷⁹ *Id.*

⁸⁰ See David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* 11 (2012). Because the Office of War Crimes Issues was directly under the Secretary of State, its abbreviation was “S/WCI.” Anonymous State Dep’t Official #2 Interview, *supra* note 71.

⁸¹ See *Our Mission*, U.S. DEP’T OF STATE, OFFICE OF GLOB. CRIMINAL JUSTICE, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/office-of-global-criminal-justice/> [<https://perma.cc/5W22-AJSJ>]. In 2012, the Office moved from reporting directly to the Secretary of State to being housed under the Under Secretary for Civilian Security, Democracy, and Human Rights. Because that Under Secretary oversees what is known as the “J” directorate, the Office’s abbreviation became “J/GCJ.” Anonymous State Dep’t Official #2 Interview, *supra* note 71.

⁸² *Our Mission*, *supra* note 81.

⁸³ See JAMES P. FINKEL, CENTER FOR THE PREVENTION OF GENOCIDE OCCASIONAL PAPER SERIES NO. 2: ATROCITY PREVENTION AT THE CROSSROADS: ASSESSING THE PRESIDENT’S ATROCITY PREVENTION BOARD AFTER TWO YEARS 2, 7 (2014), <https://www.ushmm.org/m/pdfs/20140904-finkel-atrocity-prevention-report.pdf> [<https://perma.cc/TGE-5-Y44J>].

⁸⁴ See SCHEFFER, *supra* note 80, at 3 (“On the one hand, this initiative marked a sad commentary on the state of the world at the close of the twentieth century—fifty years or so after the Holocaust and the Nuremberg and Tokyo tribunals and two decades after the atrocity crimes that devastated Cambodia during the rule of Pol Pot. On the other hand, my ambassadorship demonstrated that the United States recognized the gravity of the situation and rose to the challenge. No other nation had seen fit to designate anyone as an ambassador to cover atrocity crimes.”)

⁸⁵ Press Release, U.S. Dep’t of State, Background Briefing on the Establishment of the Department of State’s Bureau of Conflict and Stabilization Operations (Nov. 22, 2011), <https://2009-2017.state.gov/j/cso/releases/remarks/2011/177688.htm> [<https://perma.cc/HUE9-NCE3>].

⁸⁶ *Our Mission*, U.S. DEP’T OF STATE, BUREAU OF CONFLICT AND STABILIZATION OPERATIONS, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-conflict-and-stabilization-operations/> [<https://perma.cc/8J6H-T728>].

⁸⁷ See THE WHITE HOUSE, ELIE WIESEL GENOCIDE AND ATROCITIES PREVENTION REPORT 5 (2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/ELIE-WIESEL-GENO->

The George W. Bush administration founded the Office of Conflict Management and Mitigation (“CMM”) in 2002 in the Bureau of Democracy, Conflict, and Humanitarian Assistance (“DCHA”) of the U.S. Agency for International Development (“USAID”).⁸⁸ Later, the Obama administration created within USAID the Center of Excellence for Democracy, Human Rights, and Governance (“DRG”).⁸⁹ Initially, CMM and DRG shared the task of generating atrocity prevention training and tools for USAID field officers, but DRG soon took the lead.⁹⁰ USAID’s atrocity prevention publications include a 2013 technical brief about early warning signs of atrocity crimes against civilians⁹¹ and a 2015 field guide on atrocity prevention.⁹² In 2018, as part of a larger Trump administration-led reformation of the federal government,⁹³ USAID proposed creating a Bureau for Conflict Prevention and Stabilization (“CPS”), which would serve as the U.S. government’s technical lead on conflict and violence prevention; consolidate the current DCHA offices, including CMM; and manage the Complex Crises Fund (“CCF”).⁹⁴ In a press release dated April 3, 2019, USAID Administrator Mark Green stated that Congress had approved CPS’s creation.⁹⁵

The George W. Bush administration created the Human Rights Violators and War Crimes Unit (“HRVWCU”) at the Department of Homeland

CIDE-AND-ATROCITIES-PREVENTION-REPORT.pdf [https://perma.cc/9DWT-LS57] [hereinafter ELIE WIESEL ACT REPORT] (noting that CSO will serve as the Atrocity Early Warning Task Force’s Secretariat); Widdersheim Interview, *supra* note 65.

⁸⁸ See *Office of Conflict Management and Mitigation*, U.S. AGENCY FOR INT’L DEV., <https://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-0> [https://perma.cc/32RT-72V3].

⁸⁹ Widdersheim Interview, *supra* note 65.

⁹⁰ *Id.*

⁹¹ U.S. AGENCY FOR INT’L DEV., *ADVANCING EARLY WARNING OF MASS ATROCITIES AGAINST CIVILIANS* (2013), https://dec.usaid.gov/dec/content/Detail_Presto.aspx?ctID=ODVhZjk4NWQtM2YyMi00YjRmLTcxNjktZTcxMjM2NDNmY2Uy&rID=MTg5MTUx [https://perma.cc/J2VU-G5EP].

⁹² U.S. AGENCY FOR INT’L DEV., *FIELD GUIDE: HELPING PREVENT MASS ATROCITIES* (2015), https://www.usaid.gov/sites/default/files/documents/1866/Field_Guide_Mass_Atrocities.pdf [https://perma.cc/P9WH-S3JF].

⁹³ See Memorandum from Mick Mulvaney, Director, Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep’ts & Agencies (Apr. 12, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf> [https://perma.cc/Z5R7-EGJW] (calling for agency proposals to fulfill the “comprehensive Government-wide Reform Plan”).

⁹⁴ See EMILY M. MORGENSTERN ET AL., CONG. RESEARCH SERV., *TRANSFORMATION at the U.S. Agency for International Development (USAID)* (2019), <https://fas.org/sgp/crs/row/R45779.pdf> [https://perma.cc/C9PE-F8WW]; *The Bureau for Conflict Prevention and Stabilization (CPS)*, U.S. AGENCY FOR INT’L DEV., https://www.usaid.gov/sites/default/files/documents/1868/Fact_Sheet_The_Bureau_for_Conflict_Prevention_and_Stabilization_CPS.pdf [https://perma.cc/GJG4-W59W]; *Transforming USAID’s Structure*, U.S. AGENCY FOR INT’L DEV., <https://www.usaid.gov/what-we-do/transformation-at-usaid/transformation-structure> [https://perma.cc/E5WY-VXN4]. For more information about the CCF, see *infra* notes 313–14 and accompanying text.

⁹⁵ Press Release, USAID, *Statement by USAID Administrator Green on Transformation Milestone* (Apr. 3, 2019), <https://www.usaid.gov/news-information/press-releases/apr-3-2019-statement-usaid-administrator-green-transformation-milestone> [https://perma.cc/3CRQ-P2VD].

Security in 2003.⁹⁶ HRVWCU's mission includes preventing the admission into the United States of, identifying and prosecuting, and removing human rights abusers,⁹⁷ and the unit works with the FBI to pursue that mission.⁹⁸

In 2011, President Obama's PSD-10 directed the establishment in the White House of the APB, the primary purpose of which was "to coordinate a whole of government approach to preventing" atrocity crimes.⁹⁹ The Obama administration created the interagency body the following year and directed it to meet monthly.¹⁰⁰ In 2016, President Obama's EO 13,729 elaborated on PSD-10, including details about the APB's responsibilities, structure, and protocols.¹⁰¹ A senior director of the NSC chaired the APB, and representatives at the Assistant Secretary level or higher from eleven agencies and offices across the U.S. government participated.¹⁰² Since its establishment until at least January 2017, the APB met at minimum monthly,¹⁰³ and the sub-APB (the APB's working-level subcommittee) met more frequently.¹⁰⁴

In 1993, the Clinton administration created within the Department of Defense ("DoD") the U.S. Army Peacekeeping and Stability Operations Institute ("PKSOI").¹⁰⁵ PKSOI has published several atrocity prevention-related documents.¹⁰⁶ For example, PKSOI partnered with the Harvard University Kennedy School of Government's Carr Center for Human Rights Policy to publish in 2010 a conceptual framework for military prevention of

⁹⁶ See Rupert Elderkin, *Case Study: A Review of Transitional Justice Responses to the Srebrenica Genocide, 1995-2013*, 8 INTERDISC. J. HUM. RTS. L. 103, 118 (2015).

⁹⁷ See *Human Rights Violators & War Crimes Unit*, U.S. DEP'T OF HOMELAND SEC., <https://www.ice.gov/human-rights-violators-war-crimes-unit> [<https://perma.cc/QRG6-JFW4>].

⁹⁸ Widdersheim Interview, *supra* note 65.

⁹⁹ PSD-10, *supra* note 53.

¹⁰⁰ See Comprehensive Strategy, *supra* note 71. For an insider's view of the APB under the Obama administration, see POMPER, *supra* note 47.

¹⁰¹ EO 13,729, *supra* note 58.

¹⁰² See Comprehensive Strategy, *supra* note 71 (stating that "the APB will include representatives of the Departments of State, Defense, Treasury, Justice, and Homeland Security, the Joint Staff, the U.S. Agency for International Development, the U.S. Mission to the United Nations, the Office of the Director of National Intelligence, the Central Intelligence Agency, and the Office of the Vice President"); *Atrocities Prevention*, U.S. DEP'T OF STATE, <https://www.state.gov/atrocity-prevention/> [<https://perma.cc/M2LM-J5FT>].

¹⁰³ CHARLES J. BROWN, AN ASSESSMENT OF USG ATROCITY PREVENTION TRAINING PROGRAM 4 (2016) [hereinafter BROWN, ASSESSMENT]; FEINSTEIN & LINDBERG, *supra* note 68, at 2; POMPER, *supra* note 47, at 19.

¹⁰⁴ Participants in the sub-APB during the Obama administration differ on how frequently it met during that time. Compare POMPER, *supra* note 47, at 9 (stating that the sub-APB met "generally on a weekly basis"), with Widdersheim Interview, *supra* note 65 (stating that the sub-APB "sometimes" met weekly).

¹⁰⁵ See *Background & History*, PEACEKEEPING & STABILITY OPERATIONS INST., <https://pksoi.armywarcollege.edu/index.cfm/who-we-are/background-history/> [<https://perma.cc/9AY7-NE3M>].

¹⁰⁶ See *PKSOI Publications*, PEACEKEEPING & STABILITY OPERATIONS INST., <https://pksoi.armywarcollege.edu/index.cfm/resources/pksoi-publications/> [<https://perma.cc/GRB7-8XE7>].

and response to atrocity crimes.¹⁰⁷ Other components of DoD are also involved in atrocity prevention,¹⁰⁸ including as representatives to the APB.¹⁰⁹

Finally, the Intelligence Community also participates in atrocity prevention. Both PSD-10 and EO 13,729 include representatives from the Office of the Director of National Intelligence and the Central Intelligence Agency (“CIA”).¹¹⁰ Furthermore, EO 13,729 indicates that the APB may conduct its work by “request[ing] information or analysis from the Intelligence Community.”¹¹¹ The Obama administration created within the CIA an analytical unit on atrocity crimes.¹¹²

III. OVERVIEW OF NEW ATROCITY PREVENTION LAWS

Despite all of this progress on atrocity prevention in the U.S. government’s legal, normative, conceptual, and infrastructural commitments, the impact of federal U.S. law remained comparatively weak until recently. In 2018 and 2019, new legislation called on the Executive Branch to make more substantial and specific contributions to addressing atrocity crimes. Congress incorporated the Syrian War Crimes Accountability Act of 2017¹¹³ into the John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019,¹¹⁴ which President Trump signed into law on August 13, 2018.¹¹⁵ Five months later, on January 14, 2019,¹¹⁶ President Trump signed into law the Elie Wiesel Genocide and Atrocities Prevention Act of 2018.¹¹⁷

A. *Syrian War Crimes Accountability Act*

The Syrian Accountability Act is designed, inter alia, to “require a report on, and to authorize technical assistance for, accountability for war crimes, crimes against humanity, and genocide in Syria.”¹¹⁸ The law man-

¹⁰⁷ See SARAH SEWALL ET AL., MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK (2010).

¹⁰⁸ Widdersheim Interview, *supra* note 65.

¹⁰⁹ PSD-10, *supra* note 53 (noting that the APB includes representation from DoD).

¹¹⁰ See *id.*; EO 13,729, *supra* note 58.

¹¹¹ EO 13,729, *supra* note 58.

¹¹² Widdersheim Interview, *supra* note 65.

¹¹³ Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. (2017).

¹¹⁴ John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, § 1232, 132 Stat. 1636, 2035 (2018).

¹¹⁵ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5515/actions> [<https://perma.cc/5DQ5-REYD>] (indicating President signed legislation on August 13, 2018).

¹¹⁶ See Elie Wiesel Genocide and Atrocities Prevention Act, S. 1158, 115th Cong. (2019), <https://www.congress.gov/bill/115th-congress/senate-bill/1158/actions> [<https://perma.cc/MCD9-S4TF>] (indicating President signed legislation on January 14, 2019).

¹¹⁷ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, 132 Stat. 5586 (2019).

¹¹⁸ Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. pmb. (2017). When incorporated into the NDAA, this preamble was omitted.

dates five measures. First, it requires the Secretary of State to conduct a study of the feasibility and desirability of potential transitional justice mechanisms for Syria.¹¹⁹

Second, the law mandates the Secretary of State to submit to partially overlapping committees in each chamber of Congress two sets of reports.¹²⁰ The first set is on atrocity crimes in Syria,¹²¹ including a description of such offenses and a summary and assessment of programs the U.S. government has undertaken to ensure accountability for those crimes (such as supporting the International, Impartial, and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (“IIIM”) and the Independent International Commission of Inquiry on the Syrian Arab Republic (“CoI”).¹²² The second report concerns the transitional justice study’s results.¹²³ The law requires the Secretary of State to transmit both sets of reports within the same timeframe from the law’s enactment and also requires an updated version of the first set of reports to be submitted within a particular period after the conflict’s cessation.¹²⁴

Third, the law authorizes the Secretary of State to provide appropriate technical assistance to support entities pursuing accountability and transitional justice for atrocity crimes in Syria.¹²⁵ The law then requires the Secretary of State to provide detailed, biannual briefings about this assistance to designated committees in each chamber of Congress.¹²⁶

Fourth, the law amends the statute underlying the State Department’s Rewards for Justice Program, which offers monetary incentives for information leading to the arrest or conviction of certain individuals.¹²⁷ In the section on foreign nationals covered by the program, the amendment adds explicit reference to individuals accused of committing atrocity crimes in Syria beginning in March 2011,¹²⁸ when the country’s civil war erupted.¹²⁹

¹¹⁹ NDAA § 1232(b)(1).

¹²⁰ See *infra* note 210 and accompanying text.

¹²¹ NDAA § 1232(a).

¹²² *Id.* § 1232(a)(2). For background and discussion of the IIIM and CoI, see Kaufman, *Recent UN Investigations*, *supra* note 4.

¹²³ NDAA § 1232(b)(2).

¹²⁴ See *infra* notes 212–13 and accompanying text.

¹²⁵ NDAA § 1232(c).

¹²⁶ *Id.* § 1232(c)(3).

¹²⁷ *Id.* § 1232(d); see 22 U.S.C. § 2708 (2018) (enacting Rewards for Justice Program); see also *Rewards for Justice Program*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/m/ds/terrorism/c8651.htm> [<https://perma.cc/7NUC-ESAK>]; *War Crimes Rewards Program*, U.S. DEP’T OF STATE, <https://2009-2017.state.gov/j/gcj/wcrp/index.htm> [<https://perma.cc/CCN3-67SH>].

¹²⁸ NDAA § 1232(d); see 22 U.S.C. § 2708(b)(10) (2018).

¹²⁹ See *Mid-East Unrest: Syrian Protests in Damascus and Aleppo*, BBC News (Mar. 15, 2011), <https://www.bbc.com/news/world-middle-east-12749674> [<https://perma.cc/GG4K-UPUC>].

Finally, the law encourages the Secretary of State to exercise the U.S. government's influence at the UN to advocate that the UN Human Rights Council ("UNHRC") annually extends the mandate of the CoI until the CoI has completed its function.¹³⁰

Three Democrats (bill sponsor Senator Ben Cardin plus Senators Robert Menendez and Jeanne Shaheen) and three Republicans (Senators Bob Corker, Marco Rubio, and Todd Young)—all Senate Foreign Relations Committee ("SFRC") members¹³¹—introduced the Syrian Accountability Act in April 2017.¹³² As their rationale for the legislation, all six Senators cited the need to ensure justice and accountability for Bashar al-Assad and his regime's atrocity crimes in Syria over the previous six years, which killed hundreds of thousands of Syrians and caused millions more to flee as refugees.¹³³

By the end of that month, the bill had garnered thirteen additional cosponsors (all Democrats).¹³⁴ The bill passed SFRC with amendments two months later.¹³⁵ The following year, by the time an amended version of the NDAA was engrossed in the Senate, the Syrian Accountability Act had been incorporated into it.¹³⁶ The full Senate passed that version of the bill 85 to 10.¹³⁷ The next month, the House approved the amended version 359 to 54.¹³⁸ The Senate agreed six days later by a vote of 87 to 10.¹³⁹

¹³⁰ NDAA § 1232(e). The UNHRC established the CoI on August 22, 2011, to investigate all alleged violations of international human rights law since March 2011 in Syria. See *Independent International Commission of Inquiry on the Syrian Arab Republic*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independent-internationalcommission.aspx> [<https://perma.cc/4G3A-ZP34>]. As the U.S. government is no longer a member of the UNHRC, see *infra* notes 237–38 for further discussion.

¹³¹ At the time, Senators Corker and Cardin were SFRC's Chair and Ranking Member, respectively.

¹³² See Press Release, U.S. Senate Comm. on Foreign Relations, Syrian War Crimes Accountability Bill Introduced by Cardin, Bipartisan Colleagues (Apr. 7, 2017), <https://www.foreign.senate.gov/press/ranking/release/syrian-war-crimes-accountability-bill-introduced-by-cardin-bipartisan-colleagues> [<https://perma.cc/76VS-TTPA>].

¹³³ *Id.*

¹³⁴ See Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/905/cosponsors> [<https://perma.cc/6LLT-95H7>] (listing original and subsequent cosponsors).

¹³⁵ See Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/905/actions> [<https://perma.cc/XJF3-3XF2>] (indicating SFRC Chair Corker reported bill with amendments and without written report).

¹³⁶ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5515/text/eas> [<https://perma.cc/2SR9-WQEM>] (indicating text of fifth version of the bill, the "Engrossed Amended Senate" version, dated June 18, 2018, in which the Syrian Accountability Act appears at section 6203).

¹³⁷ See John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5515/actions> [<https://perma.cc/P999-VMZS>] (indicating bill passed / agreed to in Senate on June 18, 2018, by 85-10).

¹³⁸ See *id.* (indicating conference report agreed to in House on July 26, 2018, by 359-54).

¹³⁹ See *id.* (indicating conference report agreed to in Senate on August 1, 2018, by 87-10).

B. *Elie Wiesel Genocide and Atrocities Prevention Act*

The Elie Wiesel Act is more general than the country-specific Syrian Accountability Act. Through four measures, the former law aims to “prevent acts of genocide and other atrocity crimes, which threaten national and international security, by enhancing United States Government capacities to prevent, mitigate, and respond to such crises.”¹⁴⁰ First, the law declares the sense of Congress that the U.S. government’s “efforts at atrocity prevention and response through interagency coordination” are “critically important” and suggests that appropriate U.S. officials cooperate through holding meetings, identifying gaps in U.S. foreign policy, facilitating policy, providing recommendations to the President and Congress, conducting outreach with civil society, and dedicating resources.¹⁴¹

Second, the law states that the U.S. government’s policy is to “regard the prevention of atrocities as in its national interest,” to “work with partners and allies . . . to identify, prevent, and respond to the causes of atrocities,” and to pursue a U.S. government-wide “strategy to identify, prevent, and respond to the risk of atrocities.”¹⁴² Third, the law amends the Foreign Service Act¹⁴³ to add training for Foreign Service Officers on atrocity crime anticipation, prevention, and response.¹⁴⁴

Finally, the law mandates that the President transmit to designated committees in each chamber of Congress reports about atrocity prevention and response.¹⁴⁵ The law requires the President to convey these reports within a particular timeframe and at regular intervals thereafter for a set amount of time.¹⁴⁶ The law directs the reports to include a detailed description of U.S. government efforts to prevent and respond to atrocity crimes (such as a global assessment of ongoing atrocity crimes, any steps taken to respond to such offenses, and a description of countries and regions at risk of atrocity crimes), recommendations to ensure shared responsibility by international and regional organizations, the implementation status of such recommendations contained in the previous report, and identification of organizations inside and outside the U.S. government that were consulted in preparing the report.¹⁴⁷

Democratic Senator Cardin and Republican Senator Young (both members of the SFRC), along with twenty original cosponsors (three Republicans

¹⁴⁰ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, pmb., 132 Stat. 5586 (2019).

¹⁴¹ *Id.* § 2.

¹⁴² *Id.* § 3.

¹⁴³ 22 U.S.C. § 4028 (2018).

¹⁴⁴ EWGAPA § 4.

¹⁴⁵ *Id.* § 5.

¹⁴⁶ *Id.* § 5(a); *see also infra* note 211 and accompanying text.

¹⁴⁷ EWGAPA § 5(a).

and seventeen Democrats), introduced the Elie Wiesel Act in May 2017.¹⁴⁸ (This bill succeeded a similar but failed legislative initiative that Senator Cardin and Republican Senator Thom Tillis introduced the previous year.¹⁴⁹) Regarding the Elie Wiesel Act, Senators Cardin and Young both cited ethical and practical motivations for the legislation. The former stated that “our values and national security interests require us to ensure that the United States utilizes the full arsenal of diplomatic, economic, and legal tools to take meaningful action before atrocities occur,” and the latter declared that “[t]he United States has a moral and strategic imperative to help prevent and respond to acts of genocide and other mass atrocities.”¹⁵⁰

One month after the Elie Wiesel Act’s introduction in the Senate, Republican Representative Ann Wagner and Democratic Representative Joe Crowley, along with twenty-six original cosponsors (ten Republicans and sixteen Democrats), introduced the House companion of the bill.¹⁵¹ In May 2018, the House Foreign Affairs Committee (“HFAC”) passed the bill by voice vote.¹⁵² SFRC then unanimously passed the Act the following month.¹⁵³ In July of that year, the full House voted in favor of the legislation 406 to 5.¹⁵⁴ The full Senate unanimously passed an amended version of the

¹⁴⁸ See Press Release, U.S. Senate Comm. on Foreign Relations, Cardin, Young Lead Bipartisan Bill to Bolster U.S. Leadership in Genocide, Atrocity Prevention (May 17, 2017), <https://www.foreign.senate.gov/press/ranking/release/cardin-young-lead-bipartisan-bill-to-bolster-us-leadership-in-genocide-atrocity-prevention> [<https://perma.cc/9MZZ-TZEN>] [hereinafter 2017 SFRC Press Release].

¹⁴⁹ See Genocide and Atrocities Prevention Act of 2016, S. 2551, 114th Cong. (2016) (as introduced in Senate, Feb. 11, 2016); Press Release, U.S. Senate Comm. on Foreign Relations, U.S. Senators Introduce Bipartisan Genocide and Atrocities Prevention Act of 2016 (Feb. 12, 2016), <https://www.foreign.senate.gov/press/ranking/release/us-senators-introduce-bipartisan-genocide-and-atrocities-prevention-act-of-2016> [<https://perma.cc/8KG7-DLW2>] (identifying Senators Cardin and Tillis as introducing the legislation).

¹⁵⁰ 2017 SFRC Press Release, *supra* note 148.

¹⁵¹ See Press Release, Rep. Ann Wagner, Wagner Introduces Elie Wiesel Genocide and Atrocities Prevention Act of 2017 (June 22, 2017), <https://wagner.house.gov/media-center/press-releases/wagner-introduces-elie-wiesel-genocide-and-atrocities-prevention-act-of> [<https://perma.cc/7AS9-FED4>].

¹⁵² See Elie Wiesel Genocide and Atrocities Prevention Act, H.R. 3030, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/3030/all-actions> [<https://perma.cc/RG38-XT7V>] (indicating bill ordered on May 17, 2018, to be reported out of committee by voice vote).

¹⁵³ See Elie Wiesel Genocide and Atrocities Prevention Act, S. 1158, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1158/all-actions> [<https://perma.cc/QCM5-D5N5>] (indicating that the bill was passed out of committee without a written report, or any objection, on June 27, 2018).

¹⁵⁴ See Elie Wiesel Genocide and Atrocities Prevention Act, H.R. 3030, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/3030/all-actions> [<https://perma.cc/RG38-XT7V>] (indicating bill passed/agreed to in House on July 17, 2018, by 406-5).

bill five months later.¹⁵⁵ Nine days after, the full House passed the Senate's amended version 367 to 4.¹⁵⁶

IV. SIGNIFICANCE OF NEW ATROCITY PREVENTION LAWS

The Elie Wiesel and Syrian Accountability Acts hold great significance. Among other lofty, laudable implications, these laws recognize and codify atrocity prevention as in the U.S. national interest. Both laws also mainstream transitional justice and the APB in U.S. policymaking, promote domestic and international cooperation on addressing atrocity crimes, demonstrate bipartisanship on protecting human rights, convey the U.S. government's current preference for particular transitional justice options, and prod other countries to consider enacting similar legislation.

A. *Recognizing Atrocity Prevention as in the National Interest*

While the U.S. government's legal commitment to atrocity prevention dates back to the Genocide Convention ratification in 1986, U.S. law has characterized this duty as in the national interest only recently. With President Obama's 2011 PSD-10, 2015 NSS, and 2016 EO 13,729, the Executive Branch alone had officially recognized atrocity prevention as in the U.S. national interest. Not until passage of the Elie Wiesel Act did the Legislative Branch—and federal law—adopt similar language to President Obama's by "regard[ing] the prevention of atrocities as in [the U.S.] national interest."¹⁵⁷ More recently, the Trump administration emphasized that the Elie Wiesel Act "prioritizes the prevention of genocide as a matter of America's national security interest."¹⁵⁸

¹⁵⁵ See Elie Wiesel Genocide and Atrocities Prevention Act, S. 1158, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1158/all-actions> [<https://perma.cc/QCM5-D5N5>] (indicating bill passed/agreed to in Senate on December 12, 2018, with an amendment by unanimous consent).

¹⁵⁶ See Elie Wiesel Genocide and Atrocities Prevention Act, H.R. 3030, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/3030/all-actions> [<https://perma.cc/RG38-XT7V>] (indicating bill passed/agreed to in House on December 21, 2018, by 367-4). The four dissenting Congresspeople were Justin Amash, Andy Biggs, Paul Gosar, and Thomas Massie. Their Communications Directors/Press Secretaries—Poppy Nelson, Daniel Stefanski, Melissa Brown, and Laura Lington, respectively—did not respond to multiple emails and voicemails from the author requesting explanations for their bosses' votes.

¹⁵⁷ Elie Wiesel Genocide and Atrocities Prevention Act ("EWGAPA"), Pub. L. No. 115-441, § 3(1), 132 Stat. 5586 (2019). A resolution unanimously adopted by the U.S. Senate in 2010 "affirms that it is in the national interest and aligned with the values of the United States to work vigorously with international partners to prevent and mitigate future genocides and mass atrocities." S. Con. Res. 71, 111th Cong. § 2 (2010). However, the House did not pass the resolution. S. Con. Res. 71, 111th Cong. (2010), <https://www.congress.gov/bill/111th-congress/senate-concurrent-resolution/71/all-actions> [<https://perma.cc/TXB8-5U3H>] (indicating that the resolution's latest action was that the Senate sent it to the House).

¹⁵⁸ E-mail from The White House, info@mail.whitehouse.gov, to subscribers of West Wing Reads (Jan. 28, 2019) (on file with author).

Subsequent legislation recognizing past atrocity crimes invokes the Elie Wiesel Act's characterization of atrocity prevention as a U.S. national interest. On October 29, 2019, the U.S. House of Representatives cited this aspect of the Elie Wiesel Act in passing a resolution recognizing the Armenian Genocide,¹⁵⁹ the first time that a chamber of Congress had formally made such a declaration.¹⁶⁰

B. Mainstreaming “Transitional Justice” and the Atrocities Prevention Board (or Successor Entity) in U.S. Policymaking

The Elie Wiesel and Syrian Accountability Acts represent the mainstreaming in U.S. policymaking of two separate aspects of atrocity prevention. One is the concept of “transitional justice” (a term coined by Ruti Teitel in 1991¹⁶¹), which can contribute to atrocity prevention.¹⁶² The other is the institution of the APB (or its successor entity).

1. Transitional Justice

Both laws mention transitional justice on multiple occasions, significantly raising the prominence of this concept in U.S. policymaking. The term appears nine times in the Syrian Accountability Act¹⁶³ and four times in the Elie Wiesel Act.¹⁶⁴ These acts are the first to define transitional justice in U.S. law, and they do so by using identical language: Transitional justice means “the range of judicial, nonjudicial, formal, informal, retributive, and restorative measures employed by countries transitioning out of armed conflict or repressive regimes to redress legacies of atrocities and to promote long-term, sustainable peace.”¹⁶⁵

¹⁵⁹ H.R. Res. 296, 116th Cong. pmb. (2019).

¹⁶⁰ Catie Edmondson & Rick Gladstone, *House Votes To Recognize 1915 Genocide Of Armenians*, N.Y. TIMES, Oct. 30, 2019, at A4.

¹⁶¹ See RUTI G. TEITEL, *GLOBALIZING TRANSITIONAL JUSTICE* xii, 3 (2014).

¹⁶² See Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-Recurrence and the Special Adviser to the Sec’y-Gen. on the Prevention of Genocide, Joint Study on the Contribution of Transitional Justice to the Prevention of Gross Violations and Abuses of Human Rights and Serious Violations of Int’l Humanitarian Law, Including Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity, and Their Recurrence, ¶ 84, U.N. Doc. A/HRC/37/65 (2018) (“Failure to prevent or halt systematic human rights violations increases the risk of violence, conflict and atrocity crimes. Transitional justice has made important contributions to establishing, operationalizing and realizing the rights to truth, justice and reparations. A comprehensive transitional justice policy can therefore contribute to breaking cycles of impunity and marginalization, which, if left unaddressed, increase the risks of recurrence.”).

¹⁶³ John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1232(a)(2)(B)(ii), (b), (b)(1), (b)(2), (c)(1)(F), (c)(2) (twice), (g)(4) (twice), 132 Stat. 1636 (2018).

¹⁶⁴ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, §§ 3(3)(C), 4(3), 5(a)(1)(C), 6(3), 132 Stat. 5586 (2019).

¹⁶⁵ *Id.* § 6(3); see also NDAA § 1232(g)(4).

But these laws are not the only or even first federal legislation to include the term. The phrase “transitional justice” also explicitly appears in ten other federal laws passed since 2007.¹⁶⁶ Including unenacted bills and resolutions, the term appears in a total of seventy-five pieces of federal legislation since 2007.¹⁶⁷ Employment of the term in such legislation has increased steadily since that year.¹⁶⁸

The progressively common usage of “transitional justice” in federal legislation reflects the greater familiarity and comfort policymakers have with the term. That Congress has also finally defined transitional justice in not just one, but two, laws further weaves the term into the fabric of federal law. These developments demonstrate the U.S. government’s official acknowledgement of and perhaps increasing priority on supporting transitional justice as a significant component of U.S. foreign policy.

Outside the U.S. government, however, there is no consensus on the definition of transitional justice. The version Congress used in these two laws is a near-verbatim reproduction of the definition the U.S. Department

¹⁶⁶ On September 23, 2019, the author conducted a search of Congress.gov by choosing the “All Legislation” directory and searching for the term “transitional justice” [hereinafter “Transitional Justice” Search]. The search result listed the following ten laws besides the Elie Wiesel and Syrian Accountability Acts: Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, pmbll., §§ 3(3), 7(b), 124 Stat. 1209, 1209, 1210, 1213 (2010); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 7041(f), 125 Stat. 786, 1226 (2011); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7041(i), 128 Stat. 5, 526 (2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 7041(h)(1)(G), 128 Stat. 2130, 2638 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 7041(h)(1)(G), 129 Stat. 2242, 2778 (2015); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, 130 Stat. 1005, 1028 (2016); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §§ 7033(b)(4), 7041(j)(1)(G), 131 Stat. 135, 645, 665 (2017); Women, Peace, and Security Act of 2017, Pub. L. No. 115-68, §§ 5(d)(6), (8), 131 Stat. 1202, 1204 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §§ 7033(b)(4), 7041(j)(2), 7041(k)(1)(G), 132 Stat. 348, 890, 909, 910 (2018); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §§ 7033(b)(4), 7071(b)(2), 133 Stat. 13, 323, 386 (2019). An earlier version of a bill—the Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L. No. 115-330, 132 Stat. 4390 (2018)—contains the term “transitional justice,” but not the final version that became law. So, while that bill is displayed in this search, it is a false positive.

¹⁶⁷ See “Transitional Justice” Search, *supra* note 166.

¹⁶⁸ See *id.* The following table shows the number of the Congress, the two-year span of that Congress, and the number of pieces of legislation (enacted and unenacted) during that Congress in which “transitional justice” appears:

Congress	Year	Number
110	2007-2008	2
111	2009-2010	3
112	2011-2012	7
113	2013-2014	12
114	2015-2016	15
115	2017-2018	19

As of September 29, 2019, the 116th Congress (2019-20) features nineteen pieces of legislation in which “transitional justice” appears. That Congress is not included in the chart above because its two-year span is not complete.

of State employed in 2016,¹⁶⁹ as part of the Executive Branch's first public white papers on the subject.¹⁷⁰ The similar definition of transitional justice employed by Congress and the State Department partly accords with my own, but features a significant distinction. I refer to transitional justice as "both the process and objectives of societies addressing past or ongoing atrocities and other serious human rights violations through judicial and non-judicial mechanisms."¹⁷¹ The key difference between these two definitions is whether they explicitly include a reference to altering the underlying situation. The definition used by Congress and the State Department makes this reference (by limiting the context in which countries employ various measures to when the "countries [are] transitioning out of armed conflict or repressive regimes"), whereas mine does not. As Phil Clark, Kalypso Nicolaïdis, and I have argued, the first word in the term "transitional justice" may be a misnomer, as attempts to promote transitional justice objectives (such as accountability and reconciliation) may be merely aspirational and can even exacerbate or indirectly cause conflict.¹⁷² Definitions of "transitional justice" should thus reflect the reality that no "transition" from conflict to peace may actually be achieved. One option to express this nuance, as in my definition of transitional justice, is to omit reference to any actual transition.

Although the Elie Wiesel and Syrian Accountability Acts ensured that the term—and a definition for—"transitional justice" are now firmly part of

¹⁶⁹ On May 16-17, 2016, the U.S. Department of State issued six policy papers on transitional justice that were created by the Department (specifically its J/GCJ; Bureau of Democracy, Human Rights, and Labor; Bureau of International Narcotics and Law Enforcement Affairs; and Bureau of Conflict and Stabilization Operations) and USAID (particularly its DRG). See U.S. Dep't of State, *Transitional Justice Policy Paper Series* (May 16-17, 2016), <https://www.state.gov/j/gcj/transitional/index.htm> [<https://perma.cc/85TK-B2ZX>]. The State Department employed the following definition of transitional justice: "a range of measures—judicial and non-judicial, formal and informal, retributive and restorative—employed by countries transitioning out of armed conflict or repressive regimes to redress legacies of atrocities and to promote long-term, sustainable peace." U.S. Dep't of State, *Transitional Justice Overview* (May 16, 2016), <https://2009-2017.state.gov/documents/organization/257771.pdf> [<https://perma.cc/H9UY-S75P>]. The State Department based this definition on a combination of sources, including one formulated by the International Center for Transitional Justice ("ICTJ") and input from transitional justice specialists at the State Department and USAID. E-mail Interview with Anonymous Official #1, U.S. Dep't of State (Feb. 22, 2019) [hereinafter Anonymous State Dep't Official #1 Interview]. ICTJ's definition of transitional justice is "the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response." *What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUSTICE (2019), <https://www.ictj.org/about/transitional-justice> [<https://perma.cc/2HCP-6V3Q>].

¹⁷⁰ See Anonymous State Dep't Official #1 Interview, *supra* note 169.

¹⁷¹ ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 2 (2016).

¹⁷² Phil Clark, Zachary D. Kaufman & Kalypso Nicolaïdis, *Tensions in Transitional Justice*, in *AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION, AND RECONCILIATION IN RWANDA AND BEYOND* 381, 390 (Phil Clark & Zachary D. Kaufman eds., 2009).

U.S. law, controversies will undoubtedly persist within the U.S. government about describing and operationalizing the concept. Indeed, the U.S. government has a long, troubling, and inconsistent relationship with transitional justice around the world¹⁷³ and even within its own borders.¹⁷⁴

2. *Atrocities Prevention Board (or Successor Entity)*

The Elie Wiesel Act, the first law to refer explicitly to the APB (or its successor entity) outside the appropriations context, mentions the inter-agency body three times.¹⁷⁵ Since the APB was established, four appropriations laws have featured a section about it, although none of these laws actually granted the APB itself any funding.¹⁷⁶ Including unenacted bills and resolutions, explicit reference to the APB appears in a total of thirty-one pieces of federal legislation.¹⁷⁷ But the APB's prominent, repeated presence in the Elie Wiesel Act—like the references to transitional justice in the Elie Wiesel and Syrian Accountability Acts—reflects increasing awareness and acceptance of the body throughout the U.S. government. Furthermore, congressional embrace of the APB in a non-appropriations law, particularly a law that originated in a committee with subject-matter expertise (the SFRC), gives the APB additional support and legitimacy.¹⁷⁸

¹⁷³ See KAUFMAN, *supra* note 171, at 214 (examining case studies of Germany and Japan after World War II, the 1998 bombing of Pan Am flight 103, the 1990-1991 Iraqi offenses against Kuwaitis, the atrocity crimes in the former Yugoslavia in the 1990s, and the 1994 Genocide against the Tutsi in Rwanda and concluding that “[t]he USG is unlikely to take a principled or consistent approach to transitional justice. Rather, the USG will prioritize political and pragmatic factors, particularly concerning security.”).

¹⁷⁴ *Id.* at 28–29 (noting that, in the United States, at least three truth commissions have been established, and others have been proposed).

¹⁷⁵ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, §§ 2, 5(a)(1), 5(a)(1)(D), 132 Stat. 5586 (2019).

¹⁷⁶ On September 23, 2019, the author conducted a search of Congress.gov by choosing the “All Legislation” directory and searching for the term “Atrocities Prevention Board” [hereinafter “Atrocities Prevention Board” Search]. The search result listed the following four appropriations laws: Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 7034(c), H.R.J. Res. 31–312; Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 7033(d), 132 Stat. 347, 890; Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 7033(d), 131 Stat. 135, 646–47; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 7033(d), 129 Stat. 2241, 2760.

Because the APB is an entity of the NSC, Congress could not directly appropriate funding to it. The APB itself does not implement programs, so it does not need funding other than for staffing. E-mail Interview with Theo Sitther, Legislative Sec’y for Peacebuilding, Friends Comm. on Nat’l Legislation (May 24, 2019) [hereinafter Sitther Interview May 2019].

¹⁷⁷ See “Atrocities Prevention Board” Search, *supra* note 176. This figure is also based on a search the author conducted on September 23, 2019, of Congress.gov by choosing the “All Legislation” directory and searching for the term “Atrocities Prevention Board.”

¹⁷⁸ Interview with Former U.S. Senator Russ Feingold, in Stanford, Cal. (Mar. 4, 2019) (“The Elie Wiesel’s explicit mention of the APB gives the body more credibility, strengthens its status, and makes it harder for the executive to eliminate it.”) [hereinafter Feingold Interview].

Lack of funding for the APB may, however, suggest the opposite.¹⁷⁹ As with transitional justice, the APB will likely remain controversial, as the Elie Wiesel Act's own reference to the APB "or successor entity" implicitly countenances.¹⁸⁰ Indeed, the Trump administration has rebranded the "Atrocities Prevention Board" as the more modestly named "Atrocity Early Warning Task Force,"¹⁸¹ implicitly managing expectations that the interagency body will actually—or even attempt to—prevent atrocity crimes.

C. Promoting Domestic Cooperation

The Elie Wiesel and Syrian Accountability Acts both seek to promote cooperation domestically within and between the Executive and Legislative Branches. The need for such cooperation is painfully clear from history. The type of cooperation the laws prompt differs depending on whether it is intra- or inter-branch.

1. Importance of Domestic Cooperation

The importance of ensuring internal collaboration is a tragic lesson of U.S. government decision-making when confronting atrocity crimes. The 1994 Genocide against the Tutsi in Rwanda provides a glaring example.

During that humanitarian crisis, U.S. officials ignored intelligence and inhibited debate.¹⁸² One neglected expert was Joyce Leader, then deputy to U.S. Ambassador to Rwanda David Rawson and the person who shuttered the U.S. Embassy in Kigali after the massacres erupted.¹⁸³ Once Leader was evacuated to DC, she prepared the State Department's daily briefings on Rwanda.¹⁸⁴ However, despite her background and contacts in Rwanda, other U.S. officials seldom consulted Leader when formulating policy in response to the genocide.¹⁸⁵ Moreover, during the entirety of the genocide, while a mid-level interagency working group on Rwanda did meet daily, neither President Bill Clinton nor National Security Advisor Anthony Lake ever convened their senior policy advisers to discuss the crisis and the U.S. government never even debated military intervention.¹⁸⁶

The Genocide against the Tutsi illustrated that the U.S. government needed to bolster its bureaucracy on atrocity prevention and response, including when devising "early warning" systems to detect risks sooner and

¹⁷⁹ Widdersheim Interview, *supra* note 65.

¹⁸⁰ EWGAPA § 2.

¹⁸¹ ELIE WIESEL ACT REPORT, *supra* note 87, at 5. It is unclear to what extent this successor entity will de-prioritize seeking to *prevent* atrocity crimes in favor of merely *warning* of them, given how frequently atrocity prevention is emphasized throughout this report.

¹⁸² See Power, *Bystanders to Genocide*, *supra* note 41, at 86.

¹⁸³ See POWER, "A PROBLEM FROM HELL," *supra* note 41, at 331, 364.

¹⁸⁴ See *id.* at 364.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 364, 366, 370.

thereby access a broader range of policy options.¹⁸⁷ Of course, presidential attention, internal coordination, and full deliberation are no panacea; they do, however, ensure that decision-makers remain engaged, subject-matter experts are consulted, and reasonable options are considered. High-level convenings are particularly crucial, as they facilitate leadership on a problem by a senior policymaker with decision-making authority and thus obviate the need for unempowered lower-ranked officials to fill the void.¹⁸⁸ Whether political will exists to actually pursue effective policy is a separate matter.

2. Promoting Interagency Cooperation

Each law endeavors to foster cooperation within and protect parts of the Executive Branch. The laws do so in part by explicitly and repeatedly calling upon that branch to consult with components of itself whose existences have been in jeopardy. The Syrian Accountability Act refers to J/GCJ three times¹⁸⁹ and the Elie Wiesel Act refers to the APB¹⁹⁰ also three times as bodies that should play a role in the respective law's purpose.

While J/GCJ's creation and contributions to addressing atrocity crimes date back over two decades,¹⁹¹ it was almost dissolved recently. In July 2017, the Trump administration's State Department reportedly considered shuttering J/GCJ and reassigning its personnel within the State Department.¹⁹² However, after immediate, strong pushback, the administration reversed course the following month.¹⁹³ Almost two years later, the White House fi-

¹⁸⁷ See ALBRIGHT & COHEN, *supra* note 19, at 17–33.

¹⁸⁸ For a discussion of high-level attention to atrocity prevention, see BROWN, OBAMA ADMINISTRATION, *supra* note 47, at 17, 21–26, 63–64 (describing the impact of Samantha Power specifically on the APB's ability to influence policy and how, after her tenure on the National Security Staff from 2009 to 2013, others did not possess as much "access or throw-weight to ensure continued senior engagement").

¹⁸⁹ John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub L. No. 115-232, §§ 1232(a)(2)(B), (b), (c)(1), 132 Stat. 1636 (2018).

¹⁹⁰ Elie Wiesel Genocide and Atrocities Prevention Act ("EWGAPA"), Pub. L. No. 115-441, §§ 2, 5(a)(1), 5(a)(1)(D), 132 Stat. 5586 (2019).

¹⁹¹ See *supra* notes 80–82 and accompanying text.

¹⁹² See Jane Stromseth, *Why the U.S. Needs the Office of Global Criminal Justice Led by a Senate-Confirmed Ambassador-at-Large*, JUST SECURITY (July 26, 2017), <https://www.justsecurity.org/43554/u-s-office-global-criminal-justice-led-senate-confirmed-ambassador-at-large/> [<https://perma.cc/X99T-SMV5>]; Michael Gordon & Marlise Simons, *War Crimes Office May Be Shuttered As Tillerson Reorganizes State Dept.*, N.Y. TIMES, July 19, 2017, at A16; Colum Lynch, *Tillerson to Shutter State Department War Crimes Office*, FOREIGN POL'Y (July 17, 2017), <https://foreignpolicy.com/2017/07/17/tillerson-to-shutter-state-department-war-crimes-office/> [<https://perma.cc/SD9H-MLQB>]; Beth Van Schaack, *State Dept. Office of Global Criminal Justice on the Chopping Block—Time to Save It*, JUST SECURITY (July 17, 2017), <https://www.justsecurity.org/43213/u-s-office-global-criminal-justice-chopping-block/> [<https://perma.cc/6HYP-AJLQ>].

¹⁹³ Letter from Rex W. Tillerson, Sec'y of State, to Bob Corker, Chairman, U.S. Senate Comm. on Foreign Relations (Aug. 28, 2017) (on file with author) (stating that the Ambassador-at-Large for Global Criminal Justice "will be retained and continue to be organized under the office of Under Secretary for Civilian Security, Democracy, and Human Rights (J)"); Beth Van Schaack, *Key U.S. Foreign Policy Positions—Including Ambassador for War Crimes—Saved from Getting Axed*, JUST SECURITY (Aug. 29, 2017), <https://www.justsecurity.org/44527/>

nally announced President Trump's intent to nominate a new Ambassador-at-Large to lead J/GCJ.¹⁹⁴ The Syrian Accountability Act lists J/GCJ among the "appropriate agencies" that shall include in the Secretary of State's reports to Congress a description and assessment of programs that the U.S. government has undertaken to ensure accountability for atrocity crimes in Syria.¹⁹⁵ The law also names only J/GCJ as among the "appropriate officials and offices" through which the Secretary of State should act to complete and submit to Congress a report of the transitional justice study¹⁹⁶ and to provide technical assistance to support entities pursuing accountability and transitional justice for atrocity crimes in Syria.¹⁹⁷

Like J/GCJ, the APB was created under a Democratic president¹⁹⁸ and its fate has been questioned in the current Republican administration. Upon President Trump's election, commentators doubted that his "America First" doctrine¹⁹⁹ would include continuing the APB's operations, as the administration was under no legal obligation to do so (given that President Trump could overrule PSD-10 and EO 13,729).²⁰⁰ The Elie Wiesel Act declares that the U.S. government's interagency coordination of efforts to prevent and respond to atrocity crimes is "critically important" and cites only the APB as such a collaborative body.²⁰¹ The law also refers only to the APB as illustrative of "appropriate interagency representatives" with which the President should consult in developing the required reports for Congress on atrocity prevention and response.²⁰²

The Syrian Accountability and Elie Wiesel Acts emphasize the value J/GCJ and the APB add to interagency coordination by articulating the roles

global-criminal-justice-anti-trafficking-ambassadors-saved-war-crimes-at-large/ [https://perma.cc/5UY8-79W2].

¹⁹⁴ Press Release, White House, President Donald J. Trump Announces Intent to Nominate Individual to a Key Administration Post (Apr. 5, 2019), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-individual-key-administration-post-8/> [https://perma.cc/D2XK-BNWJ] (declaring that "President Donald J. Trump today announced his intent to nominate . . . Morse H. Tan of Illinois, to be the Ambassador at Large for Global Criminal Justice").

¹⁹⁵ John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub. L. No. 115-232, § 1232(a)(2)(B), 132 Stat. 1636 (2018).

¹⁹⁶ *Id.* § 1232(b).

¹⁹⁷ *Id.* § 1232(c)(1).

¹⁹⁸ See *supra* notes 99–104 and accompanying text.

¹⁹⁹ For discussion of President Trump's "America First" doctrine, see, e.g., HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 13, 107, 145 (2018); Robert Kagan, Opinion, "America First" Has Won, N.Y. TIMES, Sept. 24, 2018, at A27 (describing the three pillars of the Trump Administration's "America First" doctrine as isolationism, protectionism, and anti-immigration sentiment); Ana Swanson & Jim Tankersley, *Trade Deals Still in Motion, U.S. or No U.S.*, N.Y. TIMES, Jan. 24, 2018, at B1 (describing the Trump administration's explanations of its "America First" doctrine).

²⁰⁰ See, e.g., Silke Melbye-Hansen, *Is the Atrocity Prevention Board Dead Under Trump?*, MANTLE (Feb. 20, 2017), <https://www.mantlethought.org/international-affairs/atrocity-prevention-board-dead-under-trump> [https://perma.cc/LF34-33D4].

²⁰¹ Elie Wiesel Genocide and Atrocities Prevention Act ("EWGAPA"), Pub. L. No. 115-441, § 2, 132 Stat. 5586 (2019).

²⁰² *Id.* §§ 5(a)(1), 5(a)(1)(D).

these entities play in preventing and responding to atrocity crimes in Syria and more generally. With the futures of these two entities so uncertain at the beginning of the Trump administration, calling attention to them in these laws facilitated their continued existence and empowered their staff within the foreign policy bureaucracy. In effect, these laws help institutionalize J/GCJ and the APB (or successor entity) more permanently within the U.S. government with the intention of making the Executive Branch's atrocity prevention efforts more centralized, consistent, coordinated, and significant. Such micromanagement of the Executive Branch through this legislation exemplifies what Rebecca Ingber calls "congressional administration," which she defines as "the management and manipulation of internal executive branch decisionmaking processes for the purpose of advancing a substantive agenda."²⁰³ As part of that administration, Ingber argues that Congress employs what she terms "process controls": indirect tools to influence presidential policymaking.²⁰⁴ These controls are demonstrated by the procedural requirements and decisionmaker designations featured in the Syrian Accountability and Elie Wiesel Acts.

3. Promoting Inter-Branch Cooperation

The Elie Wiesel and Syrian Accountability Acts both aim to stimulate synchronization between the Executive and Legislative Branches. That coordination varies along three dimensions. To maximize the effectiveness of atrocity prevention and response, where requirements in the acts differ, the President and Secretary of State should voluntarily adopt the higher priority, more comprehensive, and more frequent procedures, and Congress should formalize those methods in future legislation.

First, the particular Executive Branch official mandated to provide reports to the Legislative Branch under each law differs. The Elie Wiesel Act requires the President to transmit reports,²⁰⁵ whereas the Syrian Accountability Act designates the Secretary of State to do so.²⁰⁶ Experts differ on whether this distinction is significant in practice. Those who think it is note that mandating the President to submit reports ensures that the White House (the highest-level component of the Executive Branch) includes an institutional hub (within the NSC) so tasked.²⁰⁷ And those who think the distinction is not significant note that the President usually delegates responsibility for

²⁰³ Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3361299> [<https://perma.cc/U8JE-FJ33>].

²⁰⁴ *Id.*

²⁰⁵ EWGAPA § 5(a).

²⁰⁶ John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub. L. No. 115-232, § 1232(a)(1), 132 Stat. 1636 (2018).

²⁰⁷ Anonymous State Dep't Official #2 Interview, *supra* note 71. The Trump administration has preserved the NSS directorate the Obama administration created to oversee atrocity prevention, which would manage these reports within the White House. *Id.*

such reports to the relevant departments and agencies anyway.²⁰⁸ Regardless of this debate, to convey the highest *symbolic* priority on the subject matter, the Executive Branch should adopt for the Syrian Accountability Act the Elie Wiesel Act's approach of directing the President to submit reports as well.

Second, the congressional committees designated to receive reports from the Executive Branch under each law only partially overlap. The Elie Wiesel Act requires the Executive Branch to transmit atrocity prevention reports to the Foreign Relations and Appropriations Committees in both the House and Senate,²⁰⁹ whereas the Syrian Accountability Act requires the Executive Branch to submit reports on atrocity crimes in Syria to the Foreign Relations, Armed Services, and Judiciary Committees in each congressional chamber and to submit the transitional justice report to the Foreign Relations, Judiciary, and Appropriations Committees in each chamber.²¹⁰ To ensure all relevant congressional committees remain apprised of the U.S. government's atrocity prevention work in Syria and more generally, the Executive Branch should provide all three sets of reports to all four of these relevant committees in each chamber of Congress: Foreign Relations, Appropriations, Armed Services, and Judiciary.

Third, the number, frequency, and stoppage of reports mandated by each law differ. The Elie Wiesel Act requires the Executive Branch to convey the first atrocity prevention report within 180 days of the law's enactment and subsequent reports annually thereafter for the following six years.²¹¹ In contrast, the Syrian Accountability Act requires the Executive Branch to (1) submit the first report on atrocity crimes in Syria within 90 days after the law's enactment and the only other report on the subject within 180 days after the Secretary of State determines that the violence in Syria has ceased²¹² and (2) submit a single report on transitional justice, and to do so within 180 days of the law's enactment.²¹³ Given that the conflict in Syria may continue indefinitely,²¹⁴ more frequent reports on both atrocity crimes therein and the feasibility and desirability of potential transitional justice mechanisms would help keep Congress apprised of the situation. The Executive Branch should thus exceed the bare minimum of the Syrian Accountability Act's requirements by proactively adopting the Elie Wiesel Act's construct of transmitting to Congress annual reports on offenses in and transitional justice for Syria until the final reports that are already mandated 180 days after the conflict ceases. In addition, given that the conflict in Syria

²⁰⁸ Sultoon Interview, *supra* note 70.

²⁰⁹ EWGAPA § 5(a).

²¹⁰ NDAA §§ 1232(a)(1), (b)(2), (g)(1).

²¹¹ EWGAPA § 5(a).

²¹² NDAA § 1232(a)(1).

²¹³ *Id.* § 1232(b).

²¹⁴ See Liz Sly, *In America's Hidden War, Troops Face Peril on Many Fronts*, WASH. POST, Dec. 15, 2018, at A1.

may persist for six or more years and that atrocity crimes will likely continue elsewhere well beyond then, the sunset provisions of both the Elie Wiesel Act's atrocity prevention reports and the Syrian Accountability Act's transitional justice study report are almost certainly premature. Congress should thus begin contemplating further legislative action to extend these laws.

D. Promoting International Cooperation

Like domestic cooperation on atrocity prevention and response, international cooperation in this issue area should be strengthened.²¹⁵ The Genocide against the Tutsi again provides a compelling illustration, and the Elie Wiesel and Syrian Accountability Acts reflect this lesson.

1. Importance of International Cooperation

The UN Security Council ("UNSC") withdrew most of its peacekeeping operation, the UN Assistance Mission for Rwanda ("UNAMIR"), during the height of the Genocide against the Tutsi, cutting its number of troops by about 90 percent.²¹⁶ In addition to demanding UNAMIR's withdrawal, the U.S. government pledged to provide but then delayed delivering armored vehicles to the peacekeeping operation until after the genocide had concluded.²¹⁷ A reinforced peacekeeping operation might have mitigated casualties.²¹⁸ Michael Barnett, a political officer at the U.S. Mission to the UN at the time, argues that "the international community could have intervened at relatively low cost before the effects were fully realized" but chose instead to respond "with willful ignorance and indifference."²¹⁹

Lessons from the Genocide against the Tutsi include the need to bolster international cooperation on atrocity prevention, such as through peacekeeping operations.²²⁰ The 2008 Albright-Cohen report recommended both that "[t]he State Department and USAID should expand ongoing cooperation with other governments, the United Nations, regional organizations, NGOs, and other civil society actors on early warning of genocide and mass atroci-

²¹⁵ See ALBRIGHT & COHEN, *supra* note 19, at 26 ("[C]ooperation between the U.S. government and other governments, international organizations, and NGOs with respect to early warning [of atrocity crimes] remains relatively underdeveloped."); FEINSTEIN & LINDBERG, *supra* note 68, at 1 ("Without better cooperation among [the United States, Canada, and Europe] and their like-minded cousins, efforts to address mass atrocities will continue to be reactive, slow, and devastating to human life and potential.").

²¹⁶ The UNSC reduced UNAMIR's troops from approximately 2500 to 270. See U.N. Secretary General, *Special Report of the Secretary-General on the United Nations Assistance Mission for Rwanda*, ¶ 7, U.N. Doc. S/1994/470 (Apr. 20, 1994) (noting that the total UNAMIR personnel was originally 2486); *id.* ¶¶ 15–18 (recommending, as one option, reducing the total UNAMIR personnel to about 270); S.C. Res. 912 ¶ 8(c) (Apr. 21, 1994) (authorizing the UN Security-General's recommended force level of about 270).

²¹⁷ See POWER, "A PROBLEM FROM HELL," *supra* note 41, at 334, 379.

²¹⁸ See Kaufman, *Lessons from Rwanda*, *supra* note 17, at 6 n.32 and accompanying text.

²¹⁹ BARNETT, *supra* note 17, at 1–3.

²²⁰ See Kaufman, *Lessons from Rwanda*, *supra* note 17, at 6–8.

ties”²²¹ and that “[t]he secretary of state should launch a major diplomatic initiative to create among like-minded governments, international organizations, and NGOs a formal network dedicated to the prevention of genocide and mass atrocities.”²²²

2. Promoting International Cooperation

The Elie Wiesel and Syrian Accountability Acts heed this advice. To improve atrocity prevention generally, the Elie Wiesel Act prompts the U.S. government to conduct outreach at least every six months with non-governmental organizations (“NGOs”) and civil society,²²³ work with partners and allies,²²⁴ improve the use of foreign assistance,²²⁵ bolster local civil society,²²⁶ and exercise leadership in multilateral efforts.²²⁷ The Elie Wiesel Act also requires the President to report recommendations to Congress to strengthen the role of relevant international and regional organizations.²²⁸

The Syrian Accountability Act is more specific. To help address atrocity crimes in Syria, the law, among other things, prods the Secretary of State to: report on U.S. government programs to train atrocity crime investigators within and outside of Syria and to support Syrian, foreign, and international NGOs and other entities (including the IIIM and CoI);²²⁹ consider supporting potential transitional justice mechanisms, including a hybrid tribunal;²³⁰ contemplate providing assistance to support entities involved in building Syria’s judiciary, prosecuting crimes in Syria’s domestic courts, and conducting investigations by third-party states;²³¹ and advocate for the UNHRC to extend the CoI’s mandate annually as appropriate.²³²

However, these new laws implicitly acknowledge that the U.S. government—perhaps particularly under the current Trump administration, which has expressed hostility towards multilateralism²³³—views certain aspects of

²²¹ ALBRIGHT & COHEN, *supra* note 19, at 32.

²²² *Id.* at 104.

²²³ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 2(5), 132 Stat. 5586 (2019).

²²⁴ *Id.* § 3(2).

²²⁵ *Id.* § 3(3)(B).

²²⁶ *Id.* § 3(3)(D).

²²⁷ *Id.* § 3(3)(F)(ii).

²²⁸ *Id.* § 5(a)(2).

²²⁹ John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, § 1232(a)(2)(B)(i), 132 Stat. 1636 (2018).

²³⁰ *Id.* §§ 1232(b), (c)(2).

²³¹ *Id.* § 1232(c)(1).

²³² *Id.* § 1232(e).

²³³ The Trump administration’s stated and actual animosity towards international law and organizations is well documented. *See, e.g.*, KOH, *supra* note 199 (describing the Trump administration’s hostility to international law); Catherine Amirfar & Ashika Singh, *The Trump Administration and the “Unmaking” of International Agreements*, 59 HARV. INT’L L.J. 443, 443 (2018) (observing that President Trump’s “America First” doctrine has “manifested in part as skepticism of, if not outright hostility to, the rules-based, interconnected international order that the United States had played a central role in painstakingly constructing since World War

international cooperation as controversial or even threatening. Three aspects of the Syrian Accountability Act in particular exemplify this perspective.

First, while the Syrian Accountability Act authorizes the Secretary of State to provide assistance to entities that support *investigations* by third-party states, the law does not authorize such assistance for *prosecutions* by third-party states. This distinction reflects a compromise between Democrats and Republicans to support accountability efforts of third-party states to which some suspected atrocity perpetrators from Syria have fled²³⁴ without endorsing the contentious assertion of “universal jurisdiction,”²³⁵ which Republicans generally oppose.²³⁶ However, that distinction in principle may not represent a distinction in practice, as investigations are a necessary pre-

II”); Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. FORUM 432, 433 (2018) (“Since 2017, the Trump Administration has announced its withdrawal from a host of bilateral and multilateral arrangements, including the Paris Climate Agreement; the Joint Comprehensive Plan of Action (JCPOA); the U.N. Educational, Scientific, and Cultural Organization; the Global Compact on Migration; the U.N. Human Rights Council; the Trans-Pacific Partnership (TPP); the 1955 Treaty of Amity, Economic Relations and Consular Relations with Iran; the 1961 Optional Protocol to the Vienna Convention for Diplomatic Relations on Dispute Settlement; the Universal Postal Union Treaty; and the Intermediate Nuclear Forces Treaty.”); Somini Sengupta & Rick Gladstone, *On Issue After Issue, Trump’s Statements Conflict with U.N. Positions*, N.Y. TIMES, Nov. 19, 2016, at A26 (observing that “a number of statements made by Mr. Trump and his loyalists have conflicted with the values and positions of the United States”).

²³⁴ See, e.g., Riham Alkousaa, *Three Syrians Arrested in Germany and France for Suspected Crimes Against Humanity*, REUTERS (Feb. 13, 2019), <https://www.reuters.com/article/us-germany-syria/three-syrians-arrested-in-germany-and-france-for-suspected-crimes-against-humanity-idUSKCN1Q21FO> [<https://perma.cc/KQ9B-L4DE>]; Emma Broches, *Accountability for the Syrian Regime: An Overview*, LAWFARE (Mar. 5, 2019), <https://www.lawfareblog.com/accountability-syrian-regime-overview> [<https://perma.cc/6VNH-9KQE>]; Hayley Evans, *Can German Courts Bring Accountability for Torture in Syria?*, LAWFARE (Feb. 22, 2019), <https://www.lawfareblog.com/can-german-courts-bring-accountability-torture-syria> [<https://perma.cc/MB67-TZWU>]; Natalie Nougayrède, *Opinion, Assad Can Still Be Brought to Justice—and Europe’s Role is Crucial*, GUARDIAN (Mar. 1, 2019), <https://www.theguardian.com/commentisfree/2019/mar/01/assad-europe-lawyers-syrian-war-criminals> [<https://perma.cc/7FTV-VCSW>]; “*These are the Crimes We are Fleeing*”: *Justice for Syria in Swedish and German Courts*, HUMAN RIGHTS WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> [<https://perma.cc/ME2K-K37E>].

²³⁵ “Universal jurisdiction” is the controversial assertion by a prosecuting entity that some crimes are so heinous that they are considered *hostis humani generis* (an enemy of all mankind) and therefore fall within the jurisdiction of any state or institution. Under universal jurisdiction, suspected atrocity perpetrators can be prosecuted anytime, anywhere in the world. See KAUFMAN, *supra* note 171, at 36.

²³⁶ See, e.g., Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July-Aug. 2001, at 86 (arguing that universal jurisdiction undermines reconciliation procedures, subjects the accused to unfamiliar and inconvenient legal systems, and could be politicized, biased, and arbitrary without accountability). *But see* Ryan Goodman, *United States Supports Germany’s International Arrest Warrant for Accused Syrian War Criminal*, JUST SECURITY (Mar. 6, 2019), <https://www.justsecurity.org/63079/breaking-united-states-supports-germanys-international-arrest-warrant-accused-syrian-war-criminal-a-rare-exercise-universal-jurisdiction-general-jamil-hassan/> [<https://perma.cc/F9RZ-V4PP>] (observing that, by issuing “a statement supporting Germany’s request to Lebanon to extradite a high-ranking Syrian official accused of war crimes and crimes against humanity . . . , the United States placed itself on the record in support of Germany’s exercise of a form of ‘universal jurisdiction,’ a move that marks a significant development in U.S. legal practice”).

cursor to prosecutions. The U.S. government, by supporting the former, would ultimately still be supporting the latter (even under a universal jurisdiction claim).

Second, the Syrian Accountability Act's encouragement of the Secretary of State to advocate for the UNHRC to extend the CoI's mandate is expressed with the caveat that the provision applies "while the United States remains a member" of the UNHRC.²³⁷ Yet on June 19, 2018, the U.S. government withdrew from the UNHRC, the first time a member had voluntarily done so.²³⁸ (That the withdrawal occurred almost two months *before* President Trump signed into law the Syrian Accountability Act, including the condition about ongoing UNHRC membership, reflects either an oversight in updating the bill or an unwillingness to revise the bill's text so late in the process of passing the massive NDAA, of which the Syrian Accountability Act is but a tiny portion.) Since that condition is no longer met, it is unclear whether the Trump administration would interpret the law as still urging advocacy for the CoI's mandate extension.

Finally, the entire Syrian Accountability Act carries the qualification that "nothing in [it] shall be construed to violate the American Servicemembers' Protection Act of 2002" ("ASPA").²³⁹ The ASPA, which President George W. Bush signed into law on August 2, 2002, as part of a broader piece of legislation,²⁴⁰ contains five main provisions. The law prohibits U.S. government cooperation with the International Criminal Court ("ICC"),²⁴¹ restricts U.S. participation in certain UN peacekeeping operations,²⁴² prohibits transfer of classified national security and law enforcement information to the ICC,²⁴³ prohibits U.S. military assistance to ICC parties (unless the President waives this prohibition on certain grounds or the law explicitly exempts a country from the prohibition),²⁴⁴ and authorizes the President "to use all means necessary" to free members of the U.S. armed forces and certain others detained or imprisoned by or on behalf of the ICC.²⁴⁵ (The so-called "Dodd Amendment" to the ASPA permits an important exception.²⁴⁶) Because of its threat to use force against the Hague-based

²³⁷ John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub. L. No. 115-232, § 1232(e), 132 Stat. 1636 (2018).

²³⁸ See Jean Galbraith, *United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism about its Border Policy*, 112 AM. J. INT'L L. 745 (2018); Gardiner Harris, *Trump Administration Leaves U.N. Human Rights Council*, N.Y. TIMES, June 20, 2018, at A7.

²³⁹ NDAA § 1232(f).

²⁴⁰ 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820 (2002).

²⁴¹ 22 U.S.C. § 7423 (2012).

²⁴² *Id.* § 7424 (2012).

²⁴³ *Id.* § 7425 (2012).

²⁴⁴ *Id.* § 7426 (2006) (repealed 2008).

²⁴⁵ *Id.* § 7427 (2012).

²⁴⁶ *Id.* § 7433 (2012) ("Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic,

court, critics have dubbed this final provision the “Hague invasion clause” and the entire ASPA the “Hague Invasion Act.”²⁴⁷ The ASPA qualification in the Syrian Accountability Act thus clarifies that the law’s promotion of international coordination has limits by affirming the U.S. government’s hostility to the ICC and willingness to use even military force to thwart the court.

This qualification about the ASPA in the Syrian Accountability Act parallels the Trump administration’s simultaneous opposition to the ICC through other means. On September 10, 2018—approximately one month after President Trump signed the Syrian Accountability Act into law—John Bolton seized the occasion of his first public address as President Trump’s then-National Security Advisor to pledge the use of sanctions and “any means necessary” to protect U.S. and its allies’ citizens from ICC prosecution, calling the court “ineffective, unaccountable, and indeed, outright dangerous” and “already dead to us.”²⁴⁸ Six months later, Secretary of State Mike Pompeo announced “a policy of U.S. visa restrictions on those individuals directly responsible for any ICC investigation of U.S. personnel” and that “implementation of this policy has already begun.”²⁴⁹ Within a few weeks,

Osama bin Laden, other members of Al Qaeda [*sic*] leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”)

²⁴⁷ See, e.g., U.S.: “Hague Invasion Act” Becomes Law, HUMAN RIGHTS WATCH (Aug. 3, 2002), <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law> [<https://perma.cc/82GV-FWPV>] (noting that the ASPA “authorizes the use of military force to liberate any American or citizen of a U.S.-allied country being held by the court, which is located in The Hague”).

²⁴⁸ *National Security Adviser John Bolton on Global Threats and National Security*, C-SPAN (Sept. 10, 2018), <https://www.c-span.org/video/?451213-1/national-security-adviser-john-bolton-addresses-federalist-society> [<https://perma.cc/87ZS-TFJV>] [hereinafter Bolton 2018 Speech]; see also Mark Landler, *A Harsh Diplomatic View, Even Where His Boss Sees Hope*, N.Y. TIMES, Sept. 11, 2018, at A6. Bolton’s personal involvement in undermining the ICC dates back to at least May 6, 2002, when, as the Under Secretary of State for Arms Control and International Security during the George W. Bush administration, he sent a letter to UN Secretary General Kofi Annan informing him that the United States did not intend to become a party to the treaty after David Scheffer had signed the Rome Statute on President Clinton’s behalf on the President’s final day in office. See SCHEFFER, *supra* note 80, at 242, 248; Neil A. Lewis, *U.S. Rejects All Support for New Court on Atrocities*, N.Y. TIMES, May 7, 2002, at A11; Press Release, Richard Boucher, Spokesman, U.S. Dep’t of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm> [<https://perma.cc/2MH4-EH9K>] (containing the full text of Bolton’s letter). Some, including Bolton himself, have referred to his letter as the U.S. government’s “unsigning” the Rome Statute. See, e.g., Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003); David J. Scheffer, Opinion, *A Treaty Bush Shouldn’t “Unsign”*, N.Y. TIMES, Apr. 6, 2002, at A15; Bolton 2018 Speech, *supra* (“I was honored to lead US efforts internationally to protect Americans from the court’s unacceptable overreach, starting with *un-signing* the Rome Statute.” (emphasis added)). Bolton subsequently led a campaign to sign agreements with over one hundred foreign governments that they would not surrender Americans to the ICC. See David Scheffer, *Keynote Address: The Future U.S. Relationship with the International Criminal Court*, 17 PACE INT’L L. REV. 161, 163 (2005). Bolton calls those negotiations “one of my proudest achievements.” Bolton 2018 Speech, *supra*.

²⁴⁹ Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Press (Mar. 15, 2019), <https://www.state.gov/remarks-to-the-press-6/> [<https://perma.cc/Z832-FYNC>].

the U.S. government revoked the ICC prosecutor's visa.²⁵⁰ Some commentators credit the Trump administration's pressure on the ICC as contributing to the court's Pre-Trial Chamber's decision in April 2019 to reject the ICC prosecutor's request to pursue an investigation of atrocity crimes in Afghanistan, including offenses allegedly committed by U.S. forces.²⁵¹

E. Demonstrating Bipartisanship

Before President Trump signed the Elie Wiesel and Syrian Accountability bills into law, both pieces of legislation received overwhelming bipartisan support in Congress.²⁵² Each bill was cosponsored by members of Congress from both major parties, who heralded the legislation as pathbreaking.²⁵³ Given that congressional votes on both bills were near-unanimous,²⁵⁴ such endorsement from almost all Democrats and Republicans echoes the bipartisan nature of both the Proxmire Act and the Albright-Cohen report. In addition, a diverse coalition of over seventy NGOs lobbied for the Elie Wiesel Act.²⁵⁵ Even with broad support for these two pieces of legislation, questions arise as to why President Trump, who is often criticized about his rhetoric and regard for human rights,²⁵⁶ would ultimately sign them and whether he would implement their provisions.

While the Trump administration does refer to "human rights" in its NSS,²⁵⁷ the administration is not known for its genuine or consistent commit-

²⁵⁰ See Marlise Simons & Megan Specia, *U.S. Revokes Visa of Chief Prosecutor at I.C.C.*, N.Y. TIMES, Apr. 6, 2019, at A4.

²⁵¹ See Marlise Simons et al., *International Court Abandons Afghanistan War Crimes Inquiry*, N.Y. TIMES, Apr. 13, 2019, at A4; *ICC Rejects Request to Investigate War Crimes in Afghanistan*, BBC (Apr. 12, 2019), <https://www.bbc.com/news/world-asia-47912140> [<https://perma.cc/KCU7-83LY>]. In June 2019, the ICC prosecutor appealed the decision. See *ICC Prosecutor Presses for Afghanistan Crimes Investigation*, REUTERS (June 7, 2019), <https://www.reuters.com/article/us-icc-afghanistan/icc-prosecutor-presses-for-afghanistan-crimes-investigation-idUSKCN1T81X1> [<https://perma.cc/T8CG-DB98>].

²⁵² See *supra* Part III.

²⁵³ See *supra* Part III.

²⁵⁴ See *supra* Part III.

²⁵⁵ See Tod Lindberg & Allyson Neville, Opinion, *Tennesseans and Bob Corker Can Help Prevent Global Genocide*, TENNESSEAN (Apr. 12, 2018), <https://www.tennessean.com/story/opinion/2018/04/12/opinion-tennesseans-and-bob-corker-can-help-prevent-global-genocide/507167002/> [<https://perma.cc/R3AG-HEUV>] (identifying the Anne Frank Center for Mutual Respect, Anti-Defamation League, American Jewish Committee, Oxfam America, and U.S. Conference of Catholic Bishops as among the seventy NGOs); Press Release, U.S. Senator Thom Tillis, *Elie Wiesel Genocide and Atrocities Prevention Act Signed into Law* (Jan. 17, 2019), <https://www.tillis.senate.gov/2019/1/elie-wiesel-genocide-and-atrocities-prevention-act-signed-into-law> [<https://perma.cc/ST7B-RUDC>] (identifying the Friends Committee on National Legislation, the Armenian National Committee of America, and In Defense of Christians as among the seventy NGOs).

²⁵⁶ See generally KOH, *supra* note 199; Michael Posner, *Trump Abandons the Human-Rights Agenda*, NEW YORKER (May 26, 2017), <https://www.newyorker.com/news/news-desk/trump-abandons-the-human-rights-agenda> [<https://perma.cc/FE2E-P67J>].

²⁵⁷ 2017 NSS, *supra* note 59, at 42.

ment to protecting and promoting such rights,²⁵⁸ especially when doing so does not align with its “America First” doctrine.²⁵⁹ President Trump has indeed sought to prevent or respond to some atrocity crimes, but each of those measures was narrow in scope. For example, although the Trump administration bombed Syrian military targets in 2018 supposedly in response to a chemical attack allegedly perpetrated by the Assad regime,²⁶⁰ within a few months President Trump had announced the withdrawal of U.S. troops from the country despite the ongoing humanitarian crisis, including the regime’s continued targeting of civilians.²⁶¹ In addition, while President Trump mentioned “genocide” in his 2019 State of the Union address, he did so only with respect to one arguably *threatened* by Iran,²⁶² a state the Trump administration considers a strategic enemy,²⁶³ rather than *actual* genocides, such as the one many consider to have been perpetrated recently in Myanmar.²⁶⁴ Fur-

²⁵⁸ See, e.g., Posner, *supra* note 256.

²⁵⁹ For commentary on the Trump administration’s “America First” doctrine, see generally *supra* note 199.

²⁶⁰ See Zachary Cohen & Kevin Liptak, *US, UK and France Launch Syria Strikes Targeting Assad’s Chemical Weapons*, CNN (Apr. 14, 2018), <https://www.cnn.com/2018/04/13/politics/trump-us-syria/index.html> [https://perma.cc/V3C2-NA6A].

²⁶¹ See Mark Landler et al., *U.S. Ends Mission in Syria as Trump Pulls 2,000 Troops*, N.Y. TIMES, Dec. 20, 2018, at A1; Josh Rogin, Opinion, “Never Again” Is Dying in Assad’s Prisons, WASH. POST, Feb. 8, 2019, at A21. On February 21, 2019, the Trump administration announced that it will keep “a small peacekeeping group of about 200” U.S. troops in Syria beyond the planned withdrawal. Karen DeYoung & Missy Ryan, *U.S. to Leave Peacekeeping Group of 200 Troops in Syria as Stabilizing Force*, WASH. POST, Feb. 22, 2019, at A13.

²⁶² President Donald J. Trump, Remarks by President Trump in State of the Union Address (Feb. 5, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-2/> [https://perma.cc/DDR4-34C9] (stating “We will not avert our eyes from a regime that chants ‘Death to America’ and threatens genocide against the Jewish people” in reference to Iran).

²⁶³ See David McKean & Patrick Granfield, Opinion, *Trump is Moving Us Closer to War with Iran*, WASH. POST (Feb. 7, 2019), <https://www.washingtonpost.com/outlook/2019/02/07/trump-is-moving-us-closer-war-with-iran/> [https://perma.cc/QF7A-YH9T].

²⁶⁴ On December 13, 2018, the U.S. House of Representatives passed a resolution by a near-unanimous vote of 394 to 1 characterizing as “genocide” crimes committed by Myanmar’s security forces against Rohingya Muslims. H.R. Res. 1091, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-resolution/1091/text/ih?overview=closed&format=txt> [https://perma.cc/C9J2-PY5H]. On February 27, 2019, the U.S. House Committee on Foreign Affairs called on the Trump administration to characterize the Burmese military’s atrocity crimes against the Rohingya as “genocide.” Press Release, U.S. House Comm. on Foreign Affairs, House Foreign Affairs Committee Leadership Calls on Administration to Recognize Rohingya Genocide (Feb. 27, 2019), <https://foreignaffairs.house.gov/2019/2/house-foreign-affairs-committee-leadership-calls-on-administration-to-recognize-rohingya-genocide> [https://perma.cc/76WF-4BLX]. See also Daniel J. Fullerton et al., *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State*, PUB. INT’L L. & POL’Y GRP. vii (2018), <https://www.publicinternationalallawandpolicygroup.org/rohingya-report?fbclid=IwAR1Ta22cU5CKFUVi9RupYvnmMMj-fXlua8YrBtr-6IBXauaAsTvH2C59XIA> [https://perma.cc/5KU3-983M] (concluding “that there are reasonable grounds to believe that genocide was committed against the Rohingya”); Alina Lindblom et al., *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar’s Rakhine State*, YALE L. SCH. ALLARD K. LOWENSTEIN INT’L HUM. RIGHTS CLINIC 1 (2015), <https://law.yale.edu/sites/default/files/documents/pdf/Clinics/fortifyrights.pdf> [https://perma.cc/4LJZ-DQDH] (finding “strong evidence that genocide is being committed against Rohingya”); Press Release, U.S. Holocaust Memorial Museum, Museum Finds Compelling Evidence Genocide was Committed Against Roh-

thermore, President Trump has repeatedly praised human rights abusers, such as North Korean leader Kim Jong-un²⁶⁵ and Philippine President Rodrigo Duterte.²⁶⁶

The Trump administration has even taken measures to reduce the U.S. government's own infrastructure for atrocity prevention and response. Although the White House and State Department ultimately chose not to dissolve the APB²⁶⁷ or the J/GCJ,²⁶⁸ respectively, in February 2019 the FBI confirmed that it would dismantle its IHRU.²⁶⁹ The Trump administration's dissolution of the IHRU appears antithetical to the administration's mission, attitudes, and actual threats. Given the Trump administration's "America First" doctrine (that presumably would seek to protect Americans from suspected atrocity perpetrators within the United States), the IHRU's authority over alleged perpetrators, regardless of nationality, who are located in the United States,²⁷⁰ and the President's hostility to immigrants,²⁷¹ it seems

ingya, Warns of Continued Threat (Dec. 3, 2018), <https://www.ushmm.org/information/press/press-releases/museum-finds-compelling-evidence-genocide-was-committed-against-rohingya-wa> [<https://perma.cc/CTN8-Z7CF>] (concluding that "there is compelling evidence that the Burmese military committed . . . genocide against the Rohingya").

²⁶⁵ See, e.g., Simon Denyer & David Nakamura, *Trump Again Appears to Take North Korea's Side Against His Own Military, Allies*, WASH. POST, Aug. 11, 2019, at A17 (quoting President Trump referring to Kim as a "friend" who has a "great and beautiful vision for his country"); Colby Itkowitz & John Hudson, *Trump Praises Kim Jong Un, Saying He Received a "Beautiful" Letter from Him*, WASH. POST (June 11, 2019), https://www.washingtonpost.com/politics/trump-praises-kim-jong-un-saying-he-received-a-beautiful-letter-from-him/2019/06/11/4359f4d6-8c70-11e9-b08e-cfd89bd36d4e_story.html [<https://perma.cc/B6TB-9JVV>] (quoting President Trump saying he received a "beautiful" and "very warm, very nice letter" from Kim); Edward Wong & David E. Sanger, *Leaders Start Formal Talks, With a Signing Ceremony Scheduled*, N.Y. TIMES, Feb. 28, 2019, at A9 (noting that President Trump and Kim exchanged praise and quoting the former referring to the latter as "a great leader").

²⁶⁶ David E. Sanger & Maggie Haberman, *Trump Praises Philippine President in Call Transcript*, N.Y. TIMES, May 24, 2017, at A12 (quoting President Trump telling President Duterte he is doing an "unbelievable job" and "great job" and that President Trump "wanted to congratulate" him).

²⁶⁷ See *supra* notes 181, 198–200 and accompanying text.

²⁶⁸ See *supra* notes 191–94 and accompanying text.

²⁶⁹ See Press Release, Rep. Ted Lieu, Rep Lieu Questions FBI Dismantling of War Crimes Unit (Mar. 1, 2019), <https://lieu.house.gov/media-center/press-releases/rep-lieu-questions-fbi-dismantling-war-crimes-unit> [<https://perma.cc/25YF-ZHBX>]; David Crane et al., *FBI's Human Rights Investigators Critical to Prosecuting "Atrocity Crimes"*, THE HILL (Feb. 22, 2019), <https://thehill.com/opinion/criminal-justice/430482-fbis-human-rights-investigators-critical-to-prosecuting-atrocity> [<https://perma.cc/W6JR-FM2L>]; Aaron Glantz, *The FBI Is Dismantling Its War Crimes Unit*, FOREIGN POL'Y (Feb. 18, 2019), <https://foreignpolicy.com/2019/02/18/the-fbi-is-dismantling-its-war-crimes-unit/> [<https://perma.cc/2HX7-F2EF>]; Beth Van Schaack, *Exclusive: FBI's War Crimes Unit on the Chopping Block*, JUST SECURITY (Feb. 10, 2019), <https://www.justsecurity.org/62548/exclusive-fbis-war-crimes-unit-chopping-block/> [<https://perma.cc/3W6B-VV28>]. As of mid-2019, however, the FBI's dismantling of its IHRU is on hold. Interview with Beth Van Schaack, former Deputy to the U.S. Ambassador-at-Large for Global Criminal Justice (June 4, 2019); Anonymous State Dep't Official #2 Interview, *supra* note 71.

²⁷⁰ See *International Human Rights Violations*, *supra* note 77 (noting that various statutes grant the FBI authority when, inter alia, "[t]he perpetrator, regardless of nationality, is located in the U.S.>").

²⁷¹ See Kaufman, *Lessons from Rwanda*, *supra* note 17, at 5 n.23 and accompanying text; John Fritze, *Trump Used Words Like "Invasion" and "Killer" to Discuss Immigrants at Rallies*

counterproductive for the Trump administration to eliminate infrastructure that addresses suspected atrocity perpetrators on American soil, especially as the United States is a known haven for such individuals.²⁷²

However, that the Trump administration would support legislation that *strengthens* the APB (or successor entity), which was created by the Obama administration, is particularly notable, given how forcefully President Trump has sought to undermine his predecessor's legacy²⁷³ and how less active the APB has been²⁷⁴ and its successor will be²⁷⁵ under the Trump administration.

Yet President Trump signed both the Elie Wiesel and Syrian Accountability Acts, conveying his administration's commitment to address egregious human rights violations. Perhaps President Trump did so precisely because neither law obligates him to adopt policies he finds objectionable. Due to the Constitution's separation of powers among the branches of government,²⁷⁶ both laws characterize certain prompts as suggestions rather than requirements,²⁷⁷ giving the Trump administration free rein to disregard any or all of them. Of the few requirements the laws do impose,²⁷⁸ President Trump may feel he can simply ignore them, as he has increasingly defied Congress on other matters and demonstrated hostility to the notion of legislative oversight of the Executive Branch.²⁷⁹ Indeed, the Trump administration's Department of Justice sent a letter to SFRC in 2018 notifying it that the administration

500 Times: USA TODAY Analysis, USA TODAY (updated Aug. 21, 2019), <https://www.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/> [<https://perma.cc/B6NY-ZMLV>].

²⁷² See Annie Hylton, *How the U.S. Became a Haven for War Criminals*, NEW REPUBLIC (Apr. 29, 2019), <https://newrepublic.com/article/153416/us-became-haven-war-criminals> [<https://perma.cc/JYM9-ZAVW>]. In the New England region of the United States alone, three individuals—Prudence Katengwa in 2012, Beatrice Munyenyezi in 2015, and Jean Leonard Teganga in 2019—have been convicted over just the last few years for lying on their immigration application about their role in the 1994 Genocide against the Tutsi. See Travis Andersen, *Rwandan National Gets 21 Months; Lied about Ties to 1994 Genocide*, BOS. GLOBE, Oct. 12, 2012, at B4; Maria Cramer, *Rwandan Accused of Lying about Role in Genocide Convicted*, BOS. GLOBE, Apr. 6, 2019, at A1; Michele McPhee, *Judge Upholds 10-Year Prison Sentence for 'Monster Next Door'*, BOS. MAG. (Mar. 27, 2015), <https://www.bostonmagazine.com/news/2015/03/27/beatrice-munyenyezi/> [<https://perma.cc/WJ2Y-68VY>].

²⁷³ See Juliet Eilperin & Darla Cameron, *How Trump is Rolling Back Obama's Legacy*, WASH. POST (Jan. 20, 2018), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/> [<https://perma.cc/LU8V-BKDT>]; Feingold Interview, *supra* note 178.

²⁷⁴ E-mail Interview with Theo Sither, Legislative Sec'y for Peacebuilding, Friends Comm. on Nat'l Legislation (Feb. 22, 2019).

²⁷⁵ In September 2019, the Trump administration announced that the APB's successor, the Atrocity Early Warning Task Force, will meet at the leadership level only once per year and at the working level only quarterly. ELIE WIESEL ACT REPORT, *supra* note 87, at 5. This Task Force's meeting rates are significantly less frequent than the APB's convenings at both levels. See *supra* notes 103–04.

²⁷⁶ U.S. CONST. arts. I–III.

²⁷⁷ See, e.g., John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, § 1232(e), 132 Stat. 1636 (2018); Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 2, 132 Stat. 5586 (2019).

²⁷⁸ See *supra* Part III.

²⁷⁹ See Steve Vladeck, Opinion, *Trump is Fighting Congress—and Defying the Founders*, WASH. POST, Apr. 28, 2019, at B3.

would treat the Elie Wiesel Act's provisions as mere suggestions.²⁸⁰ The Trump administration has already been delinquent in submitting reports the Elie Wiesel and Syrian Accountability Acts require,²⁸¹ further suggesting that the administration believes and will act as if it is not bound by the laws. Moreover, considering that the Elie Wiesel Act emphasizes that it does not authorize the use of force²⁸² and the Syrian Accountability Act affirms hostility to the ICC,²⁸³ the laws even support policies the Trump administration favors.²⁸⁴

Former U.S. Senator Russ Feingold, who chaired the SFRC's Subcommittee on African Affairs and served as Special Envoy to the Great Lakes region of Africa, was unsurprised by President Trump's support for the laws for these reasons and because of their focus on atrocity crimes specifically rather than human rights generally.²⁸⁵ According to Senator Feingold, "'genocide' has different connotations to conservatives than 'human rights,' which generally has a liberal undertone."²⁸⁶

F. Conveying Preferred Transitional Justice Options

The U.S. government's support for particular transitional justice options has fluctuated dramatically over time and context, and has included the general options of and specific variations on inaction, lustration, amnesty, exile, indefinite detention, lethal force, and prosecution.²⁸⁷ The Elie Wiesel and Syrian Accountability Acts provide insight into the U.S. government's currently preferred transitional justice options.

²⁸⁰ Letter from Prim F. Escalona, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Bob Corker, Chairman, U.S. Senate Comm. on Foreign Relations (Aug. 17, 2018), <https://www.justice.gov/ola/page/file/1162811/download> [https://perma.cc/TDV7-TMEJ] (declaring that "[t]o the extent these provisions require or could be read to require the President to adopt a prescribed foreign policy relating to the prevention of genocide and other atrocities, they would interfere with the President's authority to represent the United States in foreign affairs and to pursue its interests outside the borders of the country" and warning that the Trump administration "would treat [these provisions] as advisory and non-binding" (internal quotation marks and citations omitted)).

²⁸¹ As the Syrian Accountability Act was enacted on August 13, 2018, the Executive Branch's first report on atrocity crimes in Syria (due within 90 days of the law's enactment) was due around November 13, 2018, and the Executive Branch's only report on transitional justice (due within 180 days of the law's enactment) was due around February 13, 2019. See *supra* notes 212–13 and accompanying text. The Trump administration did not submit either report until May 2019. Anonymous State Dep't Official #2 Interview, *supra* note 71.

As the Elie Wiesel Act was enacted on January 14, 2019, the President's first report on atrocity prevention (due within 180 days of the law's enactment) was due around July 14, 2019. See *supra* note 211 and accompanying text. The Trump administration did not submit this report until September 12, 2019. ELIE WIESEL ACT REPORT, *supra* note 87.

²⁸² See *infra* note 338 and accompanying text.

²⁸³ See *supra* notes 239–47 and accompanying text.

²⁸⁴ See, e.g., *supra* note 233 and accompanying text.

²⁸⁵ Feingold Interview, *supra* note 178.

²⁸⁶ *Id.*

²⁸⁷ KAUFMAN, *supra* note 171, at 40.

Both laws explicitly note the objective of “accountability,”²⁸⁸ suggesting that the U.S. government currently disfavors transitional justice options that do not promote such a goal, such as inaction and amnesty. The Syrian Accountability Act is even more specific about the type of accountability it envisions and endorses. That law refers to “prosecution” multiple times,²⁸⁹ conveying that the U.S. government is presently disinclined to support non-prosecutorial transitional justice options even if they may promote accountability, such as lustration, exile, indefinite detention, and lethal force.

But even among the myriad prosecutorial transitional justice options, the Syrian Accountability Act suggests preferences. Invocation of the ASPA²⁹⁰ demonstrates the U.S. government’s continuing aversion to the ICC, even in the remote possibility it could be used to prosecute atrocity crimes in Syria.²⁹¹ Authorizing technical assistance to “support prosecutions in the domestic courts of Syria”²⁹² expresses an openness to local trials. The law repeatedly cites a “hybrid tribunal”²⁹³ as a potential transitional justice mechanism for Syria,²⁹⁴ and such a court is the only transitional justice option the law defines.²⁹⁵ A preference for such a mixed local-international court may reflect the “fatigue” over the number, cost, delays, mismanagement, and other problems of the two purely international courts (besides the ICC)—the ad hoc UN International Criminal Tribunals for Rwanda and for the Former Yugoslavia—that began arising two decades ago.²⁹⁶

²⁸⁸ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 3(3)(C), 132 Stat. 5586 (2019) (mentioning “criminal accountability”); John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1232(a), (a)(2)(B), (a)(2)(B)(iv), 132 Stat. 1636 (2018) (all referencing “accountability”).

²⁸⁹ NDAA §§ 1232(c)(1)(D), (c)(1)(F).

²⁹⁰ See *supra* note 239 and accompanying text.

²⁹¹ See Joshua D. Bauers, *Syria, Rebels, and Chemical Weapons: A Demonstration of the Ineffectiveness of the International Criminal Court*, 15 RUTGERS J.L. & RELIGION 328, 342–43 (2014) (“The factors preventing this case being brought before the ICC are: 1) there is no direct jurisdiction because Syria did not ratify the Rome Statute; 2) there is very little chance of the situation being referred via the [UNSC] because of a veto from Russia and China, and 3) the events took place inside the borders [of] Syria [*sic*] and not internationally against a State party.”); Eric Engle, *The International Criminal Court, the United States and the Domestic Armed Conflict in Syria*, 14 CHI.-KENT J. INT’L & COMP. L. 146, 169–70 (2013) (noting the unlikelihood that either the United States, Russia, or China would use their seats on the UNSC to support referral of the situation in Syria to the ICC).

²⁹² NDAA § 1232(c)(1)(D).

²⁹³ A “hybrid tribunal” is “a temporary criminal tribunal that involves a combination of domestic and international lawyers, judges, and other professionals to prosecute individuals suspected of committing” atrocity crimes. *Id.* § 1232(g)(3).

²⁹⁴ *Id.* §§ 1232(b)(1), (c)(2).

²⁹⁵ *Id.* § 1232(g)(3).

²⁹⁶ See Zachary D. Kaufman, *The United Nations International Criminal Tribunal for Rwanda*, in THE ENCYCLOPEDIA OF TRANSITIONAL JUSTICE (Nadya Nedelsky & Lavinia Stan eds., 2d ed., forthcoming) (“Critics charge that the [ICTR] has been consumed by nepotism, mismanagement, incompetence, inefficiency, waste, and insensitive treatment of witnesses. These individuals assert that . . . the ICTR has spent too much money, expended too much time, and occupied too many staff members on the completion of too few cases.”); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC’Y INT’L L. PROC. 160, 160 (2000) (“The rate of growth [of interna-

G. Prodding Similar Legislation Abroad

The Elie Wiesel and Syrian Accountability Acts may prompt similar legislation in foreign countries. The United Kingdom was the first state to invoke the Elie Wiesel Act in considering enacting a comparable bill. Just six weeks after President Trump signed the law, the House of Lords debated its assessment of it and measures the U.K. government was taking to prevent atrocity crimes.²⁹⁷ Two Lords referred to the Elie Wiesel Act generally in asking whether their government should introduce similar legislation.²⁹⁸ A third Lord noted the Elie Wiesel Act's specific provision about Foreign Service Officer training in "urg[ing] the [U.K.] Government to look seriously at co-operating with the United States and other allies on this trend"²⁹⁹ The U.K. government subsequently published a policy paper describing its approach to atrocity prevention.³⁰⁰ Despite being enacted only recently and invoked first by one of the U.S. government's closest and most likeminded allies,³⁰¹ the legislative ripple effects of the Elie Wiesel and Syrian Accountability Acts may prove to be swift and far-reaching.

V. POTENTIAL CRITICISMS OF NEW ATROCITY PREVENTION LAWS

Given the neglect of atrocity crimes by the Trump administration and the overall U.S. government, it is understandable that the Elie Wiesel and Syrian Accountability Acts would be met with skepticism. In particular, critics would reasonably raise concern over the laws' effectiveness, prioritization of their subject matter, lack of funding, omission of a key definition, and consequences for military intervention, Foreign Service Officer training, and Executive Branch reporting to the Legislative Branch.

tional courts and tribunals] has been so furious that government leaders now express concern over 'tribunal fatigue.'"); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 347 (2006) ("Runaway costs, management flaws, and communication failures in the ad hoc tribunals in Rwanda and the former Yugoslavia have generated fatal donor fatigue and called into question the efficacy of international criminal justice.").

²⁹⁷ *Genocide Prevention* – Question, THEYWORKFORYOU, (Feb. 27, 2019), <https://www.theyworkforyou.com/lords/?id=2019-02-27b.225.0> [<https://perma.cc/7N65-W4V6>].

²⁹⁸ *Id.* (statements of Lord Selkirk of Douglas and Lord Alton of Liverpool).

²⁹⁹ *Id.* (statement of Lord Pickles); *see also id.* (statement of Lord Collins of Highbury).

³⁰⁰ U.K. GOVERNMENT, POLICY PAPER: UK APPROACH TO PREVENTING MASS ATROCITIES (July 16, 2019), <https://www.gov.uk/government/publications/uk-approach-to-preventing-mass-atrocities/uk-approach-to-preventing-mass-atrocities> [<https://perma.cc/Q22P-DN6A>].

³⁰¹ For discussion of the "special relationship" between the United States and the United Kingdom, see Richard Goldberger, Note, *It's Just Not Cricket: Is the Principle of Reciprocity Being Honored in the U.S.-U.K. Extradition Treaty?*, 29 CARDOZO L. REV. 819, 842–43 (2007).

A. Effectiveness

Skeptics may dismiss these two new laws as empty rhetoric. Even worse, critics may contend that this legislation, with its lofty prose, could promote an illusion of progress, alleviating at least some pressure on the U.S. government to actually prevent and respond to atrocity crimes. This would not be the first time doubters viewed a seemingly positive policy on atrocity crimes as substituting for a more meaningful one. Critics suspected the U.S. government of supporting the establishment of ad hoc UN international criminal tribunals for Rwanda and for the former Yugoslavia to create the appearance of doing something without actually doing anything to mitigate atrocity crimes in those regions.³⁰²

Such cynicism is understandable. After all, the U.S. government has a long record of ignoring, abetting, or even perpetrating its own atrocity crimes,³⁰³ and the Trump administration demonstrates indifference or outright hostility to defending human rights either where it views doing so as strategically unimportant or unless doing so serves another goal that the administration deems strategically important.³⁰⁴

Regardless of the current and past administrations' approach to atrocity crimes, these two acts are now the law of the land; the Trump administration and all future administrations are technically bound by their provisions until they sunset or become irrelevant. The laws urge the U.S. government to proactively address atrocity crimes. As Elisha Wiesel, son of the Elie Wiesel Act's Nobel Peace Prize Laureate and Holocaust survivor namesake, declared: "My father loved this country and believed in it as a powerful moral force in the world. We are grateful that his life's mission to call atrocities by name and tilt the balance toward action will be enshrined in this important piece of legislation."³⁰⁵ If not successful in prompting action, the laws will at least raise the costs of inaction. According to Senator Feingold:

It is of great interest and concern to the Executive Branch when Congress speaks, even when it's just a letter or a hearing. With these acts bumped up to the level of laws, the Executive Branch

³⁰² Discussion of whether and, if so, what type of tribunal to create for Rwanda and for the former Yugoslavia began in each case before atrocity crimes concluded. See KAUFMAN, *supra* note 171, at 137–38.

³⁰³ See generally DIRTY HANDS AND VICIOUS DEEDS: THE U.S. GOVERNMENT'S COMPLICITY IN CRIMES AGAINST HUMANITY AND GENOCIDE (Samuel Totten ed., 2018); POWER, "A PROBLEM FROM HELL," *supra* note 41, at 503–04 ("What is most shocking about America's reaction to Turkey's killing of Armenians, the Holocaust, Pol Pot's reign of terror, Iraq's slaughter of the Kurds, Bosnian Serbs' mass murder of Muslims, and the Hutu elimination of Tutsi is . . . that U.S. policymakers did almost nothing to deter the crime Indeed, on occasion the United States directly or indirectly aided those committing genocide.").

³⁰⁴ See generally KOH, *supra* note 199; Posner, *supra* note 256.

³⁰⁵ E-mail from Naomi Kikoler, Simon-Skjold Ctr. for the Prevention of Genocide Deputy Dir., U.S. Holocaust Mem'l Museum, to subscribers of Museum's listserv (Feb. 24, 2019) (on file with author) (quoting Wiesel).

will feel compelled not to act contradictorily, especially given how bipartisan the support. These laws are tools Congress and American diplomats can use to prod the President on atrocity issues.³⁰⁶

Even if the current administration does not fulfill the laws' objectives, the legislation still holds symbolic weight. As John Dwyer argued, despite their weaknesses, symbolic laws "can redirect society by reallocating resources" and "establish government priorities and public values."³⁰⁷ Similarly, James Q. Wilson contended that such laws are "a vitally important and easily neglected causal factor in politics" because "[a]dopting policies that provide largely symbolic gratifications for demands may achieve little of substance in the immediate case but constitute nonetheless a positive reinforcement for the demands themselves and the legitimation of a governmental role in dealing with these demands."³⁰⁸ The Elie Wiesel and Syrian Accountability Acts reflect broad, bipartisan concern about atrocity crimes, conveying the U.S. government's prioritization of atrocity prevention as in the national interest and a public value. These laws call attention to such offenses, prodding the U.S. government to invest more resources in preventing and responding to them and adding heft to civil society's related advocacy campaigns. Whether these laws are ultimately effective may take years, or even decades, to determine.

B. Priority

The Elie Wiesel Act's identification of atrocity prevention as a national priority reflects significant progress, but this support could be even more pronounced. President Obama's characterizations in 2011 and 2016 of atrocity prevention as a "core" national interest, one with a parallel ethical obligation, is stronger than the Elie Wiesel Act's reference to atrocity prevention as simply in the U.S.'s "national interest," without modification of how central such an interest is or whether it is accompanied by a moral duty. When national interests are in tension, difficult decisions must be made about which to prioritize and how to resolve conflicts among interests of supposedly equal priority.³⁰⁹ President Obama's description of atrocity prevention

³⁰⁶ Feingold Interview, *supra* note 178.

³⁰⁷ John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 249 (1990).

³⁰⁸ James Q. Wilson, *The Politics of Regulation*, in *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* 135, 166 (James W. McKie ed. 1974).

³⁰⁹ In 2000, the Commission on National Interests, a bipartisan civil society initiative, published a report identifying a hierarchy of U.S. national interests: "vital interests," "extremely important interests," "important interests," and "less important or secondary interests." *COMM'N ON AM.'S NAT'L INTERESTS, AMERICA'S NATIONAL INTERESTS 2* (2000), <https://www.belfercenter.org/publication/americas-national-interests-report-commission-americas-national-interests-2000> [<https://perma.cc/9A2U-MQTG>]. The report then identified interests that fall into each category. *Id.* at 5–8. The Commission placed "prevent genocide" in the second highest ("extremely important") category. *Id.* at 6. Ruminating on why the Commission re-

as a “core” national interest means that it would trump national interests valued less highly even if it still competed with other “core” concerns.³¹⁰ The Elie Wiesel Act’s unmodified characterization of atrocity prevention as a “national interest” leaves the priority placed on such activities far less certain. That the Syrian Accountability Act is silent on the relative importance of atrocity prevention as compared to other objectives in Syria similarly conveys ambiguity.

C. Funding

Neither law contains provisions to fund its ambitious objectives. The closest either law comes is the non-binding “Sense of Congress” in the Elie Wiesel Act, which states in part “that appropriate officials of the United States Government should . . . ensure resources are made available for the policies, programs, and tools related to atrocity prevention and response.”³¹¹ However, a “Sense of Congress” is used merely for messaging purposes and thus is less impactful than other components of the legislation.³¹²

The versions of the Elie Wiesel Act introduced in the Senate on May 17, 2017, and the House on June 22, 2017, both included the establishment of a “Complex Crises Fund” (“CCF”) in the U.S. Treasury “to enable the Secretary of State and the Administrator of the United States Agency for International Development to support programs and activities to prevent or respond to emerging or unforeseen foreign challenges and complex crises overseas, including potential atrocity crimes.”³¹³ However, this section refer-

jected such prevention as a “vital” national interest, the Commission concluded that atrocity crimes “do not . . . strictly imperil the ability of the US government to safeguard and enhance US survival and freedom, and thus are ‘extremely important’ in our hierarchy.” *Id.* at 20. It is unclear which of this Commission’s categories corresponds to the Obama administration’s category of “core” national interests.

³¹⁰ For discussion of atrocity prevention as a supposedly “core” national security interest and moral responsibility of the Obama administration, see POMPER, *supra* note 47, at 8; Tod Lindberg, *Moral Responsibility and the National Interest*, AM. INTEREST (Aug. 29, 2019), <https://www.the-american-interest.com/2019/08/29/moral-responsibility-and-the-national-interest/> [<https://perma.cc/45KB-GL58?type=image>].

³¹¹ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 2(7), 132 Stat. 5586 (2019).

³¹² Sultoon Interview, *supra* note 70.

³¹³ Elie Wiesel Genocide and Atrocities Prevention Act of 2018, S. 1158, 115th Cong. (2017) (introduced in the Senate on May 17, 2017); Elie Wiesel Genocide and Atrocities Prevention Act of 2018, H.R. 3030, 115th Cong. (2017) (introduced in the House on June 22, 2017). The CCF already exists, has been appropriated since 2010, and has been used for atrocity prevention, response, and recovery activities. Nevertheless, the CCF has not been permanently established or authorized in law. Furthermore, observers note that “[a]dvocates struggle each year to secure adequate funding for the relatively new account” and “the amount of money allocated has been on the decline despite its demand.” FRIENDS COMMITTEE ON NAT’L LEGIS., THE COMPLEX CRISES FUND, <https://www.fcnl.org/documents/118> [<https://perma.cc/AY66-VYS4>]. CCF funding has been used for atrocity prevention in Central African Republic. *See id.*; BROWN, OBAMA ADMINISTRATION, *supra* note 47, at 24 n.99; Sither Interview May 2019, *supra* note 176.

ring to the CCF was stripped out of the Elie Wiesel Act by the time the bill was reported to the Senate thirteen months later.³¹⁴

Critics may argue that the lack of funding in each law signifies the absence of real reform. After all, Congress's greatest power is that of the purse,³¹⁵ which was not wielded in these laws. However, Congress generally uses an annual appropriations process to allocate funding, thereby conveying its priorities.³¹⁶ While appropriators could decline to provide money to operationalize the laws, the laws may nonetheless compel the Executive Branch to allocate part of its budget to fulfill them.³¹⁷ To date, however, such dedicated funds without congressional intervention have been lacking, leading some to refer to atrocity prevention as an "unfunded mandate."³¹⁸ In future appropriations, Congress should earmark sufficient funds for both of these laws' objectives to be fully realized.

Even then, though, Congress should clearly state the purpose of such funding to avoid unintended uses. Given President Trump's fixation on building a "wall" along the U.S.-Mexican border, his inability to deliver on his campaign promise that Mexico will pay for it,³¹⁹ and his current attempt to divert funds appropriated for other military construction projects to spend instead on border security,³²⁰ he could try to raid an entity so nebulous as a CCF by arguing that undocumented immigration qualifies as a crisis for which the CCF should support programs and activities to address.³²¹

³¹⁴ See Elie Wiesel Genocide and Atrocities Prevention Act of 2018, S. 1158, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1158/text/rs> [<https://perma.cc/AG7Y-HB44>] (indicating that version of bill reported to the Senate on June 27, 2018, omitted the CCF provision).

³¹⁵ See, e.g., JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 45–78 (2017).

³¹⁶ Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 388 (2018).

³¹⁷ Feingold Interview, *supra* note 178 ("The appropriations committee could refuse to appropriate but the Executive Branch may still be obligated to find funding to faithfully execute the laws.").

³¹⁸ FINKEL, *supra* note 83, at 2, 16–17; see BROWN, ASSESSMENT, *supra* note 103, at 14–15 (describing how "one of the biggest challenges [to atrocity prevention training] is resource constraints"); POMPER, *supra* note 47, at 36, 39.

³¹⁹ See Linda Qiu, *The Many Ways Trump Has Said Mexico Will Pay for the Wall*, N.Y. TIMES, Jan. 12, 2019, at A12.

³²⁰ Emily Cochrane & Helene Cooper, *Pentagon Lists Projects That Will Be Delayed by Border Wall*, N.Y. TIMES, Sept. 5, 2019, at A16.

³²¹ Indeed, President Trump has already argued that undocumented immigration is a crisis. President Donald J. Trump, President Donald J. Trump's Address to the Nation on the Crisis at the Border (Jan. 8, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-address-nation-crisis-border/> [<https://perma.cc/BQ2R-AAXQ>] (characterizing undocumented immigration "as a growing humanitarian and security crisis at our southern border").

D. Definitions

As comprehensive as the Elie Wiesel and Syrian Accountability Acts are, neither includes definitions of all key terms. Each law refers to the subject matter covered as “war crimes, crimes against humanity, and genocide.”³²² (These are the three offenses under the umbrella term of “atrocity crimes,” coined by David Scheffer.³²³) And each law defines two of those terms—“war crimes” and “genocide”—in reference to their meanings under the U.S. Code.³²⁴ But neither law provides a definition of the remaining term: “crimes against humanity.”

“Crimes against humanity” are defined in international law (in the statutes of international and hybrid criminal tribunals and as part of customary international law)³²⁵ but not U.S. domestic law. Even in international law, however, the term is not consistently codified.³²⁶ Omitting a definition of “crimes against humanity” in the Syrian Accountability and Elie Wiesel Acts reflects a compromise to include the term, which Democrats wanted in order to cover the relevant atrocity crimes comprehensively, without citing foreign or international law, which Republicans generally oppose doing in domestic legislation.³²⁷

³²² See, e.g., John S. McCain National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Pub. L. No. 115-232, §§ 1232(a), 132 Stat. 1636 (2018); Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 6(2), 132 Stat. 5586 (2019).

³²³ See *supra* note 2.

³²⁴ NDAA § 1232(g)(2) (defining “genocide” as an offense described in 18 U.S.C. § 1091(a); EWGAPA, § 6(1) (same); NDAA § 1232(g)(5) (defining “war crimes” as an offense described in 18 U.S.C. § 2441(c) (2018)); EWGAPA § 6(4) (same).

³²⁵ 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, 5, 22 (2017) (observing that the International Military Tribunal in Nuremberg offered the first definition of “crimes against humanity” and that the Rome Statute of the International Criminal Court provides the most comprehensive definition to date); see also Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 (defining “crimes against humanity”).

³²⁶ Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 334 (2013) (observing that “the absence of a consistent definition and uniform interpretation of crimes against humanity has made it difficult to establish the theory underlying such crimes and to prosecute them in particular cases”).

³²⁷ Feingold Interview, *supra* note 178 (“Conservatives, particularly in U.S. Supreme Court opinions, tend to reject reliance on foreign and international law. Republicans’ unwillingness to cite only an international law definition of crimes against humanity was probably a legislative version of this tendency.”); see also Zachary D. Kaufman, *From the Aztecs to the Kalahari Bushmen: Conservative Justices’ Citation of Foreign Sources: Consistency, Inconsistency, or Evolution?*, 41 YALE J. INT’L L. ONLINE 1, 2 (2015) (observing that conservative justices have expressed opposition to citing foreign law). However, some commentators believe that the division over whether to incorporate “crimes against humanity” in U.S. law has less to do with partisanship and more to do with whether particular U.S. officials believe such incorporation would expose American servicemembers to potential prosecutions overseas. E-mail Interview with Charles J. Brown, Former Senior Advisor on Atrocity Prevention & Response, U.S. Dep’t of Defense (Sept. 16, 2019).

Efforts to define “crimes against humanity” in the U.S. Code persist, including through scholarship,³²⁸ congressional testimony,³²⁹ and legislative initiatives.³³⁰ That these two and other U.S. domestic laws³³¹ invoke any contested term without definition creates ambiguous laws that could cause confusion.³³² Perhaps even worse, from the perspective of Republicans, without a definition in domestic law, interpretation of the term in the Elie Wiesel and Syrian Accountability Acts may require, by default, reference to foreign and international law. Citation without codification is evidence that, if such a term will only be defined in domestic legislation with reference to federal law, then Congress, including Republicans, should complete the process of incorporating such a definition into the U.S. Code.³³³

E. Intervention

Some commentators express concern that new initiatives regarding atrocity prevention and response will necessarily lead the U.S. government

³²⁸ POMPER, *supra* note 47, at 38, 42 (advocating for the draft crimes against humanity statute to be enacted into law); Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18’s Blind Spots*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 341 (Margaret M. deGuzman & Diane Marie Amann eds., 2018); Katherine Morales, Note, *Breaking the Silence: The Case for a Domestic Crimes Against Humanity Statute*, 31 GEO. IMMIGR. L.J. 389 (2017); Leila Nadya Sadat, *Next Steps for a Crimes Against Humanity Treaty*, INT’L CRIM. JUST. TODAY (Dec. 8, 2014), <https://www.international-criminal-justice-today.org/opinion/next-steps-for-a-crimes-against-humanity-treaty/> [<https://perma.cc/6CPQ-HC24>].

³²⁹ See *Pursuing Accountability for Atrocities: Hearing before the U.S. H.R. Tom Lantos Human Rights Comm’n*, 116th Cong. (2019) (statement of Beth Van Schaack, Stanford University Leah Kaplan Visiting Professor of Human Rights), https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/PursuingAccountability_VanSchaack.pdf [<https://perma.cc/6B73-FMMG>]; David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT’L HUM. RTS. 301 (2009) (reproducing Scheffer’s written testimony submitted to the U.S. Senate Judiciary Committee’s Subcommittee on Human Rights and the Law on October 6, 2009, and advocating for the U.S. Code to be amended so that federal courts and military courts could fully prosecute crimes against humanity).

³³⁰ See Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. (2009). Senator Richard Durbin, then the Senate Majority Whip and a member of the Senate Judiciary Committee, introduced the bill on June 24, 2009. The bill garnered four cosponsors, all Democratic members of the Senate Judiciary Committee at the time (Senators Patrick Leahy and Feingold as original cosponsors and Cardin and Dianne Feinstein as subsequent cosponsors). See Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. (2009), <https://www.congress.gov/bill/111th-congress/senate-bill/1346/cosponsors> [<https://perma.cc/83KK-8YL6>] (indicating bill’s cosponsors).

³³¹ See, e.g., North Korean Human Rights Reauthorization Act of 2017, Pub. L. No. 115-198, § 2, 132 Stat. 1519, 1519–20 (2018); Implementing Recommendations of the 9/11 Commission Act of 2007 § 2113 (2007), 22 U.S.C. § 8213 (2012).

³³² Feingold Interview, *supra* note 178.

³³³ *Id.* (“It was an error by Republicans to push for ‘crimes against humanity’ to be included in the laws without definition because doing so opens the door for using foreign or international law definitions when needed. Conservatives should codify the term in domestic law, with which they would be more comfortable.”)

into more wars.³³⁴ These critics may be wary that the U.S. government could even use the Elie Wiesel and Syrian Accountability Acts as pretexts for military interventions that are primarily motivated by political interests and only secondarily, if at all, by humanitarian concerns.³³⁵ These laws, the argument could be made, would be akin to the controversial humanitarian doctrine of R2P serving as the pretext for NATO's 2011 involvement in Libya³³⁶ and Russia's 2014 incursion into Ukraine.³³⁷

The Elie Wiesel Act itself explicitly addresses this concern, noting that “[n]othing in this Act shall be construed as authorizing the use of military force.”³³⁸ (This provision, added to the bill when SFRC reported it to the full Senate, was included to assuage concerns by two Republican SFRC members, Senators Rand Paul and Mike Lee, that the legislation might otherwise prompt the use of force.³³⁹) The more general of the two laws thus anticipates and limits the possibility of military interventions.

The qualification in the Syrian Accountability Act about the ASPA, which arguably authorizes armed action against the ICC, implicitly reminds the President that he can use force if certain conditions arise. So, quite opposite of the Elie Wiesel Act, the Syrian Accountability Act anticipates and affirms the possibility of military intervention. While some may be concerned that the new laws will undesirably prompt the use of force, others may be reassured that the laws will not prevent it.

F. Training

The training of Foreign Service Officers (“FSOs”) on atrocity crime anticipation, prevention, and response required by the Elie Wiesel Act can be traced back to a recommendation published in the 2008 Albright-Cohen report.³⁴⁰ In announcing its signing of the law, the Trump administration

³³⁴ See, e.g., Trevor Thrall, *A New Infrastructure for Intervention*, NAT’L INT. (Apr. 24, 2012), <https://nationalinterest.org/blog/human-rights/new-infrastructure-intervention-6837>, [<https://perma.cc/J8ME-SN9G>].

³³⁵ Colin Thomas-Jensen, *Fighting Fire with Fire 4* (Simon-Skojdt Center for the Prevention of Genocide, Working Paper No. 8, 2018) (“A major obstacle to greater multilateral cooperation on atrocity prevention has been the argument (frequently employed by opponents of humanitarian intervention) that preventing atrocities is simply a cynical cover for the intervening state (or state) to pursue its (or their) economic and security interests.”).

³³⁶ FEINSTEIN & LINDBERG, *supra* note 68, at 3, 11–14; POMPER, *supra* note 47, at 26–28; STRAUS, FUNDAMENTALS, *supra* note 2, at 14–15, 122; Hingst, *supra* note 7; Mohamed, *supra* note 7; Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298 (2012).

³³⁷ FEINSTEIN & LINDBERG, *supra* note 68, at 3.

³³⁸ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 7, 132 Stat. 5586 (2019).

³³⁹ E-mail Interview with Theo Sittler, Legislative Sec’y for Peacebuilding, Friends Comm. on Nat’l Legislation (June 7, 2019).

³⁴⁰ ALBRIGHT & COHEN, *supra* note 19, at 29 (“The State Department . . . should incorporate training on early warning of genocide and mass atrocities into programs for foreign service . . . officers.”).

noted only this provision about training FSOs,³⁴¹ suggesting that the administration considers this aspect of the law to be the most significant. The mandated training targets FSOs “who will be assigned to a country experiencing or at risk of mass atrocities, as determined by the Secretary of State, in consultation with the Director of National Intelligence and relevant civil society organizations.”³⁴² While any such training for FSOs is a positive development,³⁴³ and some has already occurred voluntarily,³⁴⁴ the law’s limitations may leave certain FSOs (and other U.S. officials) as well as their foreign counterparts unprepared—with dire consequences.

The Secretary of State, even in consultation with the intelligence and nongovernmental communities, may misjudge a country’s actual or potential atrocity crimes. After all, history is replete with unpredicted atrocity crimes³⁴⁵ (including those unforeseen by the U.S. government, despite all of its capabilities³⁴⁶) and forecasting such offenses is notoriously difficult and unreliable.³⁴⁷ The State Department may thus omit designating some FSOs to receive what would prove to be beneficial training.

Even if the Secretary of State correctly assesses countries experiencing or at risk of atrocity crimes, training only FSOs who “will be” assigned to such countries leaves untrained FSOs who are *already* deployed. Given that the tenure of FSOs in a particular country can be as long as four years³⁴⁸ and that the situation in-country may radically change during that time, FSOs may face atrocity crimes without preparation.

Moreover, even if the Secretary of State correctly determines all of the FSOs that should receive atrocity crime-related training, the schooling itself may not be effective. The Elie Wiesel Act requires “instruction on recognizing patterns of escalation and early warning signs of potential atrocities, and

³⁴¹ Press Release, White House, Bill Announcement (Jan. 14, 2019) (on file with author) (announcing that “the President signed into law . . . S. 1158, the ‘Elie Wiesel Genocide and Atrocities Prevention Act of 2018,’ which directs the Department of State to provide training to Foreign Service officers on preventing and responding to genocide and other atrocities”).

³⁴² EWGAPA § 4.

³⁴³ For an overview and assessment of training and education on atrocity prevention within the U.S. government until 2016, see BROWN, ASSESSMENT, *supra* note 103.

³⁴⁴ Since at least the Obama administration, the State Department and USAID have voluntarily trained certain FSOs and civil servants on atrocity prevention. Anonymous State Dep’t Official #2 Interview, *supra* note 71; Widdersheim Interview, *supra* note 65.

³⁴⁵ See, e.g., Margaret M. DeGuzman, *When are International Crimes Just Cause for War?*, 55 VA. J. INT’L L. 73, 106 n.192 (2014) (“For instance, the Arab Spring, which involved large-scale war crimes as well as crimes against humanity, came as a surprise to virtually the entire world.”).

³⁴⁶ For example, President Clinton claimed in 1998 that he “did not fully appreciate the depth and the speed” of the 1994 Genocide against the Tutsi in Rwanda. POWER, “A PROBLEM FROM HELL,” *supra* note 41, at 386.

³⁴⁷ See STRAUS, FUNDAMENTALS, *supra* note 2, at 68 (“[I]t is important to recognize that there are limits in our ability to predict genocide and mass atrocity.”); DeGuzman, *supra* note 345, at 106 (“Although substantial governmental and nongovernmental resources are being expended on efforts to predict the likelihood of future international crimes, no one claims to be able to do it accurately.”).

³⁴⁸ E-mail Interview with Stephanie Schmid, former U.S. FSO (Feb. 16, 2019).

methods of preventing and responding to atrocities, including conflict assessment methods, peacebuilding, mediation for prevention, early action and response, and appropriate transitional justice measures.”³⁴⁹ Few of these numerous, complicated subjects enjoy consensus on best practices,³⁵⁰ and each is the focus of constant development and refinement.³⁵¹

Additionally, even if the Secretary of State provides effective training to all FSOs that could confront atrocity crimes, limiting such instruction to FSOs is insufficient to address both the enormity and complexity of these crises and the fact that, as acknowledged by the APB’s creation, the U.S. government’s responses are interagency efforts. Other U.S. officials within the State Department (besides FSOs) and outside it (such as in the Departments of Defense, Homeland Security, Justice, and Treasury as well as in the FBI and CIA) also work on atrocity crime issues.³⁵² In September 2019, the Trump administration announced that it would provide atrocity prevention training to personnel of the Departments of State, Defense, and Justice, as well as USAID,³⁵³ but did not list members of other agencies the administration itself acknowledged were involved in such activities, such as the Departments of Treasury and Homeland Security, as well as the Intelligence Community.³⁵⁴

Finally, even if the U.S. government effectively trains all U.S. officials who work on atrocity crimes issues, foreign officials who do or could engage on the subject may be left unprepared. And these counterparts may be better positioned actually to prevent such crises.

To address these potential problems, the State Department should educate *all* FSOs—including those already in the field—on anticipating, preventing, and responding to atrocity crimes. The U.S. government should also school *non*-FSO officials—both within and outside the State Department—who do or could work on such matters. Furthermore, the U.S. government should seize opportunities to train willing foreign counterparts on atrocity prevention.³⁵⁵ In the process, the U.S. government should continu-

³⁴⁹ Elie Wiesel Genocide and Atrocities Prevention Act (“EWGAPA”), Pub. L. No. 115-441, § 4, 132 Stat. 5586 (2019)

³⁵⁰ For example, in transitional justice, the classic, supposed tension between peace and justice has not been resolved and probably never will be. *See, e.g.*, KAUFMAN, *supra* note 171, at 24, 43, 44, 53, 55, 131, 148, 150, 156, 162, 197, 205. More generally, transitional justice features tensions within certain themes (aspiration v. capability and retributive v. deterrent v. restorative justice) and tensions among certain themes (profound v. pragmatic objectives and reconciliation v. truth v. justice). Clark, Kaufman & Nicolaidis, *supra* note 172, at 382–87.

³⁵¹ *See* BROWN, ASSESSMENT, *supra* note 103.

³⁵² *See supra* Part II.C.

³⁵³ *See* ELIE WIESEL ACT REPORT, *supra* note 87, at 9–11.

³⁵⁴ *See id.* at 1, 7–8.

³⁵⁵ The U.S. government—through the Departments of State and Justice—helps partner countries strengthen their criminal justice systems. *See, e.g.*, *About Us*, U.S. DEP’T OF STATE BUREAU OF INT’L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, <https://www.state.gov/about-us-bureau-of-international-narcotics-and-law-enforcement-affairs/> [<https://perma.cc/Q9QF-JHBG>] (describing the Bureau’s mandate in part as “helping partner governments assess, build, reform, and sustain competent and legitimate criminal justice systems”); *Global Reach*

ously update its internal and external training methods to reflect the latest insights from scholarship and practice.³⁵⁶

G. Reporting

The Executive Branch's reporting to Congress mandated by the Elie Wiesel and Syrian Accountability Acts is a tool the Legislative Branch uses to focus the Executive Branch's attention and accountability on an issue area (here, atrocity prevention and response).³⁵⁷ However, given the Trump administration's track record on such reporting,³⁵⁸ it is reasonable to question whether it will have any impact until at least the next President takes office.

While the Elie Wiesel and Syrian Accountability Acts direct the Executive Branch to submit to Congress reports on atrocity crime issues, it is unclear whether such reports will be comprehensive or otherwise satisfy the laws' intent. Already the Trump administration is bucking the trend since President Obama's PSD-10 for the Director of National Intelligence ("DNI") to include atrocity crimes in the annual Worldwide Threat Assessment of the U.S. Intelligence Community.³⁵⁹ Congress may need to provide

and Program Scope, U.S. DEP'T OF JUSTICE OFFICE OF OVERSEAS PROSECUTORIAL DEVELOPMENT, ASSISTANCE, AND TRAINING, <https://www.justice.gov/criminal-opdat> [<https://perma.cc/Y86P-VMW7>] (describing the Office's mission in part as "assess[ing] host-country criminal justice institutions and procedures; draft[ing], review[ing] and comment[ing] on legislation and criminal enforcement policy; and provid[ing] technical assistance to host country prosecutors, judges, and other justice sector personnel working in the field"); *About ICITAP*, U.S. DEP'T OF JUSTICE INT'L CRIMINAL INVESTIGATIVE TRAINING ASSISTANCE PROGRAM, <https://www.justice.gov/criminal-icitap> [<https://perma.cc/J7BJ-HUTC>] (describing the Office's purpose as "work[ing] with foreign governments to develop professional and transparent law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism"). The U.S. government could leverage these existing relationships to train its foreign counterparts on atrocity prevention.

³⁵⁶ For example, a joint initiative between the U.S. Holocaust Memorial Museum and Dartmouth College is the first public system to use qualitative and quantitative methods to assess the risk of atrocity crimes around the world. See U.S. HOLOCAUST MEMORIAL MUSEUM, *supra* note 5.

³⁵⁷ See, e.g., Daniel Richardson, Note, *Congressional Control of Agency Expertise*, 105 VA. L. REV. 173 (2019) (describing objectives and outcomes of congressionally mandated Executive Branch reporting). Not all experts agree that reporting requirements have such effect. According to a former member of the State Department's Office of the Legal Adviser: "Burdensome reporting requirements occupy considerable staff time for government officials and may in fact divert them from doing their substantive work. As someone who spent lots of time in government working on congressionally mandated reports that I don't think many people on the Hill paid much attention to, I have doubts about the power of reporting requirements to produce policy changes." E-mail Interview with Anonymous Former Official, U.S. Dep't of State Office of the Legal Adviser (July 12, 2019).

³⁵⁸ See *supra* note 281 and accompanying text.

³⁵⁹ After President Obama issued PSD-10 in 2011, each of the DNI's annual Worldwide Threat Assessment of the U.S. Intelligence Committee throughout the rest of the Obama administration (in 2012, 2013, 2014, 2015, and 2016) included a section or subsection focusing on atrocity crimes. See JAMES R. CLAPPER, UNCLASSIFIED STATEMENT FOR THE RECORD ON THE WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE 9 (2012), https://www.dni.gov/files/documents/Newsroom/Testimonies/20120131_testimony_ata.pdf [<https://perma.cc/KP2Y-NEEY>] (featur-

further input to the President on what it seeks in the reports. But even if the intelligence community identifies risks of atrocity crimes, the President may be skeptical and thus not seek to address the offenses. After all, President Trump notoriously doubts the assessments of his own intelligence officials³⁶⁰ and those of U.S. allies.³⁶¹

VI. CONCLUSION

Amid the current, extremely partisan era in U.S. politics, it is at least a symbolic achievement that the Elie Wiesel and Syrian Accountability Acts received overwhelming bipartisan support. They codified into law principles, policies, and procedures that signify how clear an objective atrocity prevention has become even among ardent political opponents.

Nevertheless, it is too early to tell how meaningfully the unprecedented yet imperfect laws will actually contribute to mitigating genocide, war

ing section on “mass atrocities”); JAMES R. CLAPPER, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY—SENATE COMMITTEE ON ARMED SERVICES 13 (2013), https://www.dni.gov/files/documents/Intelligence%20Reports/UNCLASS_2013%20ATA%20SFR%20FINAL%20for%20SASC%2018%20Apr%202013.pdf [<https://perma.cc/2ZN4-7Z4P>] (featuring section on “mass atrocities”); JAMES R. CLAPPER, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY—SENATE SELECT COMMITTEE ON INTELLIGENCE 12 (2014), https://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WWTA%20%20SFR_SSCI_29_Jan.pdf [<https://perma.cc/T55M-K29B>] (featuring section on “mass atrocities”); JAMES R. CLAPPER, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY—SENATE ARMED SERVICES COMMITTEE 10, 12 (2015), https://www.dni.gov/files/documents/Unclassified_2015_ATA_SFR_-_SASC_FINAL.pdf [<https://perma.cc/AJF2-2CKS>] (discussion of “mass atrocities” integrated into section on “human security”); JAMES R. CLAPPER, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY—SENATE SELECT COMMITTEE ON INTELLIGENCE 15 (2016), https://www.dni.gov/files/documents/SSCI_Unclassified_2016_ATA_SFR%20_FINAL.pdf [<https://perma.cc/3FG4-A2VF>] (featuring “atrocities and instability” subsection of “human security” section).

Since President Trump took office, each of these annual assessments have featured gradually less material on atrocity crimes. The first such assessment, in 2017, included a subsection on atrocity crimes like in the previous year’s assessment. DANIEL R. COATS, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY—SENATE SELECT COMMITTEE ON INTELLIGENCE 14–15 (2017), <https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf> [<https://perma.cc/DU54-X4AC>] (featuring “atrocities and instability” subsection of “human security” section). The following year, the assessment mentioned atrocity crimes twice. DANIEL R. COATS, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMITTEE 16, 26 (2018), <https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf> [<https://perma.cc/XM6U-KY4C>]. The most recent assessment, in 2019, does not mention atrocity crimes at all. DANIEL R. COATS, STATEMENT FOR THE RECORD—WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY (2019), <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf> [<https://perma.cc/HA39-859M>].

³⁶⁰ See, e.g., Shane Harris & John Wagner, *Trump Rebukes U.S. Spy Chiefs*, WASH. POST, Jan. 31, 2019, at A1; Editorial, *The Intelligence Chiefs are Right*, WASH. POST, Jan. 31, 2019, at A22.

³⁶¹ See, e.g., Katie Rogers et al., *Allies Dispute Trump Boast of Seizing All of Caliphate*, (N.Y. TIMES, Mar. 1, 2019), at A6.

crimes, crimes against humanity, and other atrocity crimes. A wide gulf has often existed between the rhetoric and reality of U.S. policy on atrocity prevention.³⁶² Declarations, infrastructure, training, studies, technical assistance, and reports are helpful, but the U.S. government's will to act is essential.

In theory, these two laws hold great potential to relieve suffering and reinforce security. In practice, they may prompt major, minor, or even no change.

Even if advancements the laws lead to are ultimately dramatic, they may only be aspirational and incremental for now.³⁶³ Legislators—especially the bills' sponsors—must closely monitor and, where necessary, advocate for relevant appropriations and fulfillment of the laws' letter and spirit. If the Executive Branch neglects these decrees, Congress should take further measures to compel compliance. American values, interests, and leadership require such vigilance.

³⁶² See Zachary D. Kaufman, *It'll Take More than Political Rhetoric to Stop Genocide*, FORBES, May 10, 2016, <https://www.forbes.com/sites/realspin/2016/05/10/itll-take-more-than-political-rhetoric-to-stop-genocide/> [<https://perma.cc/G6D7-FEWQ>] (“[E]ven when America’s eyes are clear, its policy on atrocities is often ineffective. Rival strategic concerns as well as political, financial and logistical obstacles often thwart meaningful action. These factors include: competing foreign priorities, such as combatting terrorism and dealing with increasingly assertive states like China, North Korea, and Russia; competing domestic priorities, such as economic recession and inequality, racial tension and a vacancy on the U.S. Supreme Court; an American public distracted by a presidential election and wary of additional foreign entanglements while the U.S. military remains actively involved in the Middle East; an international community skeptical, after Iraq and Libya, of U.S. government claims to be motivated by humanitarian concerns; and veto-wielding permanent members of the UN Security Council willing to block collective action to protect their own self-interest or their allies.”). For discussion of the mixed record of atrocity prevention’s reality during even the Obama administration, when rhetoric about such policy peaked, see, e.g., BROWN, OBAMA ADMINISTRATION, *supra* note 47 (describing the case of Central African Republic); Thomas-Jensen, *supra* note 335 (describing the case of Mount Sinjar, Iraq); Ben Rhodes, *Inside the White House During the Syrian “Red Line” Crisis*, THE ATLANTIC (June 3, 2018), <https://www.theatlantic.com/international/archive/2018/06/inside-the-white-house-during-the-syrian-red-line-crisis/561887/> [<https://perma.cc/6QJA-L6AF>] (describing the case of Syria).

³⁶³ For discussion of incremental legislative change, see, e.g., Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815 (2010); Briana Lynn Rosenblum, *The Legislative Role in Procedural Rulemaking Through Incremental Reform*, 97 NEB. L. REV. 762 (2019).