
CONTESTED CRIMINALIZATION

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ABSTRACT

How does the U.S. government decide to deploy criminal justice abroad? From the Syrian civil war to the Israel-Gaza conflict, Russia-Ukraine war, and U.S.-China relations, criminal law sits at the heart of contemporary U.S. foreign relations. And yet legal scholarship has not precisely explained how the U.S. government deploys or supports criminal prosecutions abroad, often defaulting to simplistic labels of the United States as exceptionalist, carceral, or isolationist. This Article rectifies this shortcoming by introducing a theory of contested criminalization, piercing the veil of U.S. government decision-making in its use of criminal law in foreign relations. According to this process, criminalization occurs when the U.S. government pulls three levers—codification, cooperation, and creation—constituting U.S. global criminal justice policy. But such criminalization process is contested, developing contingently in geopolitical crises due to the divergent equities of Congress and three executive agencies: the Department of Justice, Department of State, and Department of Defense. Using a criminal law minimalism frame, this Article argues for a policy of cooperation to redress wrongs and advance justice for victims.

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INTRODUCTION

Criminal law sits at the heart of U.S. foreign policy.¹ But how does the U.S. government decide to deploy criminal justice abroad? Legal scholarship lacks a clear answer to this question. Often, it defaults to broad labels of the United States mechanically pursuing American interests, whether they be “carceral,” “exceptionalist,” or “isolationist.”² Or alternatively, scholarship canvases, in detail, the foreign relations interagency process from one presidential administration to another, overlooking the carceral consequences of such conduct.³ This Article responds by introducing a theory of *contested*

¹ See, e.g., Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 342 (2019) [hereinafter Koh, *Foreign Affairs*] (arguing that rise of prosecutions that require cooperation and support of foreign governments represents a shift in U.S. criminal law and may close global impunity gaps); Brian Richardson, *The Imperial Prosecutor?*, 59 AM. CRIM. L. REV. 39, 42-43 (2022) (arguing that federal prosecutors possess imperial power to speak for U.S. government and increasingly implicate national interests with foreign prosecutions); Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 226-27 (2021) (arguing Department of Justice's ("DOJ") increased interest in prosecuting individuals and entities associated with foreign states is based on common law and requires congressional action to define foreign entities' immunities); Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 213-14 (2021) (criticizing Trump Administration's China Initiative and noting its use of criminal law); Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1024-25, 1096 (2018) (noting increasing frequency of necessary cross-border prosecutions and arguing in favor of proposed uniform scheme of extraterritorial prosecutions); Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625, 634-35 (2016) (arguing growth of prosecutions of foreign criminals in U.S. courts places unfair burdens on defendants which undermine constitutional due process protections).

² See Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 9, 9-10 (Michael Ignatieff ed., 2005); Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1617 (2003) (noting that procedural and prosecutorial critiques of International Criminal Court ("ICC") are often couched in different “flavors” of American exceptionalism); Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1494 (2003) [hereinafter Koh, *On American Exceptionalism*] (“In the end, American exceptionalism succeeds best when it seeks not simply to coerce, but rather, to promote sustainable solutions through the generation of legal process and internalizable [sic] legal rules.”); Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 88, 103-04 (2010) (observing parallel between domestic isolationist criticism today and during Cold War and asserting that “U.S. criminal justice export has played a critical role in shaping how states and non-state actors respond to a range of global challenges—namely with reference to U.S.-style criminal justice frameworks—but that this approach suffers from a deep democratic deficit”); Aparna Polavarapu, *Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda*, 42 HARV. J.L. & GENDER 123, 131 (2019) (arguing that carceral paradigm remains dominant mode of viewing and addressing domestic violence in United States and globally).

³ See, e.g., Jean Galbraith, *From Scope to Process: The Evolution of Checks on Presidential Power in US Foreign Relations Law*, in ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES 239, 246 (Helmut

criminalization. According to this theory, the U.S. government may pull three criminalization levers in foreign relations—codification, cooperation, and creation—via ad hoc criminal justice decision-making arising contingently due to the divergent equities of Congress and three executive departments: the Department of State (“State Department”), Department of Justice (“DOJ”), and Department of Defense (“DOD”).

Consider a recent example. On December 6, 2023, then Attorney General Merrick Garland took to the podium of DOJ’s Main Justice building in Washington, D.C., to announce criminal charges against four Russia-affiliated military members for “heinous crimes against an American citizen.”⁴ The federal indictment, unsealed in the U.S. District Court for the Eastern District of Virginia, included three counts of war crimes (unlawful confinement, torture, and inhuman treatment) and one count of conspiracy to commit war crimes.⁵ The details of the case are grisly: The American victim was taking no active part in the hostilities when the defendants captured him.⁶ Then, according to Attorney General Garland:

[D]efendants threw the victim to the ground while he was naked, tied his hands behind his back, pointed a gun at his head, and beat him with their

Philipp Aust & Thomas Kleinlein eds., 2021) (noting that important source of process-based rules and procedures in foreign relations stems from interagency coordination and intra-agency norms); Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 668 (2020) (discussing how several offices within and outside of Department of State contribute to foreign policy decisions); Ashley Deeks & Kristen E. Eichensehr, *Frictionless Government and Foreign Relations*, 110 VA. L. REV. 1815, 1879 (2024) (emphasizing that interagency negotiations inside executive branch are frequent and robust); W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 846-47 (2018) (arguing that ignoring interagency coordination led to judicial skepticism of purpose behind President Trump’s enactments during his first Administration); Carson Sugg, Note, *Bend, Don’t Break: Promoting Interagency Collaboration to Enhance Economic Sanctions as a Foreign Policy Tool*, 98 ST. JOHN’S L. REV. 189, 194 (2024) (arguing that intra-agency approach provides president with enough authority in matters of national security while not subverting individual constitutional protections).

⁴ Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Attorney General Merrick B. Garland Delivers Remarks Announcing Four Russia-Affiliated Military Personnel Charged with War Crimes in Connection with Russia’s Invasion of Ukraine (Dec. 6, 2023) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-four-russia-affiliated>) [<https://perma.cc/J9BH-EA5J>]; see also Jeff Seldin, *US Charges Russian-Affiliated Soldiers with War Crimes*, VOA NEWS (Dec. 6, 2023, 6:30 PM), <https://www.voanews.com/a/us-charges-russian-affiliated-soldiers-with-war-crimes-/7387028.html> [<https://perma.cc/2455-G257>].

⁵ Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Four Russia-Affiliated Military Personnel Charged with War Crimes in Connection with Russia’s Invasion of Ukraine (Dec. 6, 2023) [hereinafter Press Release, War Crimes], <https://www.justice.gov/opa/pr/four-russia-affiliated-military-personnel-charged-war-crimes-connection-russias-invasion> [<https://perma.cc/DH9Y-89AJ>].

⁶ See Garland, *supra* note 4.

feet, their fists, and the stocks of their guns. . . . [T]hey forced him into a . . . closet that they were using as a jail cell. . . . [A]s they interrogated him, they tortured him. They beat him, again, with a gun. They punched him in his chest and stomach. They threatened to shoot him. They stripped off his clothes and took pictures. One of their conspirators threatened to sexually assault him.

They also allegedly conducted a mock execution:

[W]hen the victim's answers did not satisfy the defendants, [a defendant] threatened the victim with death and asked for his last words. . . . [T]hey forced him to the ground and put a gun to the back of his head. The victim believed he was about to be killed.⁷

Attorney General Garland's announcement represented the culmination of three critical federal criminal law developments in U.S. foreign relations. First, *codification*: war crimes are criminalized in 18 U.S.C. § 2441, which the political branches broadened in 2023 to include "present in" jurisdiction over individuals who have perpetrated war crimes abroad.⁸ Second, *cooperation*: DOJ has worked across the executive branch,⁹ with the Ukrainian government,¹⁰ and with foreign governments to advance this investigation to indictment.¹¹ And in 2023, Attorney General Garland became the first U.S. Attorney General to

⁷ *Id.*

⁸ 18 U.S.C. § 2441. In the press release, Attorney General Garland emphasized that such charges were the "first ever" under the U.S. war crimes statute (18 U.S.C. § 2441), while U.S. Attorney Jessica D. Aber for the Eastern District of Virginia highlighted that the federal charges also constitute "grave breaches of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War." Press Release, War Crimes, *supra* note 5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁹ Attorney General Garland stated that the case represents the culmination of a global DOJ investigation, which includes cooperation across domestic and foreign actors. Garland, *supra* note 4. In particular, Attorney General Garland recognized DOJ's Criminal Division (specifically the Human Rights and Special Prosecutions Section and the War Crimes Accountability Team), the U.S. Attorney's Office for the Eastern District of Virginia, the FBI, and the Department of Homeland Security (specifically Homeland Security Investigations). *Id.* DOJ also recognized its Criminal Division's Computer Crime and Intellectual Property Section, Appellate Section, Office of Enforcement Operations, Office of International Affairs, in addition to its National Security Division. Press Release, War Crimes, *supra* note 5.

¹⁰ Attorney General Garland lauded "the incredible courage of our partners in Ukraine, specifically our counterparts in the Ukrainian Prosecutor General's Office." Garland, *supra* note 4.

¹¹ Attorney General Garland acknowledged "partners in the international community," with whom DOJ "work[ed] closely alongside . . . to gather evidence and build cases so that when the time comes, the United States and our partners will be ready to ensure accountability for Russia's war of aggression." *Id.* Assistant Director in Charge David Sundberg of the FBI Washington Field Office further stated that "[t]hese historic charges are the culmination of a complex investigation by the FBI and our partners that spans the globe." Press Release, War Crimes, *supra* note 5.

visit the International Criminal Court (“ICC”).¹² Meanwhile, just seven months earlier, President Biden signed the Consolidated Appropriations Act of 2023, legally authorizing U.S. support of ICC investigations into atrocities perpetrated in the Russia-Ukraine war.¹³ Third and finally, *creation*: The United States has supported the creation of a special tribunal in Ukraine to prosecute the crime of aggression.¹⁴

These events are not aberrational: Everywhere we look today, criminal justice pushes to the fore of U.S. foreign relations. The Syrian civil war appears to have ended with widespread calls for justice after the end of the fifty-four-year reign of the Assad regime.¹⁵ The United States will be involved to some extent in such efforts—in fact, the day after the coup, DOJ announced the federal war crimes indictments of two top Syrian military officials, Jamil Hassan and Abdul Salam Mahmoud.¹⁶ The wars in Gaza and Lebanon included hostage-taking and widespread reports of civilian casualties, prompting calls for criminal accountability on all sides.¹⁷ Moreover, the ongoing geopolitical rivalry with

¹² Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks Announcing the Launch of the International Centre for the Prosecution of the Crime of Aggression Against Ukraine (July 3, 2023), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-announcing-launch> [<https://perma.cc/L2PJ-YQ2M>] (“[O]ur Attorney General Merrick Garland visited The Hague so that he could see and observe firsthand the robust response to Russia’s full-scale invasion of Ukraine by our Dutch partners, and at Eurojust, Europol, and the International Criminal Court, indeed becoming the first Attorney General to visit the ICC.”).

¹³ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 7073, 136 Stat. 4459, 5092 (2022).

¹⁴ Victoria Kim & Christopher F. Schuetze, *Zelensky Addresses The Hague as He Pushes for a Special Tribunal for Russia*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/04/world/europe/zelensky-to-speak-at-the-hague-as-he-pushes-for-special-tribunal-for-russia.html>.

¹⁵ Vivian Yee, *Syria Confronts an Immense Challenge: Justice for Assad Regime Crimes*, N.Y. TIMES (Jan. 12, 2025), <https://www.nytimes.com/2025/01/12/world/middleeast/syria-prosecution-assad-regime.html>.

¹⁶ Press Release, U.S. Dep’t. of Just., Off. of Pub. Affs., Criminal Charges Unsealed Against Two Former High-Ranking Syrian Government Intelligence Officials for War Crimes Against Americans and Other Civilians (Dec. 9, 2024), <https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-two-former-high-ranking-syrian-government-intelligence> [<https://perma.cc/K3N8-MNEM>]; see also Press Release, U.S. Dep’t. of Just., Off. of Pub. Affs., Former Syrian Prison Official Charged with Torture (Dec. 12, 2024), <https://www.justice.gov/usao-cdca/pr/former-syrian-prison-official-charged-torture> [<https://perma.cc/9YM3-AS3W>]; Katie Benner & Adam Goldman, *Syrian Military Officials Charged with War Crimes as Government Falls*, N.Y. TIMES (Dec. 9, 2024), <https://www.nytimes.com/2024/12/09/us/politics/justice-department-syria-war-crimes.html>.

¹⁷ See, e.g., Hwaida Saad, *Hamas Says Hostages Won’t Go Home Alive as Long as Israeli Forces Remain in Gaza*, N.Y. TIMES (Jan. 10, 2024), <https://www.nytimes.com/2024/01/10/world/middleeast/israel-hostages-hamas-gaza.html>; *Gaza Daily Deaths Exceed All Other Major Conflicts in 21st Century: Oxfam*, AL JAZEERA (Jan. 11, 2024), <https://www.aljazeera.com/news/2024/1/11/gaza-daily-deaths-exceed-all-other-major-conflicts-in-21st->

China gave rise to a Trump Administration “China Initiative” to prosecute Chinese nationals, which was shut down by the Biden Administration but is now likely to be revived by the current Trump Administration.¹⁸ Notably, the United States has oscillated from opposing the ICC to supporting it—the United States backed the ICC after arrest warrants against Russian President Vladimir Putin and Russian Commissioner for Children’s Rights Maria Lvova-Belova, but then, the second Trump Administration has sanctioned ICC officials for pursuing charges against senior Israeli officials.¹⁹ Meanwhile, the Guantanamo Bay military commissions continue to function as several war on terror detainees continue to be confined there.²⁰ Future global events will undoubtedly trigger the same: the U.S. government deploying its power to deprive wrongdoers of their liberty through criminal sanction.

This Article will explain: When global conflicts emerge, how and when will the United States criminalize? The stakes of this question are high—particularly

century-oxfam; Cassandra Vinograd, *I.C.C. Prosecutor Sought Warrants for 3 Hamas Leaders. At Least 2 Are Now Dead.*, N.Y. TIMES (Nov. 21, 2024), <https://www.nytimes.com/2024/11/21/world/middleeast/hamas-leaders-icc-arrest-warrant.html>; Ramzi Kaiss, *What Can the Lebanese Government Do to Stop War Crimes?*, HUM. RTS. WATCH (Nov. 12, 2024), <https://www.hrw.org/news/2024/11/12/what-can-lebanese-government-do-stop-war-crimes> [<https://perma.cc/98C3-J9AB>] (“[M]ore than 20 human rights organizations . . . called on Lebanon and other United Nations member states to convene a special session . . . to establish an international investigation into all human rights violations committed by all parties involved in the conflict in Lebanon.”); Bassem Mroue & Melanie Lidman, *The Death Toll in Lebanon Crosses 3,000 in the 13-Month Israel-Hezbollah War, Health Ministry Says*, AP NEWS, <https://apnews.com/article/israel-lebanon-hezbollah-death-toll-798b846237a24ed37490ea29bd4e3aba> [<https://perma.cc/MH88-VWUS>] (last updated Nov. 4, 2024).

¹⁸ See Refael Kubersky, *What Trump Has Promised on China in a Second Term*, PBS: FRONTLINE (Nov. 27, 2024), <https://www.pbs.org/wgbh/frontline/article/trump-china-second-term/>; Evan Perez, *Justice Department Ends Trump-Era China Initiative Following Bias Concerns*, CNN, <https://www.cnn.com/2022/02/23/politics/justice-department-china/index.html> [<https://perma.cc/QSF6-DUS7>] (last updated Feb. 23, 2022).

¹⁹ Press Release, Int’l Crim. Ct., Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova>; Karoun Demirjian, *House Passes Bill to Impose Sanctions on I.C.C. Officials for Israeli Prosecutions*, N.Y. TIMES (Jan. 9, 2025), <https://www.nytimes.com/2025/01/09/us/politics/icc-sanctions-house-israel.html>; Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 161, 163 (2021) [hereinafter Koh, *Othering Across Borders*] (noting periodic American hostility towards ICC).

²⁰ Carol Rosenberg, *Guantánamo Bay Explained: The Costs, the Captives and Why It’s Still Open*, N.Y. TIMES (Jan. 9, 2025), <https://www.nytimes.com/2025/01/09/us/politics/guantanamo-prison-costs.html>; Sarah Almkhatar et al., *The Guantánamo Docket*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html> (last updated Aug. 6, 2025); Dru Brenner-Beck, *Eighteen Years of Detention at Guantánamo Bay: Compliance with International Law or the Specter of Tyranny?*, 35 AM. U. INT’L L. REV. 671, 673 (2020).

when centering victims. During geopolitical conflict,²¹ the federal government often deploys criminal law. Instead of diplomacy or sanctions, the U.S. government may opt to prosecute and incarcerate foreign perpetrators of war crimes or other offenses. On one hand, too many prosecutions may lead to undue carcerality, perpetuating the problematic dynamics of criminal prosecution. On the other hand, too few may lead to “impunity gaps,” wherein perpetrators of sexual violence, human trafficking, and extermination in war live without any consequence, thereby denying justice for victims. An era of “America First” foreign policy, wherein U.S. foreign relations retract inwards, raises the specter of raw power geopolitics and less commitment to rule of law and accessibility to justice mechanisms for victims.

This Article shows contested criminalization has two dimensions. First *criminalization*. The U.S. government engages in criminal law enforcement globally by pulling any one of three policy levers: codification (i.e., amendment to federal statute), cooperation (i.e., cross-border law enforcement relationships with foreign and international partners), and creation (i.e., establishment of new tribunals or other prosecutorial mechanisms). Second, *contestation*. This process is structured by the divergent equities of Congress and three executive agencies: the State Department, DOJ, and DOD. This contested criminalization produces contingency: an ad hoc—as opposed to systematic—approach to U.S. global criminal justice policy, or the collective U.S. laws and policies that govern the administration of and relationship to the domestic (i.e., U.S. courts), transnational (i.e., cross-border relationships), and international (i.e., war crimes tribunals) criminal legal systems.

In other words, this Article looks “under the hood” of the U.S. government as it makes decisions regarding its use of criminal law worldwide, thus complicating views of the U.S. government as a monolithic global actor. Until now, scholars have broken into three camps. First, scholarship has rightly emphasized the United States as a *carceral* actor. Comparative and international scholarship on mass incarceration has focused on the number and proportion of U.S. prisoners compared to the rest of the world.²² Second, scholars have

²¹ Such conflicts may be triggered by significant and sudden events that alter the status quo of regional or global power balances, security, and stability. Often, such events occur abroad (e.g., Russia-Ukraine or Israel-Gaza), but may also occur within U.S. territory (e.g., September 11, 2001). These crises demand immediate and coordinated responses from the international community.

²² See, e.g., Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 83-85 (2005) (discussing role of American prison conditions within an international law analysis); Mohamed A. Arafa & Jonathan G. Burns, *Judicial Corporal Punishment in the United States? Lessons from Islamic Criminal Law for Curing the Ills of Mass Incarceration*, 25 IND. INT'L & COMP. L. REV. 385, 385-86 (2015) (reiterating U.S. has highest incarceration rate globally, with nearly seven million people, or 2.9%, of U.S. adult population on probation, parole, or in prison or jail).

described the United States as an *exceptionalist* actor.²³ On this account, the U.S. failure to ratify the Rome Statute of the ICC constitutes an abandonment of global leadership in international criminal law, and much of the analysis centers on how U.S. policies shift with changes in political party control of the White House.²⁴ And now, many believe the Trump Administration will usher in an era of the United States as *isolationist*, abandoning commitments to Ukraine and, potentially, to allies like Taiwan.²⁵ From this perspective, the Trump Administration may not prosecute anyone for atrocity crimes. Accordingly, these three labels oversimplify the complexity of U.S. criminal law in foreign relations. If the United States were solely interested in carceralism, it would deploy aggressive global prosecution under universal jurisdiction while supporting the ICC and other international criminal tribunals. If the United States were solely exceptionalist, it would never engage with the international criminal court system. Last, if it were solely isolationist, it would never criminalize or prosecute extraterritorial criminal offenses, nor cooperate with foreign criminal justice systems or international courts.

This Article will show that the reality of U.S. global criminal justice policy is much more complex and contingent. The United States has long embedded itself in a complex web of global criminal justice relationships depending on the particular alignment of Congress and the executive agencies toward geopolitical conflict. But at some times, political and administrative frictions impede any meaningful criminal legal action.

The time is ripe for this scholarly inquiry, at the dawn of a new Trump Administration, and at the end of wars in the Middle East and Ukraine that have collectively led to an estimated one million victims.²⁶ Part I will introduce this

²³ See, e.g., MARGARET MACMILLAN, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* 14 (2003); Ignatieff, *supra* note 2, at 9; Koh, *On American Exceptionalism*, *supra* note 2, at 1482-88.

²⁴ See Harold Hongju Koh, Address, *International Criminal Justice 5.0*, 38 *YALE J. INT'L L.* 525, 533 (2013) [hereinafter Koh, *Criminal Justice*].

²⁵ See, e.g., Charles Kupchan, *The Deep Roots of Trump's Isolationism*, *FOREIGN AFFS.* (Sept. 9, 2024), <https://www.foreignaffairs.com/united-states/deep-roots-trump-isolationism-america-first> [<https://perma.cc/5NSG-69DH>].

²⁶ Bojan Pancevski, *One Million Are Now Dead or Injured in the Russia-Ukraine War*, *WALL ST. J.*, <https://www.wsj.com/world/one-million-are-now-dead-or-injured-in-the-russia-ukraine-war-b09d04e5> (last updated Sept. 17, 2024) (noting one million are now dead or wounded in Russia-Ukraine conflict and determining exact number affected has been difficult, but Ukrainian troop casualties are estimated at 80,000 and Russian troop casualties may be as high as 200,000); Nidal Al-Mughrabi & Emma Farge, *Gaza Death Toll: How Many Palestinians Has Israel's Gaza Offensive Killed?*, *REUTERS*, <https://www.reuters.com/world/middle-east/how-many-palestinians-has-israels-gaza-offensive-killed-2025-01-15/> [<https://perma.cc/TZ5B-YM92>] (last updated July 30, 2025) (explaining that since October 7, 2023, roughly 60,000 Palestinians have been killed in Gaza, of which Israeli government estimates 20,000 are Hamas fighters, and that 454 Israeli soldiers have died since Israel's ground operation began on October 27, 2023); Aryn Baker, *How Many People Have Died in Syria's Civil War?*, *N.Y. TIMES* (Dec. 11, 2024), <https://www.nytimes.com/2024/12/11/world/middle-east/syria-civil-war-death-toll.html> ("Death toll estimates from the conflict [in Syria] are as

topic through a hypothetical: how would you, as a White House staffer, leverage U.S. criminal justice abroad? Part II will describe the equities of Congress and the State Department, DOJ, and DOD in contested criminalization. It will then describe three levers of U.S. criminal law in foreign relations: codification, cooperation, and creation. Part III will situate this global criminal justice policy through the framework of criminal law minimalism and explore this policy's contingency for victims, given that geopolitical crises lead to ad hoc criminal justice decision making. Finally, Part IV will recommend changes to lend more coherence over contingency in pursuit of victims. Specifically, it will argue for the necessity of relational cooperation based on alignment of interests, followed by domestic prosecution and the creation of new tribunals. In so doing, such policy may center the communities most calling for accountability—mass atrocity victims. But Part IV will also show how the Trump Administration is unlikely to pursue such coherence. Methodologically, this Article uses the Russia-Ukraine War as the leading example but also incorporates the Israel-Gaza, Lebanon, and Syrian wars as the accountability picture emerges there.²⁷

This Article thus collapses walls between three major threads of legal scholarship. First, this Article brings foreign relations law and criminal law scholarship into further conversation. Traditionally, foreign relations scholars overlook criminal law, and criminal law scholars overlook foreign affairs.²⁸ This Article bridges that gap. Second, many contemporary domestic criminal law scholars have criticized American criminal law in an era of mass incarceration. Such literature criticizes not criminal conduct but instead the U.S. criminal justice system itself, with some scholars even questioning the desirability of the criminal sanction altogether.²⁹ But this commentary rarely engages with a recent

high as 620,000"); *Costs of Israel-Hezbollah Conflict on Lebanon, Israel*, REUTERS, <https://www.reuters.com/world/middle-east/costs-israel-hezbollah-conflict-lebanon-israel-2024-11-26/> [https://perma.cc/2J8Q-YE54] (last updated Nov. 27, 2024) (stating that at least 3,768 people have been killed in Lebanon since October 2023, of which Tel Aviv University's Institute for National Security Studies estimates 2,450 are Hezbollah fighters, and that 45 Israeli civilians and at least 73 Israeli soldiers have been killed in northern Israel, Golan Heights, and in combat in southern Lebanon over same period).

²⁷ Whereas the accountability picture for Russia-Ukraine is comparatively highly developed (e.g., changes to U.S. federal law, exchange of evidence across borders, and creation of a hybrid tribunal within Ukraine), the accountability picture in the Middle East is decidedly less so. For present purposes, this Article assumes that atrocities warranting accountability have been perpetrated in the Israel-Gaza, Lebanon, and Syrian civil wars.

²⁸ Foreign relations scholars have chronicled interagency disputes regarding national security lawmaking, but comparatively less attention has been devoted to how the agencies have articulated such processes in extraterritorial criminal law. Meanwhile, contemporary criminal law scholars of mass incarceration have largely focused on criminal justice at the state and local levels, overlooking the role of racial subordination across borders. See Koh, *Othering Across Borders*, *supra* note 19, at 164.

²⁹ See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1797 (2020); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1466 (2016); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1203 (2015); Alice Ristroph,

wave of scholarship that has explored the “long arm” of U.S. criminal justice, wherein the United States engages in foreign affairs prosecutions, or domestic criminal cases with some nexus to a foreign country.³⁰ Consider the indictment and/or prosecution of Sinaloa drug cartel leaders,³¹ FIFA officials in Switzerland,³² Huawei CFO Meng Wanzhou from China,³³ and Venezuelan President Nicolás Maduro Moros in recent years.³⁴ Such extraterritorial law enforcement constitutes a foreign policy modality, alongside more traditional foreign policy tools like diplomacy, military force, and sanctions.³⁵ Scholarship on those topics overlaps with prior academic commentary on post-9/11 changes to American law, including criminal law.³⁶ Finally, this Article brings relations with transnational and institutional criminal justice mechanisms into an analysis of intra-executive action. Other scholars have explored the international court

Farewell to the Felony, 53 HARV. C.R.-C.L. L. REV. 563, 616-17 (2018); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 860 (2021).

³⁰ See, e.g., sources cited *supra* note 1 (listing examples of recent scholarship examining intersection of criminal law and U.S. foreign policy); Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239, 242, 246 (2019) (describing how United States launched new wave of extraterritorial global bank prosecutions between 2008 and 2016).

³¹ Steven Arrigg Koh, *A Modern Narcos? A Guide to the “El Mayo” Sinaloa Cartel Surrender*, JUST SEC. (Sept. 17, 2024), <https://www.justsecurity.org/98780/el-mayo-surrender-cartels/> [<https://perma.cc/5Y8C-JMYA>].

³² Tariq Panja, *Former FIFA Officials Face Fraud Charges Over Secret Payment*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/sports/soccer/fifa-blatter-platini-fraud-charges.html>.

³³ Tracy Sherlock & Dan Bilefsky, *Extradition of Huawei Executive Clears a Major Legal Hurdle in Canada*, N.Y. TIMES, <https://www.nytimes.com/2020/05/27/world/canada/huawei-extradition-meng-wanzhou.html> (last updated Sept. 25, 2021).

³⁴ Julie Turkewitz, *Biden Raises Bounty for Nicolás Maduro to \$25 Million*, N.Y. TIMES (Jan. 10, 2025), <https://www.nytimes.com/2025/01/10/world/americas/biden-bounty-nicolas-maduro.html>.

³⁵ Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 739 (2021) [hereinafter Koh, *Foreign Relations*]. Previous scholarship has recognized the existence of a U.S. extraterritorial law enforcement policy, namely the use of criminal prosecution as a foreign policy modality. See *id.* at 740 & n.12. While this captures how the White House and DOJ, especially, engage in foreign affairs prosecutions, subsequent research and the example of the Russia-Ukraine War have clarified how U.S. global criminal justice policy is broader, cutting across domestic, transnational, and international criminal legal systems. In other words, such scholarship emphasizes criminalization over cooperation and neglects creation. Furthermore, scholars have recently argued that U.S.-China relations are triggering changes to American law, mirroring the Cold War dynamic and leading to the criminalization of China. See, e.g., Mark Jia, *American Law in the New Global Conflict*, 99 N.Y.U. L. REV. 636, 650-53 (2024).

³⁶ See generally Erwin Chemerinsky, *Civil Liberties and the War Terror: Seven Years After 9/11 History Repeating: Due Process, Torture and Privacy During the War on Terror*, 62 SMU L. REV. 3 (2009); Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004); Shirin Sinnar, Note, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

system, particularly the ICC's role in global law enforcement³⁷ and the history of the international criminal tribunal system extending back to Nuremberg or earlier.³⁸ Each camp overlooks the other. Domestic legal scholars often assume that international courts are wholly disconnected from American law and policy—floating “out there” and thus the province of distinct scholarly discussion—while calling for justice for victims, especially those suffering from trauma. Meanwhile, international scholars rarely focus on the interrelationship between the ICC and U.S. state agencies like DOJ, which similarly engages in prosecutions of global import.³⁹ All such scholars miss a unified phenomenon: a process of contested criminalization implicating U.S. criminal law in foreign relations.

I. HYPOTHETICAL: THE 2025 TRUMP WHITE HOUSE

Contested criminalization is the process by which Congress, the State Department, DOJ, and DOD criminalize in geopolitical crises by pulling three levers—codification, cooperation, and creation. To introduce and begin understanding this process, this Part will explore the following hypothetical:

Imagine you are a White House policymaker in January 2025. Wars are ending in Ukraine and the Middle East. Widespread reports of horrific war crimes are being documented—civilians targeted, hostages tortured, sexual violence perpetrated on and off the battlefield. Victims' voices are rapidly emerging as they flee the country. President Trump asks you what the U.S. government policy should be. You are mindful of victims' voices and want to push for a meaningful intervention in President Trump's “America First” foreign policy. What do you say?⁴⁰

³⁷ See, e.g., Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618, 634-35 (2003); Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 364 (2008); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 511, 550 (2003); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 54-55 (2008).

³⁸ See, e.g., CASSESE'S INTERNATIONAL CRIMINAL LAW 267-70 (A. Cassese et al. eds., 3d ed. 2013); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 629 (2008).

³⁹ See TODD BUCHWALD & BETH VAN SCHAACK, AM. SOC'Y OF INT'L L., ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC 69 (2021), <https://www.asil-us-icc-task-force.org/uploads/2021-ASIL-Task-Force-Report-on-US-ICC-Engagement-FINAL.pdf> [<https://perma.cc/5HX2-56L5>].

⁴⁰ Of course, in reality, the Trump Administration is hostile to many axiomatic principles of victim-oriented justice, criminal law, and foreign policy. See Koh, *Othring Across Borders*, *supra* note 19, at 167-70, 172-73. But this thought experiment in fact underscores the importance of the exercise; in an era wherein the Trump Administration is disrupting domestic and global norms, what *should* it be doing with regard to criminal justice and foreign relations? The very problems in the Trump White House emphasize the need for such analysis.

For starters, you are unclear on what to call such a policy field. You are dealing with criminal law, to be sure, but not with a mere prosecution in a U.S. court for a local crime. Instead, you are considering *foreign* perpetrators in a *foreign* territory—military violence occurring halfway around the world. Do U.S. prosecutors and courts even have a role to play in such cases? Unlike other foreign policy tools such as diplomacy or military force, DOJ autonomy largely eludes direct White House control.⁴¹ Those policy tools, by contrast, fall to the State Department and DOD.⁴² This is thus not solely a question of “prosecutorial policy” or “foreign policy”—it is some sort of hybrid.

Preliminary nomenclature aside, you realize three central legal questions defy simple explanation. First, a *positive legal question*: What U.S. criminal law and policy options strengthen criminal accountability for the horrific crimes occurring abroad? Potential options cut across domestic, transnational, and international legal systems. You could propose legislation to amend U.S. federal law, facilitating domestic prosecution of war criminals in U.S. courts. You could strengthen cross-border law enforcement relationships with Ukraine and other countries to promote the sharing of evidence and/or extradition of fugitives. Or you could foster U.S. cooperation with international criminal courts, including the ICC or a new hybrid international war crimes tribunal within Ukraine, which could require further amendment to federal law and/or U.N. Security Council authorization.

Second, a *process question* is similarly elusive: How do you achieve such changes to law and policy? If this was a military operation, you could simply leverage such force through DOD.⁴³ But this seems much more politically and administratively complex. Changes to federal law—particularly criminal law—require political branch consensus, surely no easy task in a fractured political climate.⁴⁴ And even when Congress does reach consensus, executive branch agency obstinacy can render congressional action ineffective. The State Department has an Ambassador-at-Large for Global Criminal Justice, a post most recently held by Professor Beth Van Schaack.⁴⁵ But how might her

⁴¹ See Koh, *Foreign Relations*, *supra* note 35, at 772.

⁴² See *About the U.S. Department of State*, U.S. DEP’T OF STATE, <https://www.state.gov/about/> [<https://perma.cc/3NMM-94PP>] (last visited Oct. 8, 2025); *About*, U.S. DEP’T. OF DEF., <https://www.defense.gov/about/> [<https://perma.cc/5BF9-FPS8>] (last visited Oct. 8, 2025).

⁴³ This would be subject, of course, to War Powers Act limitations. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2023)). See generally Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 977-80 (2016) (discussing limits on military intervention imposed by War Powers Resolution in light of U.S. engagement in Kosovo).

⁴⁴ See Jens D. Ohlin, *Fundamental Principles of Criminal Law*, in CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 94 (3d ed. 2021); Jack Healy, J. David Goodman, Jenna Russell & Alan Blinder, *How Do Americans Feel About Politics? ‘Disgust Isn’t a Strong Enough Word,’* N.Y. TIMES (Oct. 6, 2023), <https://www.nytimes.com/2023/10/06/us/kevin-mccarthy-congress-matt-gaetz-speaker-biden-trump-voters.html>.

⁴⁵ *Beth Van Schaack*, U.S. DEP’T. OF STATE, <https://2021-2025.state.gov/biographies/beth-van-schaack/> [<https://perma.cc/VH6X-P7PJ>] (last visited Oct. 8, 2025).

successor foster the necessary law enforcement relationships abroad given that the State Department is the U.S. government's foreign affairs agency, yet DOJ wields investigative and prosecutorial authority? And finally, how is ICC cooperation even possible given the American Servicemembers' Protection Act of 2002 ("ASPA") which limits such cooperation?⁴⁶

Third and finally, *normative questions* haunt you: To what degree should the United States even use criminal law to resist Russia or promote accountability in Israel, Lebanon, or Syria? On one hand, you worry about "impunity gaps," wherein perpetrators of sexual violence, human trafficking, and extermination in war face no consequences, denying justice for victims. How should such policies grapple with the trauma of victims? For such perpetrators, your impulse may be that criminal conduct deserves a criminal justice response—traditional notions of retribution, deterrence, and incapacitation apply. On the other hand, this might set a dangerous precedent. Just as "hard cases make bad law," might the Russia-Ukraine War or Middle Eastern wars undesirably expand criminal sanction beyond what is desirable? You are particularly mindful that both the Biden and Trump Administrations have acknowledged the pathologies of mass incarceration in domestic criminal law.⁴⁷

At the dawn of the second Trump Administration, such questions underscore the consequence and ambiguity of U.S. criminal law in foreign relations. From an orthodox criminal law perspective, the criminal sanction is among the most coercive and grave that the U.S. government can deploy. But when geopolitical crises emerge, prosecution exists alongside measures like economic sanctions and, at the extreme, military intervention.⁴⁸ Just as the United States provided

⁴⁶ 22 U.S.C. §§ 7421-7433; *Id.* § 7433 ("Assistance made available pursuant to subsection (a) of this section may be made available notwithstanding section 7401 of this title, except that none of the funds made available pursuant to this subsection may be made available for the purpose of supporting investigations or prosecutions of U.S. servicemembers or other covered United States persons or covered allied persons as such terms are defined in section 7432 of this title.").

⁴⁷ See Justin Jouvenal, *Biden Helped Usher in an Era of Mass Incarceration. Can He Now End It?*, WASH. POST (Jan. 11, 2021), <https://www.washingtonpost.com/politics/2021/01/11/biden-mass-incarceration/> (quoting Joe Biden's campaign trail speech: "Let us vow to make this, at last, an era of action to reverse systemic racism with long-overdue and concrete changes"); *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/4E62-B944>] (last visited Oct. 8, 2025).

⁴⁸ See Koh, *Foreign Relations*, *supra* note 35, at 739.

military equipment,⁴⁹ used sanctions,⁵⁰ and marshaled NATO,⁵¹ the United States leveraged criminal justice as a form of U.S. statecraft to resist Russia. It is thus unclear how and when the U.S. government decides to engage prosecutorial power. Furthermore, scholars often only assess one aspect of this policy—prosecution in U.S. courts, cross-border cooperation, or engagement with international tribunals—instead of considering each of these aspects as alternative policy levers the federal government may pull.⁵²

What is the current process by which U.S. criminal law advances foreign relations during geopolitical crises? What are the key principles by which we evaluate such process? How can the U.S. government ensure coherence and consistency in its prosecutorial process, honoring justice for victims without becoming unduly punitive or carceral? Parts II through IV below will address each of these questions, describing the contingency of U.S. criminal law in foreign relations, and then considering its ideal function in U.S. foreign policy as it responds to calls for action and centers victims.

II. CONTESTED CRIMINALIZATION

This Part will explain the process of contested criminalization. According to this process, the U.S. government *criminalizes* using one or more of three foreign policy levers: codification, cooperation, and creation. But such criminalization in U.S. foreign relations is *contested*, evolving contingently because of longstanding State Department, DOJ, and DOD equities mixing with congressional imperatives. In contrast to military operations (DOD) or diplomatic negotiations (State Department), U.S. criminal law in foreign relations does not belong exclusively to any one agency. Thus, the push-pull of policymaking unfolds in an ad hoc manner when geopolitical crises emerge. As a result, U.S. global criminal justice policy—the collective U.S. laws and policies that govern the administration of and relationship to the domestic (i.e., U.S. courts), transnational (i.e., cross-border relationships), and international

⁴⁹ Janet Yellen, U.S. Sec. of the Treasury, Treasury Secretary Yellen Delivers Remarks on U.S. Support for Ukraine (Feb. 27, 2023), <https://ua.usembassy.gov/treasury-secretary-yellen-delivers-remarks-on-u-s-support-for-ukraine/> [<https://perma.cc/K6D9-4U34>] (noting “[m]uch of the public focus has been on . . . security support . . . for Ukraine’s brave military”).

⁵⁰ Richard Oscar, *The War in Ukraine: A New Paradigm of Sanctions Practice*, LAWFARE (Aug. 1, 2022), <https://www.lawfaremedia.org/article/war-ukraine-new-paradigm-sanctions-practice> [<https://perma.cc/J29Q-XXHL>].

⁵¹ Daniel Fried, *At the NATO Summit, Do the Right Thing for Ukraine’s — and Democracy’s — Future*, JUST SEC. (July 7, 2023), <https://www.justsecurity.org/87172/at-the-nato-summit-do-the-right-thing-for-ukraines-and-democracys-future/> [<https://perma.cc/7AZ2-BWDN>].

⁵² See, e.g., Franklin D. Rosenblatt, *The Relationship Between International Criminal Tribunals and National Militaries*, 55 CAL. W. INT’L L.J. 67, 69-70 (2024) (highlighting distinct mechanisms of tribunals and militaries).

(i.e., war crimes tribunals) criminal legal systems—is more varied and flexible than scholars generally perceive.

A. *The Political Branches: Between Criminal and Foreign Relations Law*

The political branches develop U.S. criminal law in foreign relations, although the executive branch's role in this process is stronger than in traditional criminal law. To understand why, consider how criminal law and foreign relations law differ. Criminal law arises from political branch consensus, wherein legislators and high-level executive actors—often, governors or the U.S. president—reach political agreement on matters of domestic import. By contrast, in foreign relations law, the Supreme Court has, in the maximalist reading, recognized “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,” requiring no congressional action as a basis of its exercise.⁵³ Foreign relations law scholars emphasize that the president and executive branch almost always win in foreign affairs—Congress often acquiesces to the executive branch due to a combination of “legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional absence of political will,” while the judiciary often defers to the other branches.⁵⁴ Thus, as new presidential administrations take power, the interagency process becomes highly consequential, with the collective decision-making of lawyers and policymakers in the State Department, DOJ, and DOD all contributing to the executive branch's views under the purview of the National Security Council.⁵⁵

The same dynamics emerge in the development of U.S. criminal law in foreign relations: When geopolitical crises emerge, ad hoc policies are made at the intersection of the executive agencies' mandates, which are superficially

⁵³ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). This is seen as the maximalist judicial statement on foreign relations authority, and scholars have debated the Constitutional textual commitment over such authority. Compare HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 67 (1990) [hereinafter KOH, *NATIONAL SECURITY*], and H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 534 (1999) (“The Constitution contains no provision expressly granting either political branch a general power to formulate or execute foreign policy, or provide for national security, or indeed to make war.”), with Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 233-34 (2001) (challenging common scholarly account that Constitution provides little guidance about nature and scope of foreign affairs power).

⁵⁴ Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297, 1316-17 (1988).

⁵⁵ Many of these issues came to a head publicly during the Obama Administration in intra-agency disputes regarding national security policies such as Guantanamo Bay detention and targeted killings. See generally CHARLIE SAVAGE, *POWER WARS: THE RELENTLESS RISE OF PRESIDENTIAL AUTHORITY AND SECRECY* (rev. ed. 2017); DANIEL KLIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012).

distinct but overlap in this policy zone. Additionally, Congress may then play a critical role, particularly in passing new legislation.

First, DOJ's central equity is *enforcement*, particularly ensuring legal accountability for federal crimes.⁵⁶ Because it enjoys relative autonomy within the executive branch, DOJ often acts without input from, and in apparent indifference to, the interests of other U.S. agencies.⁵⁷ As noted above, DOJ may bring federal charges against individuals engaged in domestic or international crimes, including war crimes or foreign corrupt practices.⁵⁸ It may extradite U.S. nationals to foreign countries, provided that such countries have demonstrated probable cause that a U.S. national committed a crime in their jurisdiction and the country otherwise satisfies certain procedural safeguards.⁵⁹ And sometimes global crises trigger a change in prosecutorial priorities within the existing statutory structure.⁶⁰ Take, for example, the U.S. practice of extraditing and prosecuting drug traffickers from Colombia as part of a broader engagement to assist Colombia in its battle against narcotics traffickers.⁶¹ Or, for example, the cooperation between the United States, Brazil, and Switzerland that led to the guilty pleas of Odebrecht, a global construction conglomerate, and Braskem S.A., a Brazilian petrochemical company, which agreed to pay a combined \$3.5 billion in penalties due to their role in a global bribery scheme of public

⁵⁶ See U.S. DEP'T. OF JUST., <https://www.justice.gov> [<https://perma.cc/F8HR-6FR8>] (last visited Oct. 8, 2025) ("The mission of the Department of Justice is to uphold the rule of law, to keep our country safe, and to protect civil rights.").

⁵⁷ See Richardson, *supra* note 1, at 42 (noting DOJ indictment, arrest, and subsequent dismissal of former Mexican Defense Minister took place while other agencies were kept in dark and maintained ordinary interactions with minister).

⁵⁸ See KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 41-46 (2019); Koh, *Foreign Affairs*, *supra* note 1, at 365-83; David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L HUM. RTS. 30, 33-36 (2009).

⁵⁹ See Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 258-61 (2020) (describing criminal procedural standard that U.S. government has established in its bilateral extradition relationships).

⁶⁰ See generally, Mailyn Fidler, *Foreign Affairs Prosecutions and Cybercrime*, B.U. L. REV. 1857 (2025) (reviewing shifts in prosecutorial priorities in cybercrime prosecutions).

⁶¹ See U.S. DEP'T OF STATE, REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000 AS ENACTED IN THE MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001, PUBLIC LAW 106-246 RELATING TO PLAN COLUMBIA (Jan. 17, 2001), <https://2009-2017.state.gov/s/1/16162.htm> [<https://perma.cc/PM42-LYQ3>]; SECOND REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000 AS ENACTED IN THE MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001, PUBLIC LAW 106-246 RELATING TO PLAN COLUMBIA (July 13, 2001), <https://2009-2017.state.gov/s/1/16163.htm> [<https://perma.cc/KE9G-S3UL>]; THIRD REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000 AS ENACTED IN THE MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2001, PUBLIC LAW 106-246 RELATING TO PLAN COLUMBIA, <https://2009-2017.state.gov/s/1/16164.htm> [<https://perma.cc/E6LV-33WP>] (last visited Oct. 8, 2025).

officials.⁶² This corruption scandal and investigation are the largest of their kind in the history of Latin America, implicating, *inter alia*, a Colombian senator, a former vice president of Ecuador, Venezuelan President Nicolás Maduro, former Brazilian President Luiz Inácio Lula da Silva, and three former Peruvian presidents, including one who was forced to resign in March 2018.⁶³

Second, the State Department's central equity is *foreign relations*: As the foreign affairs agency of the U.S. government, it manages bilateral and multilateral relationships with foreign states and engagement with regional and global institutions such as the United Nations.⁶⁴ Such authority is relatively broad, stemming from the robust foreign affairs authority that the president enjoys under Article II of the Constitution, though constrained in various ways by federal legislation, including on appropriations and oversight.⁶⁵

Regarding U.S. criminal law in foreign relations, the State Department has long been the most willing American executive agency to engage with the ICC and has long focused on coalition building and multi-state agreements. For example, the State Department supported domestic efforts to bolster the ICC investigation in Ukraine⁶⁶ and worked to suspend Russia from the U.N. Human Rights Council.⁶⁷ In another instance, the State Department provided support to the ICC's Darfur Investigations by offering \$5 million rewards for ICC fugitives through their Rewards for Justice Program.⁶⁸ Therefore, the State Department

⁶² Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve> [<https://perma.cc/68BX-8ZTS>].

⁶³ See Anthony Faiola, *The Corruption Scandal Started in Brazil. Now It's Wreaking Havoc in Peru.*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/world/the-americas/the-corruption-scandal-started-in-brazil-now-its-wreaking-havoc-in-peru/2018/01/23/0f9bc4ca-fad2-11e7-9b5d-bbf0da31214d_story.html?utm_term=.f99c77953f0c; Simeon Tegel, *The Corruption Scandal That's Ensnared Not One, but Three Peruvian Presidents*, WASH. POST (Mar. 23, 2018), https://www.washingtonpost.com/world/the-americas/the-corruption-scandal-thats-ensnared-not-one-but-three-peruvian-presidents/2018/03/22/7d15a75a-2c50-11e8-8dc9-3b51e028b845_story.html?utm_term=.d1687b01b189.

⁶⁴ U.S. DEP'T OF STATE, *supra* note 42 ("We now work to fight terrorism, protect U.S. interests abroad, and implement foreign policy initiatives while building a more free, prosperous, and secure world.").

⁶⁵ U.S. DEP'T OF STATE, AUTHORITY, RESPONSIBILITY, AND ORGANIZATION (2003), <https://fam.state.gov/fam/01fam/01fam0010.html> [<https://perma.cc/CXW4-A8B2>].

⁶⁶ See Dan De Luce & Abigail Williams, *Pentagon is Blocking U.S. Cooperation with International Investigations of War Crimes in Ukraine*, NBC NEWS (May 31, 2023), <https://www.nbcnews.com/politics/national-security/defense-holding-us-cooperation-war-crimes-probe-ukraine-rcna87168> [<https://perma.cc/QWH4-8FS5>].

⁶⁷ See Press Release, Anthony J. Blinken, Sec'y of State, U.S. Dep't of State, Russia's Suspension from the UN Human Rights Council (Apr. 7, 2022), <https://2021-2025.state.gov/russias-suspension-from-the-un-human-rights-council/> [<https://perma.cc/654T-9F4K>].

⁶⁸ See Marlise Simons, *U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned*, N.Y. TIMES (Apr. 2, 2013), <https://www.nytimes.com/2013/04/03/world/eurpe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html>.

may see information sharing with the ICC as an opportunity to strengthen the nation's relationship with the court and build a basis for further collaboration in the future. At the same time, the State Department's prioritization of foreign relations concerns has influenced and impeded efforts to achieve legal accountability.

Third, DOD's central equity is *security*: protecting U.S. territory and American servicemembers from foreign prosecution.⁶⁹ DOD has historically prosecuted U.S. servicemembers through domestic court-martials, partly due to concerns about foreign jurisdictions' documented efforts to fabricate war crimes against U.S. personnel.⁷⁰ To this end, DOD and U.S. law do not recognize international courts' authority over U.S. servicemembers, although DOD recognizes international precedent may be persuasive to domestic and military courts.⁷¹ But DOD has long been skeptical of recognizing the ICC's ability to prosecute non-parties and believes this precedent may be used to prosecute U.S. personnel.⁷² Its longstanding position was likely solidified by the ICC's investigation of torture claims against American personnel during the war on terror, which has now been dropped.⁷³ Thus, regarding the ICC's investigation of war crimes in Ukraine, Gaza, or elsewhere, DOD opposes any precedent that may be used against U.S. servicemembers in the future. Further, DOD may see DOJ's focus on bilateral accountability for war crimes and the State Department's emphasis on multinational treaties as potential threats to its ability to investigate and prosecute its soldiers in military courts.

All such agency action exhibits a duality: While presidential administration priorities shift and agencies vary in their relative authority, agency equities remain consistent. Sometimes, a "top-down" mandate from the White House is refracted through this process. In other instances, interagency national security law and policy processes persist across administrations.⁷⁴ In the same way, at the dawn of a new Trump Administration, well-established agency equities will not dissipate. For example, regarding the issue of ICC cooperation, the DOD will feel more emboldened in its view and the State Department will have a

⁶⁹ U.S. DEP'T. OF DEF., *supra* note 42 ("Our mission is to provide the military forces needed to deter war and ensure our nation's security.").

⁷⁰ GEN. COUNS. OF THE DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 1136 n.34 (updated July 2023).

⁷¹ *Id.* at 1139.

⁷² See Letter from Twenty-Three Members of Congress to Joseph R. Biden, Jr., President of the U.S. 1-2 (June 6, 2023) (on file with the Office of Representative Jason Crow), <https://crow.house.gov/sites/evo-subsites/crow.house.gov/files/evo-media-document/20230606-final-letter-to-president-on-information-sharing-with-the-international-criminal-court-icc.pdf> [<https://perma.cc/Z4ZP-XZVE>] (noting DOD's "historic concerns regarding our non-party status to the ICC and setting precedent to change our status").

⁷³ See Charlie Savage, *The U.S. Has Long Been Wary of the I.C.C., but Relations Have Been Thawing*, N.Y. TIMES (Mar. 17, 2023) <https://www.nytimes.com/2023/03/17/world/europe/icc-us-relations.html>.

⁷⁴ See, e.g., SAVAGE, *supra* note 55 (discussing continuity of national security policies from Bush to Obama Administrations).

decreased voice. However, the longstanding DOD equity in security and longstanding State Department equity in foreign relations endure. This dynamic will persist even as the Trump Administration removes senior career officials from their posts: new political appointees will quickly begin to advocate for the equities of their respective agencies.⁷⁵

Fourth and finally, Congress is integral in articulating criminal law in foreign relations. As Dan Richman and Bill Stuntz have persuasively argued, no principled line animates substantive criminalization.⁷⁶ Instead, our current political moment is one wherein legislators have publicly positioned themselves to voters as “tough on crime,”⁷⁷ and judicial articulation of greater criminal procedural protection has triggered an expansive criminal legislative response.⁷⁸ Thus, in many circumstances, legislators are reactive to events as they unfold in real time. Just as legislators pass new laws in response to events like the attacks on September 11, 2001, they also do so when new geopolitical crises emerge. What complicates this dynamic beyond the traditional picture painted by scholars like Richman and Stuntz, however, is that the geopolitical predilections of individual legislators emerge in this space. For example, in the wake of Russia’s invasion of Ukraine, relative consensus emerged of the need to hold Russia accountable for war crimes—a consensus that has increasingly frayed as the Republicans have lost their appetite for continued resistance against Russia.⁷⁹ In the wake of the October 7 attacks, the vast majority of legislators expressed support for Israel—though such consensus has also frayed as the war drags on.⁸⁰ Finally, the Syrian civil war is unsettled for U.S. legislators, who

⁷⁵ See Perry Stein & Ellen Nakashima, *Justice Dept. Removes Senior Career Officials from Key Positions*, WASH. POST (Jan. 21, 2025), <https://www.washingtonpost.com/national-security/2025/01/21/justice-trump-removes-senior-staffers-national-security-criminal/>.

⁷⁶ See Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 69-71 (Michael Klarman, David Skeel & Carol Steiker eds., 2012) (recounting growth of criminal law as a form of regulation since founding of Republic).

⁷⁷ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) [hereinafter Stuntz, *Pathological Politics*] (describing political economy of overcriminalization); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1391 (2018) (surveying political and legislative barriers to criminal justice reform).

⁷⁸ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997).

⁷⁹ Compare David J. Scheffer, Irwin Cotler, Hans Corell & David Crane, *Russia Must Be Held Accountable for Alleged Criminal Aggression in Ukraine: Two Paths to Justice*, COUNCIL ON FOREIGN RELS. (Nov. 28, 2023, 2:24 PM), <https://www.cfr.org/article/russia-must-be-held-accountable-alleged-criminal-aggression-ukraine-two-paths-justice> [https://perma.cc/QWL3-MLAG], with Bret Stephens, *The Isolationist G.O.P., Again*, N.Y. TIMES (Feb. 13, 2024), <https://www.nytimes.com/2024/02/13/opinion/gop-senate-ukraine-aid.html> (“From Wisconsin’s Ron Johnson, we have the claim that although Vladimir Putin is ‘an evil war criminal,’ Russia is certain to win the war, so funding Kyiv prolongs Ukrainian suffering and, by implication, wastes American money.”).

⁸⁰ Compare Morgan Rimmer, *Senate Passes Bipartisan Resolution Affirming Support for Israel*, CNN (Oct. 19, 2023, 9:21 PM), <https://www.cnn.com/2023/10/19/politics/senate-pass>

may feel a less visceral stake in the outcome and thus are decidedly less willing to facilitate prosecution.⁸¹

B. *Three Criminalization Levers*

Let us now consider the process of contested criminalization. Specifically, we will consider how the political branches may pull any of three levers: codification, cooperation, and creation. Using Russia-Ukraine as a case example reveals codification as less contested, cooperation as highly contested, and creation as a compromise position.

1. Codification

Codification is amendment of the U.S. Code, substantively criminalizing individual conduct arising in geopolitical conflict.⁸² In recent years, the most salient codification involved amendment to the federal war crimes statute.⁸³

Notably, such amendment was not highly contested within the political branches. In 2022, a bipartisan group of U.S. senators led the call to amend

es-israel-bipartisan-resolution/ index.html [https://perma.cc/RL4V-J7Q3], with Ross Barkan, *How the Israeli-Palestinian Conflict Drove a Wedge into the Democratic Party*, N.Y. TIMES (Feb. 13, 2024), https://www.nytimes.com/2024/02/07/magazine/israel-october-7-democrats.html.

⁸¹ See *Conflict in Syria*, COUNCIL ON FOREIGN RELS. (May 14, 2025), https://www.cfr.org/global-conflict-tracker/conflict/conflict-syria [https://perma.cc/HYB8-ZZSV].

⁸² Codification also occurs in foreign states. See, e.g., Jonathan Tybjerg, *The Danish Government Seeks to Criminalize War Crimes in Danish Law*, DANISH INST. FOR HUM. RTS. (Nov. 5, 2024), https://www.humanrights.dk/news/ danish-government-seeks-criminalize-war-crimes-danish-law [https://perma.cc/59U7-V4AM]; Krassen Nikolov, *Bulgaria to Launch Investigation Against Kremlin Regime's 'Aggression'*, EURACTIV (Feb. 8, 2024, 6:48 AM) https://www.euractiv.com/ section/ politics/ news/ bulgaria -to-launch -investigation-against -kremlin-regimes-aggression/ [https://perma.cc/GP57-M9UP] (“Bulgarian authorities are preparing amendments to the country’s criminal code to allow prosecution of the Kremlin regime for the war of aggression against Ukraine”); Gissou Nia, *Congress Just Passed a Big Change to War Crimes Law. Here’s What It Means for Ukraine and Beyond*, ATL. COUNCIL (Dec. 23, 2022), https://www.atlanticcouncil.org/blogs/new-atlanticist/congress-just-passed-a-big-change-to-war-crimes-law-heres-what-it-means-for-ukraine-and-beyond/ [https://perma.cc/L6AJ-9PSZ] (“US prosecutors can bring a prosecution for war crimes whenever the alleged perpetrator is on US soil, irrespective of where the crimes were committed or the nationality of the victims or alleged perpetrators.”). Future research should investigate this phenomenon.

⁸³ Codification has also occurred at the state level, albeit to a lesser extent. In 2015, California Governor Jerry Brown signed AB 15 into law, which extended statutory limitations on certain causes of action if they amounted to human rights violations under international law. The bill also defined crimes against humanity, which is still without definition under federal law, to correspond to the definition found in Article 7 of the Rome Statute. See Beth Van Schaack, *New California Human Rights Legislation*, JUST SEC. (Oct. 6, 2015), https://www.justsecurity.org/ 26619/ california-human-rights-legislation/ [https://perma.cc/K9BN-89NE].

federal legislation to prosecute war criminals.⁸⁴ Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA), along with Senate Whip Dick Durbin (D-IL), Representative David Cicilline (D-RI), and Representative Victoria Spartz (R-IN) stated publicly that they introduced the Justice for Victims of War Crimes Act to “enable prosecution of war criminals under jurisdiction of the U.S. courts, regardless of the location or targets of their alleged atrocities.”⁸⁵ Senator David N. Cicilline (D-RI) publicly stressed the importance of the U.S. role in prosecuting war criminals, saying, “[w]e need to pass the Justice for Victims of War Crimes Act so that when this war ends, none of these war criminals will evade justice for the unconscionable acts they have committed in Ukraine.”⁸⁶ This legislative process resulted in passage into law of the Justice for Victims of War Crimes Act on January 5, 2023.⁸⁷

The Act has three critical components. First, the Act broadens 18 U.S.C. § 2441 to provide “present in” jurisdiction for war crimes perpetrators, encompassing prosecution of individuals present in U.S. territory who perpetrated war crimes, regardless of whether the perpetrator or victim is an American national.⁸⁸ Under the prior statutory language, the perpetrator or victim had to be American for DOJ to bring a war crimes prosecution, thus restricting who could be prosecuted and substantially limiting U.S. compliance with the Geneva Conventions.⁸⁹ This limitation, as outlined by federal prosecutor Eli Rosenbaum in Congressional testimony in 2022, “mean[t] that if a war criminal from the current conflict in Ukraine were . . . to come to the United States today [and was] subsequently identified, [the prior] war crimes statute would not apply, thus potentially allowing that war criminal and others to walk the streets of our country without fear of prosecution.”⁹⁰ Ambassador Van Schaack described the prior version of the war crimes statute as essentially dead letter.⁹¹

⁸⁴ Press Release, Sen. Chuck Grassley, Justice for Victims of War Crimes Act Sponsors React to UN Findings of War Crimes in Ukraine (Sept. 29, 2022), <https://www.grassley.senate.gov/news/news-releases/justice-for-victims-of-war-crimes-act-sponsors-react-to-un-findings-of-war-crimes-in-ukraine> [<https://perma.cc/77Y9-TB2Y>].

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Justice for Victims of War Crimes Act, Pub. L. No. 117-351, 136 Stat. 6265 (2023).

⁸⁸ *Id.* § 2.

⁸⁹ *From Nuremberg to Ukraine: Accountability for War Crimes and Crimes Against Humanity: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 5 (2022) (statement of Eli M. Rosenbaum, Dir. of Hum. Rts. Enf’t Strategy & Pol’y, Hum. Rts. & Special Prosecutions Section & Couns. for War Crimes Accountability, U.S. Dep’t of Just.), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Rosenbaum%20-%202022-09-28.pdf> [<https://perma.cc/VU6E-6CS3>].

⁹⁰ *Id.*

⁹¹ Ambassador Beth Van Schaack, Panelist at International Law Weekend: Beyond International Law (Oct. 21, 2023).

Second, the Act removes the statute of limitations for war crimes. Whereas the previous statute of limitations was five years unless it was a capital case, the new provision provides that an “indictment may be found or an information may be instituted at any time without limitation.”⁹² This opens the door to U.S. prosecution of war criminals on a much longer future time horizon.

Third, the Act includes a certification requirement in 18 U.S.C. § 2441(f), requiring the Attorney General, the Deputy Attorney General, or an Assistant Attorney General to provide written certification before a war crimes prosecution can proceed.⁹³ The certification requirement is designed to mitigate foreign policy entanglements arising from what I have called U.S. *foreign affairs prosecutions*.⁹⁴

The Act exemplifies the first lever of U.S. criminal law in foreign relations: codification. All criminal prosecutions require explicit statutory authority, which the political branches define.⁹⁵ A written statute requirement governs the bounds of criminal legal accountability as part of a broader principle of legality.⁹⁶

Why is codification less contested? Our recent political history is one wherein legislators have publicly positioned themselves to voters as “tough on crime,”⁹⁷ and judicial articulation of greater criminal procedural protections has triggered an expansive criminal legislative response.⁹⁸ In such a scenario, political incentives generally trend in one direction: toward higher penalties and more criminalization, what Daniel Richman has called “overcriminalization for lack of better options.”⁹⁹ The same applies to geopolitical crises, which may incentivize legislators to criminalize. From a global perspective, such changes occur when legislators want to be seen as “doing something” on an issue of global concern. For example, the United States amended the Mann Act to criminalize those traveling or conspiring to travel abroad intending to engage in sexual activity with a minor, partly because of an awareness of the effects of

⁹² 18 U.S.C. § 2441(e).

⁹³ § 2441(f) (“No prosecution for [a war crime] . . . shall be undertaken by the United States except on written certification of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, which function of approving prosecutions may not be delegated, that a prosecution by the United States is in the public interest and necessary to secure substantial justice.”).

⁹⁴ See generally Koh, *Foreign Affairs*, *supra* note 1. See also Koh, *Foreign Relations*, *supra* note 35, at 773.

⁹⁵ Ohlin, *supra* note 44, at 94 (“Every state in the United States now has a written penal statute, and appellate courts in many states enforce a prohibition against prosecuting an old common law crime that was not carried over and codified in statute.”).

⁹⁶ See *id.*

⁹⁷ Stuntz, *Pathological Politics*, *supra* note 77 (describing political economy of overcriminalization); see also Richman, *supra* note 76; Darryl Brown, Yick Wo and the *Constitutional Regulation of Criminal Law*, 2008 U. ILL. L. REV. 1405, 1407 (2008).

⁹⁸ Stuntz, *supra* note 78 (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs.”).

⁹⁹ Richman, *supra* note 76.

such travel on Thailand.¹⁰⁰ The Foreign Corrupt Practices Act was also passed into law in 1977 to prevent bribery of foreign government officials for business purposes.¹⁰¹ In the wake of September 11, 2001, Congress passed the USA PATRIOT Act, which included sweeping terrorism-related changes to substantive criminal law, criminal procedure, and sentencing.¹⁰²

Such codification then fits into the broader federal laws and prosecutorial policies governing the substantive elements and jurisdictional reach of federal crimes with global dimensions. Title 18 of the U.S. Code (Crimes and Criminal Procedure) includes provisions criminalizing genocide,¹⁰³ war crimes,¹⁰⁴ and torture,¹⁰⁵ all of which have been incorporated into U.S. law through crime control treaties that the United States heavily participated in establishing.¹⁰⁶ All also have extraterritorial reach, thus allowing federal prosecutors in the United States to bring prosecutions for such offenses occurring abroad.¹⁰⁷

¹⁰⁰ See generally Vicki F. Li, Comment, *Child Sex Tourism to Thailand: The Role of the United States as a Consumer Country*, 4 PAC. RIM L. & POL'Y J. 505 (1995).

¹⁰¹ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

¹⁰² USA PATRIOT Act, Pub. L. No. 107-056; 115 Stat. 272 (2001); see also Howell, *supra* note 36.

¹⁰³ 18 U.S.C. §§ 1091-1093.

¹⁰⁴ § 2441.

¹⁰⁵ § 2340A.

¹⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide art. VI, *opened for signature* Dec. 9, 1948, S. EXEC. DOC. NO., 81-1 (1949), 78 U.N.T.S. 227 (entered into force Jan. 12, 1951); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 8; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), *opened for signature* Feb. 4, 1985, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984) (entered into force June 26, 1987). See generally DAVID LUBAN, JULIE R. O'SULLIVAN, DAVID P. STEWART & NEHA JAIN, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW (3d ed. 2018) (discussing how international and transnational crime shapes treaties and their implementation into U.S. federal law). The United States lacks any federal legislation criminalizing crimes against humanity, in part due to the fact that an international crimes against humanity treaty does not exist. Sean D. Murphy, *The International Law Commission's Proposal for a Convention on the Prevention and Punishment of Crimes Against Humanity*, 50 CASE W. RES. J. INT'L L. 249, 256, 259 (2018).

¹⁰⁷ 18 U.S.C. § 1091(e) (extending jurisdiction for crimes of genocide committed outside U.S. to U.S. nationals, residents, stateless individuals habitually residing in U.S. or individuals present in U.S.); 18 U.S.C. § 2441(b) (extending jurisdiction for war crimes committed outside U.S. provided victim or offender is a U.S. national, resident, soldier, or present within U.S.); 18 U.S.C. § 2340A(b) (extending jurisdiction to individuals that are U.S. nationals or are present within U.S. regardless of nationality); see also Johan D. van der Vyver, *Treatment*

Furthermore, DOJ leverages various prosecutorial law enforcement policies from one presidential administration to another. For example, as I have described previously, DOJ launched the China Initiative under Attorney General Jeff Sessions. The initiative was designed to fortify “the strategic priority of countering Chinese national security threats and reinforce[] the President’s overall national security strategy.”¹⁰⁸ The head of DOJ’s National Security Division spearheaded the group alongside various U.S. Attorneys around the country.¹⁰⁹ The multi-faceted initiative emphasized trade secret theft cases, proactive information sharing, and threat identification with individual U.S. Attorney Offices.¹¹⁰ In 2022, the Biden Administration announced that it was abandoning the policy.¹¹¹ Similarly, each agency in the Biden Administration launched its own global criminal justice policy initiatives. For example, DOJ actively pursued different policies to further criminal accountability for crimes in Ukraine. In June 2022, Attorney General Garland announced the appointment of Eli Rosenbaum as Counselor for War Crimes Accountability.¹¹² And in March 2022, Attorney General Garland also announced the inception of the KleptoCapture Task Force, which was successful in seizing superyachts and private airplanes of sanctioned Russian individuals, as well as dismantling Russian criminal networks.¹¹³

Once codification has occurred, DOJ may proceed to indict and prosecute amid geopolitical crises. For instance, in September 2024, DOJ announced it had unsealed charges of terrorism, murder conspiracy, and sanctions-evasion on six leaders of Hamas for their role in planning, supporting, and executing the terror

of International Human Rights Violations in the United States, 6 DUKE F. FOR L. & SOC. CHANGE 61, 73-82 (2014).

¹⁰⁸ U.S. DEP’T OF JUST., INFORMATION ABOUT THE DEPARTMENT OF JUSTICE’S CHINA INITIATIVE AND A COMPILATION OF CHINA-RELATED PROSECUTIONS SINCE 2018 (2020), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [<https://perma.cc/C3C2-B3U2>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Perez, *supra* note 18.

¹¹² Press Release, U.S. Dep’t. of Just., Off. of Pub. Affs., Attorney General Merrick B. Garland Visits Ukraine, Reaffirms U.S. Commitment to Help Identify, Apprehend, and Prosecute Individuals Involved in War Crimes and Atrocities (June 21, 2022) [hereinafter Press Release, Garland Visits Ukraine], <https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-visits-ukraine-reaffirms-us-commitment-help-identify> [<https://perma.cc/D5NL-PGDK>].

¹¹³ Press Release, U.S. Dep’t. of Just., Off. of Pub. Affs., Attorney General Merrick B. Garland Announces Launch of Task Force KleptoCapture (Mar. 2, 2022), <https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-announces-launch-task-force-kleptocapture> [<https://perma.cc/8LK9-STUC>]; Luke Barr, Aaron Katersky & Alexander Mallin, *Russian Oligarch’s Yacht Seized by DOJ’s ‘KleptoCapture’ Task Force*, ABC NEWS (Apr. 4, 2022, 9:00 PM), <https://abcnews.go.com/US/russian-oligarchs-yacht-seized-dojs-kleptocapture-task-force/story?id=83868205> [<https://perma.cc/98WT-XVAM>].

attacks in Israel on October 7.¹¹⁴ Similarly, during that same month, DOJ also charged six computer hackers, all of whom are resident-nationals of Russia, with conspiracy to commit computer intrusion and wire fraud conspiracy to hack, steal data, and leak information obtained from computer systems associated with the Ukrainian Government before the Russian invasion of Ukraine.¹¹⁵ The hackers also planned to similarly target computers in states providing support to Ukraine, such as the United States and other NATO countries.¹¹⁶

2. Cooperation

Cooperation is executive federal practice that facilitates exchange of evidence or fugitives to foreign national jurisdictions or international criminal tribunals. This may include amendment of the U.S. Code to facilitate such cooperation.

For example, to combat Russia, legislators attempted to amend a longstanding U.S. federal statute proscribing cooperation with the ICC, which has jurisdiction over a large percentage of atrocities in Ukraine.¹¹⁷ The ICC is a global adjudicative body that sits in The Hague, Netherlands with subject matter jurisdiction over atrocity crimes occurring in or perpetrated by nationals of countries that have ratified the Rome Statute of the ICC.¹¹⁸ This multilateral treaty came into force in 2002.¹¹⁹ The United States has never formally joined the ICC, oscillating between engagement and hostility.¹²⁰ After Russia invaded

¹¹⁴ Press Release, U.S. Dep't. of Just., Off. of Pub. Affs., Justice Department Announces Terrorism Charges Against Senior Leaders of Hamas (Sept. 3, 2024), <https://www.justice.gov/opa/pr/justice-department-announces-terrorism-charges-against-senior-leaders-hamas> [<https://perma.cc/5C56-ABKY>].

¹¹⁵ Press Release, U.S. Dep't. of Just., Off. of Pub. Affs., Five Russian GRU Officers and One Civilian Charged for Conspiring to Hack Ukrainian Government (Sept. 5, 2024), <https://www.justice.gov/opa/pr/five-russian-gru-officers-and-one-civilian-charged-conspiring-to-hack-ukrainian-government> [<https://perma.cc/X7D6-PGHD>].

¹¹⁶ *Id.*

¹¹⁷ While Ukraine is not formally a State Party to the Rome Statute of the ICC, it has twice lodged declarations accepting the ICC's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to Article 12(3) of the statute. The first declaration accepted ICC jurisdiction with respect to alleged crimes committed on Ukrainian territory from November 2013 to February 2014. The second declaration extended this time period to ongoing alleged crimes committed in Ukrainian territory on or after February 20, 2014. Press Release, Amnesty Int'l, Ukraine: Ratifying the Rome Statute a Welcome Step, but Limitations Must Be Addressed (Aug. 22, 2024), <https://www.amnestyusa.org/press-releases/ukraine-ratifying-the-rome-statute-a-welcome-step-but-limitations-must-be-addressed/>; Situation in Ukraine, ICC-01/22, Decision Assigning the Situation in Ukraine to Pre-Trial Chamber II (Mar. 2, 2022) [hereinafter Assignment to Pre-Trial Chamber II], https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_01686.PDF.

¹¹⁸ *About the Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/the-court> (last visited Oct. 8, 2025).

¹¹⁹ *Office of the Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp> (last visited Oct. 8, 2025).

¹²⁰ See generally Koh, *Criminal Justice*, *supra* note 24 (documenting dynamic U.S. policies in international criminal law, from Nuremberg through Obama Administration).

Ukraine, Senator Durbin, along with other senators from both sides of the aisle—Senator Lindsey Graham (R-SC), Robert Menendez (D-NJ), and Thom Tillis (R-NC)—wrote a letter to President Biden stressing the importance of strengthened ICC cooperation.¹²¹ In it, they urged President Biden “to move forward expeditiously with support to the ICC’s work so that Putin and others around him know . . . that accountability and justice for their crimes are forthcoming.”¹²² The Senate also passed a resolution calling for member states to petition the ICC to investigate Russian war crimes, stating it “supports any investigation into” war crimes in Ukraine.¹²³ Similarly, Russia’s invasion prompted resolutions in both houses of Congress calling for the ICC to prosecute Russian crimes in Ukraine.¹²⁴

On December 29, 2022, the Consolidated Appropriations Act was passed into law, prescribing:

The [2002] prohibition [on ICC cooperation] . . . shall not apply with respect to investigative activities that . . . relate solely to investigations and prosecutions of foreign persons for crimes within the jurisdiction of the International Criminal Court related to the Situation in Ukraine¹²⁵

The Act removes any statutory impediment to sharing information about atrocity crimes (genocide, crimes against humanity, and war crimes) in the Russia-Ukraine War for use as potential evidence in ICC prosecutions.¹²⁶ Such legislation exemplifies the criminal *cooperation* lever in U.S. foreign relations. Such cooperation extends far beyond the U.S.-ICC relationship.¹²⁷ In fact, the U.S. government engages with a mix of federal law, treaties, and cooperation agreements governing cross-border relationships. For example, chapter 209 of Title 18 of the U.S. Code prohibits extradition unless a bilateral extradition

¹²¹ Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC’s Investigation into Atrocities in Ukraine (Mar. 24, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-graham-bipartisan-group-of-senators-urge-president-biden-to-support-the-iccs-investigation-into-atrocities-in-ukraine> [https://perma.cc/QH9Z-L32H].

¹²² *Id.*

¹²³ S. Res. 546, 117th Cong. § 1(3) (as passed by Senate, Mar. 15, 2022).

¹²⁴ H.R. Con. Res. 76, 117th Cong. (as passed by House of Representatives, Mar. 2, 2022); S. Res. 546 § 1(2).

¹²⁵ Consolidated Appropriations Act, Pub. L. No. 117-328, § 7073(a), 136 Stat. 5092, 5092 (2022).

¹²⁶ *Id.*

¹²⁷ Another example of such cooperation is the creation of an Intelligence Community Coordinator for Russian Atrocities Accountability. See 50 U.S.C. § 3025 note (Intelligence Community Coordinator for Russian Atrocities Accountability); Pub. L. 117-263, § 6512, 136 Stat. 3543, 3543-44 (2022). The Trump Administration has vacated this position. See Ellen Nakashima, *Trump Administration Unwinds Efforts to Investigate Russian War Crimes*, WASH. POST (Apr. 22, 2025), <https://www.washingtonpost.com/national-security/2025/04/22/trump-russia-war-crimes-intelligence-ukraine/>.

treaty exists between the United States and another country.¹²⁸ Such treaties, in turn, have been created with dozens of countries worldwide¹²⁹ and, as stated by the U.S. Constitution, have the same status under law as federal statute.¹³⁰

Mutual legal assistance treaties have a parallel role in evidence-sharing across borders.¹³¹ When the United States lacks extradition or mutual legal assistance treaties with foreign states, it may also engage in more informal cooperation agreements and bilateral meetings—policies that vary by U.S. presidential administration. For example, the United States and Cuba have signed memoranda of understanding and have held four Law Enforcement Dialogues since President Obama reopened diplomatic channels with the country in December 2014.¹³² Particular concerns for the two countries include terrorist activities, migrant smuggling, and human trafficking.¹³³ Such dialogue began during the Obama Administration, was paused during the Trump Administration, and resumed under the Biden Administration.¹³⁴

Cooperation may trigger intensive interagency contestation. For example, the aforementioned ICC cooperation legislation catalyzed a divisive, adversarial intra-executive process, highlighting the distinct equities of DOJ, the State Department, and DOD. The Russian invasion of Ukraine prompted agencies to reconsider the ICC's role in promoting criminal accountability for the situation in Ukraine. Only a week after the invasion, the White House publicly alluded to an “[interagency] process that . . . would provide any information to the ICC.”¹³⁵

¹²⁸ See 18 U.S.C. § 3181(a).

¹²⁹ See § 3181 note (Extradition Agreements) (listing bilateral extradition treaties in force); e.g., Extradition Treaty Between the United States of America and the United Mexican States, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059; The Treaty of Extradition Between the United States of America and the Republic of Colombia, Colom.-U.S., Sept. 14, 1979, S. TREATY DOC. 97-8; Treaty on Extradition Between Canada and the United States of America, Can.-U.S., Dec. 3, 1971, 27 U.S.T. 983.

¹³⁰ U.S. CONST. art. VI, cl. 2 (providing that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

¹³¹ See, e.g., The Treaty on Mutual Legal Assistance Between the United States of America and the Republic of Colombia, Colom.-U.S., art. 20(3), Aug. 20, 1980, S. TREATY DOC. 97-11 (“An object certified pursuant to Article 15 of this Treaty [Searches and Seizures] shall be accepted into evidence in the Requesting State without additional proof as to its condition at the time of its seizure, provided that the object is otherwise admissible.”).

¹³² Press Release, Off. of the Spokesperson, U.S. Dep’t of State, United States and Cuba Resume Law Enforcement Dialogue (Jan. 19, 2023) [hereinafter Press Release, U.S. & Cuba Dialogue], <https://2021-2025.state.gov/united-states-and-cuba-resume-law-enforcement-dialogue> [<https://perma.cc/WGV6-AHNK>]; Press Release, Off. of the Spokesperson, U.S. Dep’t of State, United States and Cuba to Sign Law Enforcement Memorandum of Understanding (Jan. 16, 2017) [hereinafter Press Release, U.S. & Cuba Memo], <https://2009-2017.state.gov/r/pa/prs/ps/2017/01/267007.htm> [<https://perma.cc/WP63-G48W>].

¹³³ Press Release, U.S. & Cuba Memo, *supra* note 132.

¹³⁴ See Press Release, U.S. & Cuba Dialogue, *supra* note 132.

¹³⁵ Press Briefing by Press Sec’y Jen Psaki, March 3, 2022, THE WHITE HOUSE (Mar. 3, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/press-briefings/2022/03/03/press-briefing-by-press-secretary-jen-psaki-march-3rd-2022/> [<https://perma.cc/SF49-G6ZJ>].

Subsequently, a global criminal justice policy rift emerged between the State Department, DOJ, and DOD. Initially, the State Department led efforts to collect and distribute necessary materials to U.S. allies.¹³⁶ The State Department seemingly supported information sharing with the ICC early in the invasion and “welcomed the fact that the . . . International Criminal Court has also opened an investigation into . . . Ukraine.”¹³⁷

Ambassador Van Schaack also commented that the Biden Administration was “identifying specific areas where we can support ICC investigations and prosecutions.”¹³⁸ Although DOJ’s opinion on ICC information-sharing before congressional action was not evident to the public, subsequent statements from Deputy Attorney General Lisa Monaco suggested support and DOJ has led U.S. efforts to cooperate with other international partners, including Ukraine and the International Centre for the Prosecution of the Crime of Aggression against Ukraine.¹³⁹ Further, the internal debate over ICC cooperation reportedly focused on a 2010 DOJ memo advising that information-sharing in “particular cases” would not run afoul of domestic law, including the American Servicemembers Protection Act of 2002.¹⁴⁰

Before the Russian invasion, Secretary of State Anthony Blinken in 2021 reiterated the United States’ “longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties such as the United States and Israel.” Press Release, Anthony J. Blinken, U.S. Sec’y of State, U.S. Dep’t of State, Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court (Apr. 2, 2021), <https://2021-2025.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/> [<https://perma.cc/R89J-ZJGP>].

¹³⁶ *Annual World Wide Threats Hearing with Heads of the Intelligence Community Before the H. Permanent Select Comm. on Intel.*, 118th Cong. 56 (2023) [hereinafter *Annual World Wide Threats Hearing*] (testimony of Avril Haines, Dir. of Nat’l Intel.), <https://docs.house.gov/v/meetings/IG/IG00/20230309/115448/HHRG-118-IG00-Transcript-20230309.pdf> [<https://perma.cc/9NNP-SLEV>].

¹³⁷ Ned Price, Dep’t Spokesperson, U.S. Dep’t of State, Department Press Briefing (Mar. 23, 2022), <https://2021-2025.state.gov/briefings/department-press-briefing-march-23-2022> [<https://perma.cc/M2WQ-PXPW>].

¹³⁸ Francesca Chambers & Josh Meyer, *U.S. Officials Pledged to Hold Russia Accountable for War Crimes in Ukraine. Congress Wants Receipts.*, USA TODAY, <https://www.usatoday.com/story/news/politics/2023/03/26/us-russia-putin-war-crimes-ukraine-prosecution/11364190002> [<https://perma.cc/QX8C-CUJL>] (last updated Mar. 26, 2023).

¹³⁹ Press Release, U.S. Senate Comm. on the Judiciary, Durbin Questions Deputy Attorney General Lisa Monaco During Senate Judiciary Committee Hearing on Accountability for Russian War Crimes and Crimes Against Humanity in Ukraine (Apr. 19, 2023) [hereinafter Press Release, Accountability Hearing], <https://www.judiciary.senate.gov/press/dem/releases/durbin-questions-deputy-attorney-general-lisa-monaco-during-senate-judiciary-committee-hearing-on-accountability-for-russian-war-crimes-and-crimes-against-humanity-in-ukraine> [<https://perma.cc/P534-QUMB>]; Press Release, U.S. Dep’t of Just., Readout of Assistant Attorney General Kenneth A. Polite, Jr.’s Trip to Lithuania (Apr. 17, 2023), <https://www.justice.gov/opa/pr/readout-assistant-attorney-general-kenneth-polite-jr-s-trip-lithuania> [<https://perma.cc/688C-UB4V>].

¹⁴⁰ Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022) [hereinafter Savage, *U.S. Weighs Shift*], <https://>

However, DOD's opposition to ICC cooperation and longstanding concern about potential ICC prosecutions of U.S. servicemembers has led to its "balking" at ICC cooperation on a case-by-case basis.¹⁴¹ Although DOD did not publicly oppose congressional efforts to pass legislation allowing cooperation with the ICC, several senators have publicly stated that DOD objected to such efforts.¹⁴² The Pentagon argued that any cooperation would undermine future U.S. arguments that ICC jurisdiction does not extend to non-parties, and other detractors similarly expressed concerns about the implications for Israeli servicemembers.¹⁴³ Furthermore, many months after the passage of the Consolidated Appropriations Act, DOD succeeded in blocking information-sharing efforts supported by the institutional actors above.¹⁴⁴ In May 2023, Secretary Austin informed Congress that he retained concerns about international prosecutions of Russian war crimes due to the potential reciprocity for American soldiers in the future.¹⁴⁵ However, at the same hearing, General Milley offered support for the international legal order, including characterizing the Russian invasion of Ukraine as a violation of the U.N. Charter and discussing the dangers of international aggression.¹⁴⁶ Shortly thereafter, while testifying on

www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html; see also Memorandum from David J. Barron, Acting Assistant Att'y Gen., U.S. Dep't of Just., to Mary DeRosa, Legal Adviser, Nat'l Sec. Council (Jan. 15, 2010), <https://int.nyt.com/data/documenttools/2009-olc-memo-on-support-for-the-icc/b1a4ef1b0c5dc790/full.pdf> [<https://perma.cc/Y435-PSY5>].

¹⁴¹ See Savage, *U.S. Weighs Shift*, *supra* note 140. The ICC investigation of CIA torture allegations in Afghanistan undoubtedly heightened such objections. Stephanie Van Den Berg, *ICC Clears Way for Probe of Alleged Afghanistan War Crimes*, REUTERS (Mar. 5, 2020), <https://www.reuters.com/article/world-icc-clears-way-for-probe-of-alleged-afghanistan-war-crimes-idUSKBN20S0HV/> [<https://perma.cc/L658-JMPS>]

¹⁴² Charlie Savage, *Pentagon Blocks Sharing Evidence of Possible Russian War Crimes with Hague Court*, N.Y. TIMES (Mar. 8, 2023) [hereinafter Savage, *Pentagon Blocks Evidence*], <https://www.nytimes.com/2023/03/08/us/politics/pentagon-war-crimes-hague.html>; see Press Release, Accountability Hearing, *supra* note 139.

¹⁴³ Savage, *U.S. Weighs Shift*, *supra* note 140.

¹⁴⁴ Savage, *Pentagon Blocks Evidence*, *supra* note 142. *But see Annual World Wide Threats Hearing*, *supra* note 136 (detailing Avril Haines testimony that DOD is not preventing information sharing with ICC to her knowledge).

¹⁴⁵ Phil Stewart & Idrees Ali, *US Senators Accuse Pentagon of Hindering War Crimes Prosecution of Russia*, REUTERS (May 11, 2023), <https://www.reuters.com/world/us/us-senators-accuse-pentagon-hindering-war-crimes-prosecution-russia-2023-05-11/> [<https://perma.cc/4MVK-BLYP>].

¹⁴⁶ *A Review of the President's Fiscal Year 2024 Budget Request for the Dep't of Def. Before the Subcomm. on Def. of the S. Comm. on Appropriations*, 118th Cong. 3-4 (2023) (written statement of Gen. Mark A. Milley, Chairman, Joint Chiefs of Staff), <https://www.appropriations.senate.gov/imo/media/doc/CJCS%20PB24%20Written%20Statement%20SAC-D%2011M> [<https://perma.cc/3CGG-4NK9>] ("Russia's invasion of Ukraine is in complete contradiction to the basic rules that underline the United Nations Charter established at the end of World War II. Russia's war is a brazen assault against the free people of Ukraine and threatens to destabilize all of Europe and beyond.").

behalf of the State Department, Ambassador Van Schaack publicly blamed DOD for not cooperating with ICC information-sharing efforts.¹⁴⁷ Meanwhile, Congress continued to pressure the White House to share information on war crimes with the ICC.¹⁴⁸ Ultimately, President Biden ended the interagency struggle and indicated to members of Congress that his Administration would begin sharing information with the ICC.¹⁴⁹ Although the factors informing President Biden's decision to overrule DOD's objections remain unclear, the decision was likely due to State Department- and DOJ-led efforts within the executive branch and mounting congressional pressure, including the Senate Committee on Appropriations' Fiscal Year 2024 Foreign Operations Appropriations Bill.¹⁵⁰

Such contestation is even more evident in Congress at the dawn of the Trump Administration. On January 9, 2025, the House of Representatives passed legislation with bipartisan support imposing sanctions on ICC officials.¹⁵¹ The bill proposes to freeze property assets and deny visas to foreigners who materially or financially contribute to the ICC's efforts to "investigate, arrest, detain or prosecute a protected person."¹⁵² Protected persons include all current and former military and government personnel of the United States as well as allies who have not consented to ICC jurisdiction, most relevantly Israel.¹⁵³ Senate Majority Leader Senator John Thune argued that the ICC's "rogue actions . . . cannot be allowed to stand unchecked."¹⁵⁴ However, despite achieving some bipartisan support, many Democrats opposed the bill; Rep. Jim McGovern of Massachusetts argued that "Republicans want to sanction the I.C.C. simply because they don't want the rules to apply to everyone."¹⁵⁵

¹⁴⁷ Dan De Luce & Abigail Williams, *Pentagon Is Blocking U.S. Cooperation with International Investigations of War Crimes in Ukraine*, NBC NEWS (May 31, 2023), <https://www.nbcnews.com/politics/national-security/defense-holding-us-cooperation-war-crimes-probe-ukraine-rcna87168> [<https://perma.cc/35PE-XC48>].

¹⁴⁸ Press Release, U.S. Senate Comm. on the Judiciary, *supra* note 121; Adam Keith, *Is the Pentagon Relenting?: A Close Study of Opposition to the Int'l Criminal Court's Ukraine Investigation*, JUST SEC. (July 12, 2023), <https://www.justsecurity.org/87231/is-pentagon-opposition-to-the-international-criminal-courts-ukraine-investigation-relying> [<https://perma.cc/4V94-DN8E>].

¹⁴⁹ Charlie Savage, *Biden Orders U.S. to Share Evidence of Russian War Crimes with Hague Court*, N.Y. TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/us/politics/biden-russia-war-crimes-hague.html>.

¹⁵⁰ Department of State, Foreign Operations, and Related Programs Appropriations Act, 2024, S. 2438, 118th Cong. § 7049(c)(3) (2023).

¹⁵¹ Illegitimate Court Counteraction Act, H.R. 23, 119th Cong. (2025); *see also* Demirjian, *supra* note 19.

¹⁵² H.R. 23.

¹⁵³ *Id.*; Demirjian, *supra* note 19.

¹⁵⁴ Demirjian, *supra* note 19.

¹⁵⁵ *Id.*

3. Creation

Creation is the establishment of new criminal justice tribunals and mechanisms worldwide. In March 2023, Ambassador Van Schaack announced the Biden Administration's support for "an internationalized court" that would be "rooted in Ukraine's judicial system" but that includes "international elements."¹⁵⁶ Noting that the U.S. government had closely analyzed and considered "a number of models," it concluded that a new tribunal should be established within Ukraine having "significant international elements," including substantive law, personnel, information sources, and structure.¹⁵⁷ She also noted that the tribunal could be located elsewhere in Europe to reinforce Ukraine's stated desire for a European orientation and enable international involvement via bodies such as Eurojust, the European Union's agency for criminal justice cooperation.¹⁵⁸ Ambassador Van Schaack stated that this tribunal could mirror the example of other successful hybrid justice mechanisms, such as the Special Court for Sierra Leone.¹⁵⁹

But Ambassador Van Schaack's statement supporting a hybrid tribunal belies the intra-executive agency contestation that likely arose around creating an international tribunal. ICC prosecutions of Russian leadership, including President Putin, likely raise concerns within DOD about immunity-piercing precedents and may be a factor in the U.S. decision to propose a hybrid domestic tribunal likely to afford senior Russian leadership *ratione personae* immunity.¹⁶⁰ By contrast, before announcing public support for the hybrid model, Ambassador Van Schaack reported that the State Department had yet to determine whether to support a hybrid or international tribunal.¹⁶¹ Although the State Department may have shared some of DOD's concerns about the crime of

¹⁵⁶ Beth Van Schaack, Ambassador-at-Large for Glob. Crim. Just., Off. of Glob. Crim. Just., Remarks on the U.S. Proposal to Prosecute Russian Crimes of Aggression at the Nuremberg Principles Meeting at Catholic University of America (Mar. 27, 2023), <https://2021-2025.state.gov/ambassador-van-schaacks-remarks> [<https://perma.cc/Y2JT-NSY4>].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ("This kind of model . . . builds upon the example of other successful hybrid justice mechanisms."); see Oona A. Hathaway, Maggie Mills & Heather Zimmerman, *The Legal Authority to Create a Special Tribunal to Try the Crime of Aggression upon the Request of the UN General Assembly*, JUST SEC. (May 5, 2023), <https://www.justsecurity.org/86450/the-legal-authority-to-create-a-special-tribunal-to-try-the-crime-of-aggression-upon-the-request-of-the-un-general-assembly> [<https://perma.cc/95LK-EYX7>] (discussing creation of Special Court of Sierra Leone).

¹⁶⁰ See Rebecca Hamilton, *Ukraine's Push to Prosecute Aggression: Implications for Immunity Ratione Personae and the Crime of Aggression*, 55 CASE W. RESV. J. INT'L L. 39, 40-41 (2023).

¹⁶¹ Alice Sperti, *Momentum Grows on Special Tribunal to Prosecute Putin's Aggression in Ukraine*, INTERCEPT (Feb. 13, 2023), <https://theintercept.com/2023/02/13/russia-ukraine-war-crimes> [<https://perma.cc/Y98G-EFDY>] (reporting Ambassador Van Schaack's comments that U.S. was still examining "pluses and minuses associated with [different models]").

aggression and immunity-piercing precedent in the ICC, it publicly remained supportive of the ICC's efforts to prosecute President Putin for war crimes and crimes against humanity.¹⁶² DOJ may also prefer a hybrid model because, despite its cooperation with Eurojust's International Centre for the Prosecution of the Crime of Aggression ("ICPA"), DOJ has prioritized supporting Ukrainian-led prosecutions throughout the war and may view a Ukrainian-led hybrid as the continuation of such efforts.¹⁶³ Thus, although there has been interagency disagreement as to supporting international prosecutions of Russia's crime of aggression, the hybrid model likely balances the State Department and DOJ's interest in holding Russian leadership legally accountable with DOD concerns about precedent-setting for potential future international tribunals and potential investigations of U.S. leadership.

In other words, the U.S. government's proposal for a hybrid aggression tribunal is likely a compromise position. DOJ can support a foreign jurisdiction by providing evidence, prosecutorial expertise and, if need be, prosecutors, as was done in the 1990s with the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").¹⁶⁴ The State Department can strengthen multilateral ties in support of a foreign tribunal that is prosecuting a violation of a fundamental principle of state sovereignty under the U.N. Charter, namely, to be free of incursion into its territorial integrity. And DOD has confidence that a localized Ukrainian tribunal will create less global precedent than a sui generis international aggression tribunal or enlarged ICC authority, either of which could someday be used against U.S. servicemembers.

Foreign and international criminal justice mechanisms will also continue to proliferate globally, opening up new paths for U.S. government cooperation. While formal tribunals like the ICTY and ICTR have closed,¹⁶⁵ others like the Kosovo Specialist Chambers in The Hague have opened.¹⁶⁶ Furthermore, international investigative mechanisms are growing. The two most prominent relate to Syria and Myanmar.¹⁶⁷ In the wake of the Russia-Ukraine conflict, there

¹⁶² Glenn Thrush & Charlie Savage, *State Dept. Proposes Joint Tribunal to Try Russian Leaders*, N.Y. TIMES (Mar. 28, 2023), <https://www.nytimes.com/2023/03/28/us/politics/state-dept-tribunal-ukraine-war-crimes.html> (reporting State Department spokesman's comments that ad hoc tribunal is not "an alternative or replacement" for ICC prosecutions).

¹⁶³ See Glenn Thrush, *Justice Dept. Embraces Supporting Role in Pursuing War Crimes in Ukraine*, N.Y. TIMES (Mar. 21, 2023), <https://www.nytimes.com/2023/03/21/us/politics/ukraine-russia-war-crimes-justice-dept.html>.

¹⁶⁴ Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 169, 214 (2016).

¹⁶⁵ *International Tribunals*, UNITED NATIONS, <https://main.un.org/securitycouncil/en/content/repertoire/international-tribunals> [<https://perma.cc/7DZB-C6R3>] (last visited Oct. 8, 2025).

¹⁶⁶ KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFF., <https://www.scp-ks.org/en> [<https://perma.cc/UJ7S-75NU>] (last visited Oct. 8, 2025).

¹⁶⁷ The mechanism related to Syria, established in December 2016 pursuant to U.N. General Assembly Resolution 71/248, is formally called the International, Impartial, and

is similarly a proliferation of investigative mechanisms. As Harold Hongju Koh has noted, instead of the post-World War II tribunal, where there was one central forum for accountability pursuing multiple forms of accountability in multiple fora against multiple defendants, a “Fragmented Nuremberg” exists.¹⁶⁸ Ukraine has adopted an “inclusive” criminal legal policy, supporting domestic prosecutions in Ukraine,¹⁶⁹ a joint referral by forty-three States of ongoing crimes against humanity to the International Criminal Court,¹⁷⁰ and discussion about a possible Aggression Tribunal.¹⁷¹ Meanwhile, there are three categories of investigation regarding Ukraine in other jurisdictions: (1) individual nations moving in tandem or separately to promote criminal accountability in Ukraine; (2) efforts by regional actors to promote accountability, investigate, and gather evidence; and (3) efforts by international bodies ensure criminal accountability for international crimes committed during Russia’s invasion of Ukraine. Immediately after the Russian invasion, national and international initiatives primarily focused on evidence gathering and supporting the ICC investigation.¹⁷²

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. *Mandate*, IIM.UN.ORG, <https://iim.un.org/mandate/> [<https://perma.cc/27W6-LANP>] (last visited Oct. 8, 2025); G.A. Res. 71/248 (Dec. 21, 2016). It collects evidence of human rights violations committed in Syria for use in future national or international criminal proceedings. IIM.UN.ORG, *supra*. The mechanism related to Myanmar, called the Independent Investigative Mechanism for Myanmar (“IIMM”), was established by the Human Rights Council in September 2018 through Resolution 39/2. *Independent Investigative Mechanism for Myanmar*, IIMM.UN.ORG, <https://iimm.un.org/en/> [<https://perma.cc/A9C9-Z6FT>] (last visited Oct. 8, 2025). Its mandate is to assemble evidence “of the most serious international crimes and violations of international law” committed in Myanmar for future prosecutorial use. See U.N. Secretary-General, *Independent Investigative Mechanism for Myanmar: Terms of Reference*, ¶ 1, U.N. Doc. A/73/716 (Jan. 16, 2019).

¹⁶⁸ Harold Hongju Koh, *International Law in the Russia-Ukraine War Keynote Address*, 84 OHIO STATE L.J. 1125, 1156 (2024).

¹⁶⁹ See, e.g., ABA Law Student Podcast, *Russia v. Ukraine: The Policy and Legal Considerations of an Unprovoked Attack on a Sovereign Nation*, A.B.A., at 20:01 (Mar. 8, 2022), <https://legaltalknetwork.com/podcasts/aba-law-student-podcast/2022/03/russia-v-ukraine-the-policy-and-legal-considerations-of-an-unprovoked-attack-on-a-sovereign-nation> [<https://perma.cc/S2V4-2W4M>].

¹⁷⁰ Ukraine, ICC-01/22, Investigation (Mar. 2, 2022), <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/938R-NMLM>].

¹⁷¹ See, e.g., Thrush & Savage, *supra* note 162.

¹⁷² See, e.g., *Ukraine: Countries Request ICC War Crimes Inquiry*, HUM. RTS. WATCH (Mar. 2, 2022), <https://www.hrw.org/news/2022/03/02/ukraine-countries-request-icc-war-crimes-inquiry> [<https://perma.cc/H2MG-BUF8>] (noting thirty-eight governments joined to request ICC investigate Russia’s invasion of Ukraine and that Lithuania had made a separate referral a week earlier); Press Release, Anthony J. Blinken, Sec’y of State, U.S. Dep’t of State, Launch of the Atrocity Crimes Advisory Group (“ACA”) for Ukraine (May 25, 2022), <https://2021-2025.state.gov/launch-of-the-atrocity-crimes-advisory-group-aca-for-ukraine/> [<https://perma.cc/6CEQ-9G2W>] (announcing joint initiative between United States, Ukraine, European Union, and United Kingdom to document, preserve, and analyze evidence of war

Further, at least eighteen countries opened domestic war crimes investigations in Europe and the Americas.¹⁷³ Poland and Lithuania launched a joint investigation team with the Ukrainian government to investigate war crimes, crimes against humanity, and other core crimes.¹⁷⁴ The Ukrainian government identified over six hundred suspects, opened eighty prosecutions, and, by March 2023, had won convictions in twenty-six criminal trials.¹⁷⁵ However, by the start of 2023, most nations pivoted to supporting an international tribunal to investigate the crime of aggression in Ukraine. European nations, including France and Germany, have publicly supported an international tribunal,¹⁷⁶ while the United Kingdom announced it was determining the feasibility of a hybrid ad hoc tribunal.¹⁷⁷

Furthermore, as individual countries have sought to supplement the ICC investigation with their own efforts and a potential ad hoc tribunal, regional bodies have moved forward with evidence-gathering efforts to support war crimes prosecutions.¹⁷⁸ Eurojust has begun evidence-gathering and support

crimes in Ukraine); *Poland Say It Has Collected More than 300 Witness Statements on War in Ukraine*, REUTERS (Mar. 16, 2022), <https://www.reuters.com/world/poland-say-it-has-collected-more-than-300-witness-statements-war-ukraine-2022-03-16/> [<https://perma.cc/W5XC-UKXG>] (reporting Poland has gathered photographic evidence, video evidence, and over three hundred “trial testimonies and witness statements” of war crimes related to ICC investigation).

¹⁷³ Loveday Morris, *An ‘Unprecedented’ Effort to Document War Crimes in Ukraine. But What Chance of Justice?*, WASH. POST (May 28, 2022, 4:00 AM), <https://www.washingtonpost.com/world/2022/05/28/ukraine-war-crimes-investigations/>.

¹⁷⁴ Press Release, Eurojust, Joint Investigation Team into Alleged Core International Crimes in Ukraine: One Year of International Collaboration (Mar. 24, 2023), <https://www.eurojust.europa.eu/news/joint-investigation-team-alleged-core-international-crimes-ukraine-one-year-international> [<https://perma.cc/97Z5-Y3Y9>].

¹⁷⁵ *What is a War Crime and Could Putin Be Prosecuted Over Ukraine?*, BBC (July 20, 2023), <https://www.bbc.com/news/world-60690688> [<https://perma.cc/VEF8-S7TB>].

¹⁷⁶ Ewelina U. Ochab, *Germany Calls for a Tribunal for Putin’s Crime of Aggression*, FORBES (Jan. 22, 2023, 5:09 PM), <https://www.forbes.com/sites/ewelinaochab/2023/01/22/germany-calls-for-a-tribunal-for-putins-crime-of-aggression/?sh=6bd1bdd570cd> [<https://perma.cc/C5W3-EY57>].

¹⁷⁷ *UK Joins International Push to Hold Russia Accountable for Ukraine Invasion*, REUTERS (Jan. 20, 2023, 6:22 AM), <https://www.reuters.com/world/europe/britain-joins-international-push-make-russia-accountable-invasion-2023-01-20/> [<https://perma.cc/GM46-3DKY>].

¹⁷⁸ These efforts have been largely led by European bodies, while the African Union has proposed a yet-to-be-made-public peace plan. Catherine Nzuki, *Africa’s Peace Delegation: A New Chapter for Africa and the Ukraine War*, CTR. FOR STRATEGIC & INT’L STUD. (June 16, 2023), <https://www.csis.org/analysis/africas-peace-delegation-new-chapter-africa-and-ukraine-war> [<https://perma.cc/HP25-ACQM>]. The Organization of American States has repeatedly struggled to reach a consensus statement condemning Russian aggression, most recently when meeting European states in July 2023. Aida Sanchez Alonso, *EU-Latin America Leaders Fail to Agree on Final Statement on War in Ukraine*, EURONEWS (July 18, 2023), <https://www.euronews.com/my-europe/2023/07/18/eu-latin-america-leaders-fail-to-agree-on-final-statement-on-war-in-ukraine> [<https://perma.cc/KD6C-NWJW>].

operations at the ICPA, which includes a collaborative process with the ICC and DOJ.¹⁷⁹ Although European support has begun to consolidate around the ICPA, regional actors, including Europol and the European Commission, have also supported domestic Ukrainian prosecutions and the ICC efforts with funding, training, investigative support, and evidence-gathering.¹⁸⁰ Further, the Organization for Security and Co-operation in Europe (“OSCE”) opened an investigation into the forced transfer of Ukrainian children into Russian territory after forty-five countries invoked the so-called “Moscow Mechanism.”¹⁸¹

By way of conclusion for this Part: Contestation is inevitable because of intra-executive and congressional institutional realities. Despite the Trump Administration’s self-perceived mandate to engage in agency reform, the State Department, DOJ, and DOD are unlikely to cede wholesale authority over criminal justice decision-making given their respective mandates. More practically, a dramatic reorganization of executive authority is unlikely in our fragmented American climate. If anything, the agencies will each continue to claim authority over matters at the heart of U.S. criminal law in foreign relations. For example, DOJ has long possessed a foreign war crimes unit in DOJ’s Criminal Division, now called the Human Rights and Special Prosecutions Section (“HRSP”).¹⁸² After the 9/11 attacks, DOJ now has a National Security Division dealing with “threats to our national security by pursuing justice through the law.”¹⁸³ And the State Department has an Office of the Legal

¹⁷⁹ Press Release, Eurojust, History in the Making — the International Centre for the Prosecution of the Crime of Aggression Against Ukraine Starts Operations at Eurojust (July 3, 2023), <https://www.eurojust.europa.eu/news/history-making-international-centre-prosecution-crime-aggression-against-ukraine-starts-operations-at-eurojust> [<https://perma.cc/6D5J-ZRLF>].

¹⁸⁰ European Commission Press Release IP/22/3543, Russian War Crimes in Ukraine: EU Supports the International Criminal Court Investigation with €7.25 Million (June 7, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3543 (announcing €7.25 million in European Commission funding for ICC’s investigation capacity); Press Release, Europol, Europol’s Support to Ukraine: One Year On (Feb. 23, 2023), <https://www.europol.europa.eu/publications-events/publications/europols-support-to-ukraine-one-year#downloads> [<https://perma.cc/5T6W-NG3Q>] (noting Europol support to Ukraine includes organized crime and terrorism threat assessments, support staff and experts, over 160,000 Europol database cross-checks, over 7,500 SIENA, and numerous efforts to support Ukrainian war crime investigations, including over 7,000 photos and videos, 540 witness statements, and 150 suspect identifications).

¹⁸¹ Press Release, Vedant Patel, Principal Deputy Spokesperson, U.S. Dep’t of State, Invocation of the OSCE Moscow Mechanism to Examine Reports of the Russian Federation’s Forcible Transfer and Deportation of Ukraine’s Children (Mar. 30, 2023), <https://2021-2025.state.gov/invocation-of-the-osce-moscow-mechanism-to-examine-reports-of-the-russian-federations-forcible-transfer-and-deportation-of-ukraines-children/> [<https://perma.cc/27JL-UNNR>].

¹⁸² *About the Section*, U.S. DEP’T OF JUST., CRIM. DIV., <https://www.justice.gov/criminal/criminal-hrsp/about-hrsp> [<https://perma.cc/YE96-D7DD>] (last updated May 20, 2025).

¹⁸³ *Mission*, U.S. DEP’T OF JUST., NAT’L SEC. DIV., <https://www.justice.gov/nsd> [<https://perma.cc/P4PP-W9EV>] (last visited Oct. 8, 2025).

Adviser for Law Enforcement and Intelligence, which focuses partly on international law enforcement issues.¹⁸⁴

Meanwhile, congressional contestation is inevitable given legislators' varied policy motivations from one conflict to another. Consider the shifts from Ukraine to Israel to Syria. First, members of Congress spoke publicly about revisiting laws that limit ICC cooperation and funding, and members of the Senate Judiciary Committee met with Chief ICC Prosecutor Karim Khan to discuss Ukrainian prosecutions.¹⁸⁵ Although some members of Congress remained skeptical of the ICC, several members have expressed their support for the ICC's Russia investigation, including advocating for U.S. recognition and funding of the Court.¹⁸⁶ Then, in the wake of the ICC prosecutor's announcement regarding arrest warrants in the Israel-Gaza conflict, many members of the House and Senate decried the ICC as an institutional actor—culminating in the most recent, aforementioned House bill.¹⁸⁷ Finally, despite the proposal for the Syrian War Crimes Accountability Act in 2017, legislators have been reticent on creation in the wake of the conflict.¹⁸⁸

What is sure, however, is that the U.S. government will pull some combination of these three levers when it deploys criminal law in response to geopolitical crises. This opens the door to the subsequent questions of the process by which such consequential policy unfolds, as well as the question of whether and when it is even desirable.

¹⁸⁴ *Office of Law Enforcement and Intelligence*, U.S. DEP'T OF STATE, <https://www.state.gov/bureaus-offices/secretary-of-state/office-of-the-legal-adviser/office-of-law-enforcement-and-intelligence/> [<https://perma.cc/P6UZ-RL6G>] (last visited Oct. 8, 2025).

¹⁸⁵ Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Graham, Grassley Meet with ICC Chief Prosecutor (May 10, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-graham-grassley-meet-with-icc-chief-prosecutor> [<https://perma.cc/V7NY-DFUK>].

¹⁸⁶ *See, e.g.*, Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for US Policy Shift on Int'l Criminal Court*, JUST SEC. (Apr. 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-wave-for-us-policy-shift-on-intl-criminal-court/> [<https://perma.cc/L9CY-4ZWA>] (reporting Rep. Brian Fitzpatrick's comments that he supports U.S. recognizing ICC's authority and providing it with funding); Press Release, Ilhan Omar, Off. of Rep. Ilhan Omar, Rep. Omar Statement on Ukraine War Crime Deterrence and Accountability Act (Apr. 5, 2022), <https://omar.house.gov/media/press-releases/rep-omar-statement-ukraine-war-crime-deterrence-and-accountability-act> [<https://perma.cc/WD48-7M8F>] (“It is long past time the United States joined the International Criminal Court . . .”). *But see* Press Release, Mitch McConnell, Off. of Sen. Mitch McConnell, McConnell Condemns Russian Atrocities, Calls for More International Resolve (Apr. 4, 2022), <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=292FDDA6-0574-49DA-8C88-3C7B06A9E-E36> [<https://perma.cc/X87W-CPDV>] (“[R]eferrals to the International Criminal Court or invocations of the UN Human Rights Council may slake people's consciences, but will not curtail the atrocities or stop the violence.”).

¹⁸⁷ *See* sources cited *supra* note 151.

¹⁸⁸ *See* Alexandra Schmitt, *US Senate Shines Spotlight on Justice for Syria War Crimes*, HUM. RTS. WATCH (June 5, 2017), <https://www.hrw.org/news/2017/06/05/us-senate-shines-spotlight-justice-syria-war-crimes> [<https://perma.cc/6US4-74X7>].

III. CONTINGENCY: NO JUSTICE FOR VICTIMS?

This Part will shift to normative evaluation of contested criminalization: Is such a de-centralized, contested process desirable? We must normatively evaluate the deeper goals of the process as it contributes to U.S. global criminal justice policy—particularly given the mass scale of victims today.

Justice Oliver Wendell Holmes, Jr. famously said that “hard cases make bad law”—particular facts can lead to undesirable rulemaking.¹⁸⁹ Can the same occur in this policy space, wherein geopolitical crises trigger contested criminalization, resulting in undesirable changes to U.S. criminal law? This Part will argue that the overarching goal of criminal accountability for atrocity crimes is desirable for accountability and victim justice. In particular, this Part will apply a criminal law minimalism lens to distinguish the traditional U.S. context (non-violent, victimless crimes, with disproportionate racial impact) from the mass atrocity context (maximally violent, millions of victims, with defendants often of the same race). Thus, on this account, contingency arising from contested criminalization leads to “impunity gaps,” wherein perpetrators of sexual violence, human trafficking, and extermination in war face no consequences, denying justice for victims.

A. *Criminal Law Minimalism in Foreign Relations*

When evaluating contested criminalization, we must ask the threshold question: Is the criminal sanction even appropriate here? The answer is yes—but only when focused on victims. If the criminal sanction is to have purchase anywhere, it should be for perpetrators of genocide or for acts like human trafficking, sexual violence, and extermination in war. A lack of accountability for the most heinous crimes creates undesirable “impunity gaps” and denies justice to victims.

To understand why, we must first recognize that the desirability of criminal sanction for atrocity crimes materially differs from orthodox domestic criminal legal analysis. Domestic criminal law scholars are increasingly skeptical of orthodox criminal law in an era of mass incarceration.¹⁹⁰ This skepticism arises during national conversation about the use and, as many believe, *overuse* of criminal law in the United States.¹⁹¹ The momentum of scholarly contestation

¹⁸⁹ Sepehr Shahshahani, *Hard Cases Make Bad Law? A Theoretical Investigation*, 51 J. LEGAL STUD. 133, 139 (2021).

¹⁹⁰ See sources cited *supra* note 29.

¹⁹¹ Much American academic study of criminal justice feels decidedly *American*, rooted in the particularities of U.S. history around federalism, race, and constitutional rights. See generally SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Daniel C. Richman & Sarah A. Seo, *How*

has focused on the pathologies of the U.S. criminal justice system itself rather than on individual perpetration of criminal conduct, with some scholars even questioning the desirability of the criminal sanction altogether.¹⁹² As Jamelia Morgan notes, abolitionists emphasize “nonpunitive and noncarceral systems of accountability and care,” separate from the architecture of criminal justice.¹⁹³ In her view:

Abolitionists aim to dismantle and resist punitive and carceral institutions and the logics that define them in order to prevent these systems from operating as tools of racial, gender, disability, and class based subordination. Dismantling reliance on carceral systems, policing, and surveillance is accompanied by . . . a set of “positive projects” focused on recreating social systems, social relations, and social provisions that are not just alternatives, but new ways of restructuring society.¹⁹⁴

Such ambitious reimagination is essential in an American era of mass incarceration. However, it is a prospective project focused on deep structural overhaul. Thus, a question emerges: What to do with past criminal conduct wherein victims call for justice? How should we grapple with the criminal prosecutions against, say, Derek Chauvin or Harvey Weinstein? Many would argue that *some* criminal justice response is appropriate, particularly when victims call for it. And this is underscored even further in global war. In the wake of armed conflict—atrocities like the Holocaust, the Rwandan genocide, or mass casualties in Ukraine—the sheer gravity of such crimes may warrant a criminal justice response.

What theoretical school may direct us toward a way forward for criminal law, mindful of abolitionist critique? A related school of criminal legal thought, cognizant of such structural accounts, emphasizes criminal law minimalism—a limited public law enforcement system “necessary to deal with certain types of social harms or wrongs.”¹⁹⁵ On this view,

Federalism Built the FBI, Sustained Local Police, and Left Out the States, 17 STAN. J.C.R. & C.L. 421 (2022); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311 (1997). While this dialogue is necessary given the scale of mass incarceration and the disproportionate impact on historically marginalized communities, U.S. scholars generally have not considered the applicability of such insights to jurisdictions outside of the United States, especially those where thousands of victims’ lives are at stake.

¹⁹² Steven Arrigg Koh, *Criminal Law’s Hidden Consensus*, 101 WASH. U. L. REV. 1805, 1811-12 (2024) [hereinafter Koh, *Hidden Consensus*].

¹⁹³ Jamelia N. Morgan, *An Abolitionist Critique of Quality-of-Life Policing*, 69 UCLA L. REV. 1624, 1630 (2023).

¹⁹⁴ *Id.* at 1630 (citing McLeod, *supra* note 29, at 1161).

¹⁹⁵ Máximo Langer, *What is Penal Minimalism?*, 101 WASH. U. L. REV. 2031, 2033 (2024). For further exploration of penal minimalism, see Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020)

[The] penal system should be fair and humane, and should be used only exceptionally when there are no other means of preventing and dealing with these social harms or wrongs. Penal minimalism asks [legal and non-legal actors] to constantly pause, think, and discuss whether criminal law is a fair, a necessary and the most adequate way to deal with a given social situation or set of social situations before they appeal to it. And penal minimalism asks these actors to engage with these questions in a way that never dehumanizes those who have contributed to or have been affected by these social harms and wrongs.¹⁹⁶

As I have argued previously, such criminal law minimalism should be centered around core societal values, including justice for victims.¹⁹⁷ This applies acutely in the case of atrocity crimes: If there is ever a space for criminal law, it is in the pursuit of accountability for the horrors of the Holocaust or the genocide in Rwanda. The core values here are a reaffirmation of the right of peoples—such as Jewish people in Europe or Tutsi people in Rwanda—to exist free from systematic extermination. On this account, criminal law is necessary to hold accountable the powerful who would otherwise evade responsibility for systematically targeting such a population. Criminal law minimalism says that the Nuremberg trials and the U.N. International Criminal Tribunal for Rwanda are positive developments, affirming the humanity of victims.

Indeed, criminal law minimalism suggests that if criminal law is to exist, it should provide accountability for victims of mass atrocity—from historical victims of the Holocaust or Rwandan genocide victims to contemporary victims of global war. Whereas critiques of American mass incarceration tend to focus on prosecution for *nonviolent, victimless crimes with disproportionate racial impact*,¹⁹⁸ here the focus is on *maximal state violence* perpetrated against *millions of victims* globally, in which often the *perpetrators and victims are of the same race*.

Let us begin with the nature of the violence at issue: mass civilian casualties amid global conflict. The origins and nature of violence are contested in legal and other disciplines of scholarship,¹⁹⁹ but even the most hopeful conceptions of

and Trevor George Gardner, *Auditing Criminal Justice Minimalism*, 78 WASH U. J.L. & POL'Y 147 (2025).

¹⁹⁶ Langer, *supra* note 195, at 2033.

¹⁹⁷ See generally Koh, *Hidden Consensus*, *supra* note 192.

¹⁹⁸ See, e.g., I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563 (2020) (“Each year our jails cycle through approximately ten million people, the vast majority charged with nonviolent crimes.”).

¹⁹⁹ Abolitionists have also advanced a theory of violence rooted in the “racialized political, economic, militarist, and environmental roots and manifestations of violence.” Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 527 (2022). See also HANNAH ARENDT, ON VIOLENCE 8-9 (1970); ELIZABETH FRAZER & KIMBERLY HUTCHINGS, VIOLENCE AND POLITICAL THEORY 1 (2020) (conducting historical survey of political theorists’ accounts of nature of violence); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE:

the future imagine some form of inevitable violence necessitating community response. For example, in an Afrofuturist conception, Bennett Capers has argued that “to the extent that much economic crime and even violent crime is traceable to frustrations from wealth inequality, legislation and norm building to redistribute wealth and de-fetishize unadulterated capitalism will have already removed the major incentive for much of this type of crime.”²⁰⁰ But he has also recognized that “some crime will persist, necessitating some form of policing.”²⁰¹ Furthermore, as philosopher Tommie Shelby has recently noted in *The Idea of Prison Abolition*, “we don’t really know how human beings would conduct themselves in the post-capitalist utopia.”²⁰² Even if, in some ideal society, such wrongs were to be eliminated, some system of laws would still need to define such wrongs and advance some system of meaningful redress. As Shelby notes:

The optimistic thought seems to be that if we were to create just societies and a just global order, and to treat (rather than punish) those with mental illnesses, prisons would be obsolete. Yet interpersonal violence was prevalent before the emergence of racism and capitalism, even before Christian and Islamic imperialism, and in a wide variety of societies. Another reason to suspect that there would be serious interpersonal wrongs even under just conditions is the existence of familiar human vices such as the thirst for power, greed, jealousy, lust, and wrath. These character flaws and temptations have been present in every society of recorded history, not just in capitalist or racist societies.²⁰³

This reality of grave harms begs the question of criminal prosecution in response. Surely, given that they are coercive and involve a deprivation of liberty, criminal sanctions should be used sparingly. Neither domestic nor international actors should over-criminalize for lack of better options.²⁰⁴ Just as American scholarly discourse centers on prospective measures to prevent criminogenic conditions, similar policies should be considered to prevent aggression and atrocity. But, at the same time, this does not answer the question of what to do about *past* conduct that is harmful on a mass scale—nor what to do when we realize that American views should not override those of foreign victims.

HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 16 (2021); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 604 (2011).

²⁰⁰ I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 39, 48 (2019) (explaining that within an Afrofuturist conception, “what police departments will look like and how they will police crimes will likely be very different”).

²⁰¹ *Id.*

²⁰² TOMMIE SHELBY, *THE IDEA OF PRISON ABOLITION* 194 (2022).

²⁰³ *Id.* at 193.

²⁰⁴ Richman, *supra* note 76, at 69-71.

Criminal law minimalism also bolsters the distinctive options arising in foreign (as opposed to domestic) policy. In the domestic law space, criminal law is the *most* dramatic state response, given it entails deprivation of liberty and, at the extreme, the death penalty. By contrast, in foreign relations law, orthodox prosecution is *less* coercive than military force or prolonged detention in Guantanamo Bay.²⁰⁵ Indeed, as many people argued at the time, it would have been preferable to prosecute 9/11 perpetrators like Khalid Sheikh Mohamed in an Article III federal court than to subject them to interminable detention and prosecution in a *sui generis* military commission.²⁰⁶ And many international criminal law scholars assume prosecution's desirability, a legacy of the World War II Allies' awareness that the post-conflict alternative could involve dramatic measures like mass executions.²⁰⁷

To underscore the above-described differences between international criminal law and traditional American criminal law, consider the Russia-Ukraine War.²⁰⁸ In this case, both the perpetrators and victims are of the same race—though in many cases, the perpetrators of the crimes are Russians, who have historically held more power.²⁰⁹ The crimes are also much graver—atrocities on a mass scale as opposed to the lower-level misdemeanor offenses driving American incarceration. And finally, whereas some victimized U.S. communities have stated that they do not wish to see prosecutions occur in the United States, Ukrainian President Volodymyr Zelenskyy has invoked the voices of thousands of Ukrainian victims, recalling the trauma of their experiences and calling for

²⁰⁵ See generally Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015) (discussing scope of military court jurisdiction, including over Guantanamo Bay).

²⁰⁶ See, e.g., Stephanie Nebehay, *9/11 Suspects Should Face Civilian Court*, U.N. Envoys Say, REUTERS (Mar. 9, 2010, 12:43 PM), <https://www.reuters.com/article/idUSTRE62831420100309/> [<https://perma.cc/2X3A-QF3B>]; Tom Malinowski, *KSM Doesn't Deserve to Be a War Criminal*, FOREIGN POL'Y (Feb. 11, 2010, 11:04 PM), <https://foreignpolicy.com/2010/02/11/ksm-doesnt-deserve-to-be-a-war-criminal> [<https://perma.cc/X9QB-HYY9>]; *Terrorism Cases Should Be Tried in Federal Court*, ACLU (Feb. 18, 2010), <https://www.aclu.org/documents/terrorism-cases-should-be-tried-federal-court> [<https://perma.cc/H6BM-M346>].

²⁰⁷ See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75 (2005); Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998). But see generally Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1071 (2015) (questioning use of prosecutions as tool in post-World War II international relations).

²⁰⁸ See Patryk I. Labuda, *Countering Imperialism in International Law: Examining the Special Tribunal for Aggression Against Ukraine Through a Post-Colonial Eastern European Lens*, 49 YALE J. INT'L L. 271, 274-75 (2024) (arguing that Eastern European support for special tribunal to prosecute aggression against Russia reveals counter-hegemonic, post-colonial legal vision which challenges dominant West-versus-Global South frameworks).

²⁰⁹ See *id.* at 278-82 (detailing history of Russian and Soviet domination in region).

accountability.²¹⁰ In fact, the Ukrainian government has engaged in a multifaceted legal attempt to promote accountability for Russia's invasion, including litigation before the ICC²¹¹ and International Court of Justice ("ICJ").²¹² Part of this legal attempt is a ten-point peace plan, introduced by President Zelenskyy during the November 2022 G20 Summit in Bali. The plan calls for the return of all wartime prisoners and deportees to Ukraine, a total cessation of all hostility, and the establishment of a Special Tribunal to prosecute Russia's crime of aggression.²¹³ Earlier that April, President Zelenskyy insisted that the U.N. Security Council remove the Russian Federation from its membership so it could no longer use its veto power to block decisions related to Russian crimes of aggression.²¹⁴

In sum, given the wishes of the victims and scale of the traumatic harms in cases like the Russia-Ukraine War, the U.S. government may recognize that some degree of investigation and prosecution is necessary. As international law scholars have correctly argued, the overarching specter here is the "impunity gap," wherein serious harms occur to a large number of victims with no possibility for accountability.²¹⁵ This creates undesirable effects for victims,

²¹⁰ See Volodymyr Zelenskyy, President of Ukr., Speech to Representatives of the Public, Political and Expert Circles of the Kingdom of the Netherlands and International Institutions Based in The Hague (May 4, 2023), <https://www.president.gov.ua/en/news/vistup-volodimira-zelenskogo-pered-predstavnikami-gromadskos-82653> [<https://perma.cc/VTM4-2KCP>] ("Impunity is the key that opens the door to aggression. If you look at any war of aggression in history, they all have one thing in common—the perpetrators of the war did not believe they would have to stand to answer for what they did."); cf. Dara Massicot, *Dara Massicot on Dealing with Trauma in Ukraine*, ECONOMIST (Nov. 13, 2023), <https://www.economist.com/the-world-ahead/2023/11/13/dara-massicot-on-dealing-with-trauma-in-ukraine> [<https://perma.cc/Y3RK-U7W3>] (focusing on trauma-informed care to heal post-war Ukraine). In doing so, Zelenskyy has also called for alternative mechanisms for victim compensation. See Shawna Chen, *Zelensky Proposes Compensation for "Victims of Russian Aggression"*, AXIOS (May 20, 2022), <https://www.axios.com/2022/05/21/russia-ukraine-zelensky-compensation>.

²¹¹ See Assignment to Pre-Trial Chamber II, *supra* note 117.

²¹² See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Provisional Measures, 2022 I.C.J. Rep. 211 (Mar. 16); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. Rep. 558 (Nov. 8).

²¹³ Volodymyr Zelenskyy, President of Ukr., Speech at the G20 Summit (Nov. 15, 2022), <https://www.president.gov.ua/en/news/ukrayina-zavzhdi-bula-liderom-mirotvorchih-zusil-yaksho-rosi-79141> [<https://perma.cc/BU6M-CW93>].

²¹⁴ *Ukraine's President Calls on Security Council to Act for Peace, or 'Dissolve' Itself*, UN NEWS (Apr. 5, 2022), <https://news.un.org/en/story/2022/04/1115632> [<https://perma.cc/3EKH-PQGP>].

²¹⁵ See NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 2 (2d ed. 2018); Koh, *Foreign Affairs*, *supra* note 1, at 352; see also Stuntz, *Pathological Politics*, *supra* note 77, at 544-45; CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 45 (2023).

communities, and societies. In the space of transitional justice, the axiom is that, in the tension between peace and justice, “there can be no peace without justice.”²¹⁶

B. *The Problems of Contingency*

If criminal law minimalism is a guide, then contingency arising from contested criminalization is potentially problematic in providing justice for victims. Let us begin with codification. Because contemporary events drive contested, ad hoc changes to U.S. policies, the overall architecture of U.S. global criminal justice policy lacks conceptual coherence—wherein crimes are prosecuted against some, while in other cases no such accountability exists.

One example is the puzzling lack of criminalization of crimes against humanity in U.S. federal law—despite codification of genocide and war crimes.²¹⁷ Senator Durbin, in particular, has long called for a crimes against humanity statute—the reason he supported the aforementioned amendments to the federal war crimes statute.²¹⁸ In fact, he had introduced the Crimes Against Humanity Act of 2010, which would have made various acts crimes against humanity, such as sex trafficking of children, hostage-taking, and extermination as predicate acts.²¹⁹ Former Ambassador-at-Large for Global Criminal Justice David Scheffer has also called for federal legislation criminalizing crimes against humanity.²²⁰ To this end, DOJ has also publicly supported the codification of a crimes against humanity statute in order to fill a gap in U.S. law.²²¹

Federal law provides for prosecution of torture or genocide only if the alleged perpetrator is “present in” the United States.²²² There may be gaps in universal

²¹⁶ Eileen Travers, *Stories from the UN Archive: 1960s Roots of ‘No Justice, No Peace,’* UN NEWS (Aug. 31, 2024), <https://news.un.org/en/story/2024/08/1152626> [<https://perma.cc/9WZN-XTG9>]; see also Kofi A. Annan, *Justice vs. Impunity*, INT’L HERALD TRIB., May 31, 2010, at 8.

²¹⁷ See 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).

²¹⁸ Rita Siemion, Chief Nat’l Sec. & Hum. Rts. Couns., U.S. Senate Comm. on the Judiciary, *Prosecuting War Crimes in U.S. Courts: New Avenues for Legal Accountability in Ukraine & Beyond* Panel at International Law Weekend: Beyond International Law (Oct. 20, 2023).

²¹⁹ Crimes Against Humanity Act of 2010, S. 1346, 111th Cong. (2009) (introduced by Senator Richard J. Durbin (D-IL)).

²²⁰ Ambassador David Scheffer & Kristin Smith, *Congress Should Close the ‘Crimes Against Humanity’ Loophole*, JUST SEC. (Feb. 17, 2023), <https://www.justsecurity.org/85135/congress-should-close-the-crimes-against-humanity-loophole> [<https://perma.cc/X4Q3-GN3Q>].

²²¹ See Rosenbaum, *supra* note 89, at 6.

²²² Elise Baker, *Closing the Impunity Gap for War Crimes*, JUST SEC. (Jan. 12, 2023), <https://www.justsecurity.org/84737/closing-the-impunity-gap-for-war-crimes> [<https://perma.cc/2W9G-XKFR>].

jurisdiction for prosecution for genocide and torture where the victim is a U.S. citizen but the defendant is neither a U.S. citizen nor present in the United States.²²³ In addition, the statute providing punishment for torture only permits prosecution when the act has occurred outside of the United States.²²⁴ Meanwhile, the United States lacks any federal codification of crimes against humanity.²²⁵

In other words, at a time when the U.S. federal courts are closing the doors to civil accountability under the Alien Tort Statute²²⁶ and Foreign Sovereign Immunities Act (“FSIA”)²²⁷ for “foreign cubed” cases (i.e., foreign plaintiffs, foreign defendants, and foreign territory), in criminal law we are selectively modifying the U.S. Code, without any systematic commitment to victims of the most horrific crimes.

And what of recent developments for victims in Israel, Gaza, Yemen, or Lebanon? For example, in October 2024, in “a rare instance of public disagreement from within the Justice Department,” DOJ attorneys wrote an open letter to Attorney General Garland, claiming an inequitable prosecutorial approach in the Russia-Ukraine War and Israel-Gaza War.²²⁸ Among other things, they noted that credible evidence existed against the Israeli Defense Force and other Israelis of crimes perpetrated against American citizens and others in violation of 18 U.S.C. § 2332 (homicide), 18 U.S.C. § 2339A (providing material support to terrorists), 18 U.S.C. ch. 113C (torture), and 18 U.S.C. § 2441 (war crimes).²²⁹

Cooperation is also highly contingent. Contested criminalization underscores the well-known oscillation in U.S. engagement with the ICC. In the months leading up to the December 31, 2000 deadline to sign the Rome Statute, the Clinton Administration “was concerned that the treaty would claim jurisdiction

²²³ See Beth Van Schaack, *The Parallels Between South African and U.S. Law on Universal Jurisdiction*, JUST SEC. (Dec. 16, 2013), <https://www.justsecurity.org/4611/parallels-south-african-u-s-law-universal-jurisdiction> [<https://perma.cc/CWR5-UPXK>]; Jeremy Gutner, *How to Get Away with Crimes Against Humanity: The Statutory Gap in US Law*, JUST SEC. (Sept. 8, 2023), <https://www.justsecurity.org/88084/how-to-get-away-with-crimes-against-humanity-the-us-statutory-gap> [<https://perma.cc/8SE6-KTR9>].

²²⁴ 18 U.S.C. § 2340A.

²²⁵ Gutner, *supra* note 223.

²²⁶ See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (holding that “absent further action from Congress, it would be inappropriate for courts to extend ATS liability to foreign corporations”).

²²⁷ See *Republic of Hungary v. Simon*, 145 S. Ct. 480, 498 (2025) (holding that to qualify for FSIA’s expropriation connection, plaintiffs must demonstrate clear link between expropriated property and property present in United States, which in effect reduces reach of exception).

²²⁸ Ryan Lucas, *DOJ Lawyers Slam ‘G glaring Gap’ in Failure to Investigate Potential Israeli Crimes*, NPR (Oct. 25, 2024, 11:52 AM), <https://www.npr.org/2024/10/25/g-s1-29820/justice-lawyers-israel-gaza-america-killings> [<https://perma.cc/XNH9-PYQ6>].

²²⁹ Letter from Emps. of Dep’t of Just. to Merrick B. Garland, U.S. Att’y Gen., (Oct. 21, 2024) (on file with the Boston University Law Review).

over personnel of nations which had not ratified the treaty.”²³⁰ The Bush Administration, by contrast, took a decidedly adversarial posture, proscribing any U.S. government cooperation with the ICC. Congress subsequently passed the American Servicemembers’ Protection Act of 2002 (“ASPA”), prohibiting and restricting ICC cooperation.²³¹ In particular, the ASPA prohibited any state body from providing support to the ICC, restricted military assistance to states who refused to sign the Article 98 agreements (which required countries to refuse to surrender Americans to the ICC), and limited the U.S. armed forces’ ability to perform U.N. peacekeeping operations in ICC member states.²³² Some ASPA restrictions, however, were rolled back almost immediately.²³³ Most notably, in the 2002 Dodd Amendment, ASPA restrictions were rendered inapplicable to “international efforts to bring to justice Saddam Hussein, Slobodan Milosovic [sic], 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.”²³⁴

The United States claims that it objects to the ICC because it fears prosecution of U.S. nationals in an international court, and yet routinely extradites its own nationals abroad to be tried in foreign courts and has provided in federal law for surrender of U.S. nationals to other Hague tribunals.²³⁵ DOJ indicts, extradites, and/or prosecutes in varied cases based on evidence availability, federal statutes’ structure, and vagaries of its prosecutorial autonomy.

Or consider all of the changes that will occur under the new Trump Administration. Under the prior Biden Administration, cooperation proliferated on myriad fronts. DOJ primarily focused on supporting the Ukrainian police and prosecutor general with domestic Ukrainian prosecutions, including logistical

²³⁰ Jean Galbraith, *The Bush Administration’s Response to the International Criminal Court*, 21 BERKELEY J. INT’L L. 683, 685 (2003).

²³¹ 22 U.S.C. §§ 7421-7433.

²³² Todd Buchwald, *Unpacking New Legislation on US Support for the International Criminal Court*, JUST SEC. (Mar. 9, 2023), <https://www.justsecurity.org/85408/unpacking-new-legislation-on-us-support-for-the-international-criminal-court> [<https://perma.cc/ZF4S-3CVP>].

²³³ *Id.*

²³⁴ *Id.* The ASPA is out of step with much U.S. history vis-à-vis international tribunals. After the creation of the first two modern era international tribunals, the U.N. International Criminal Tribunal for the former Yugoslavia and the U.S. International Criminal Tribunal for Rwanda, the United States passed legislation stating that existing federal extradition statutes apply to the surrender of persons to both such tribunals. 18 U.S.C. § 3181 note (Judicial Assistance to International Tribunal for Yugoslavia and International Tribunal for Rwanda). The legislation was incorporated into 18 U.S.C. § 3181 by reference to two congressional-executive agreements, each made at the conclusion of each tribunal. *Id.*

²³⁵ See 18 U.S.C. § 3181 (“[P]rovisions of chapter 209 of title 18, United States Code, relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, [to the ICTY and ICTR].”).

support, training, and assistance with investigations and cases.²³⁶ Attorney General Garland visited Ukraine to reaffirm the U.S. commitment to finding and prosecuting war criminals involved in the invasion of Ukraine.²³⁷ DOJ further signed a memorandum of understanding with the Ukrainian Prosecutor General's office, allowing it to work with Ukraine continuously without requiring the State Department's approval.²³⁸ The War Crimes Accountability Team sent two attorneys overseas (one to Europe and the other to the Middle East) to coordinate mutual legal assistance and extraditions with prosecutors in E.U. member states.²³⁹ And DOJ supported global efforts to ensure accountability for war crimes in Ukraine through its cooperation with Eurojust²⁴⁰ and Five Eyes.²⁴¹ Internationally, in June 2023, Attorney General Merrick Garland became the first Attorney General to visit the ICC²⁴² and has publicly supported information sharing with the ICC related to the Russian invasion of Ukraine.²⁴³ Under the new Trump Administration, all of this will likely cease under an America First foreign policy.

Finally, consider the contingency in U.S. policy regarding creation. The United States was a leader in establishing the Nuremberg and Tokyo Tribunals in the wake of World War II—an innovation at the time to “stay the hand of vengeance” and submit enemy combatants to the rule of law over execution.²⁴⁴ While creation of new institutions stalled during the Cold War, such policymaking resumed in the 1990s. For example, early in her tenure as U.N. Ambassador in the Clinton Administration, Madeleine Albright pushed for creation of the ICTY, noting that to do so would not conflict with any of

²³⁶ Thrush, *supra* note 163.

²³⁷ Press Release, Garland Visits Ukraine, *supra* note 112.

²³⁸ Thrush, *supra* note 163.

²³⁹ Emily Zantow, *Justice Department Launches Team to Investigate War Crimes in Ukraine*, COURTHOUSE NEWS SERV. (June 21, 2022), <https://www.courthousenews.com/justice-department-launches-team-to-investigate-war-crimes-in-ukraine>.

²⁴⁰ Press Release, Eurojust, *supra* note 174.

²⁴¹ Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Readout of U.S. Attorney General Merrick B. Garland's Meeting with Five Eyes Partners and Ukraine's Prosecutor General (May 5, 2022), <https://www.justice.gov/opa/pr/readout-us-attorney-general-merrick-b-garland-s-meeting-five-eyes-partners-and-ukraine-s> [<https://perma.cc/44W7-K3RY>].

²⁴² See *supra* note 12 and accompanying text.

²⁴³ Savage, *Pentagon Blocks Evidence*, *supra* note 142.

²⁴⁴ “*The Grave Responsibility of Justice*”: Justice Robert H. Jackson's Opening Statement at Nuremberg, THE NAT'L WWII MUSEUM, NEW ORLEANS (Nov. 20, 2020), <https://www.nationalww2museum.org/war/articles/robert-jackson-opening-statement-nuremberg> [<https://perma.cc/46DG-MH8D>]; James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 24-25 (2009); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1763-73 (2005); see also Ryan Liss, *Criminal Law in a World of States*, 43 MICH. J. INT'L L. 263 (2022) (providing a state-centered political theory account of international criminal law).

Washington's other priorities.²⁴⁵ Throughout the 1990s, the Clinton Administration supported the creation of the U.N. International Criminal Tribunal for Rwanda²⁴⁶ and Special Court for Sierra Leone.²⁴⁷ Hillary Clinton continued similar work as Secretary of State supporting the Extraordinary Chambers in the Courts of Cambodia.²⁴⁸ Further, in the 2000s, the George W. Bush Administration supported creation of the Special Tribunal for Lebanon.²⁴⁹ While the United States has historically supported the creation of such tribunals, it is not a party to the Rome Statute of the ICC, and federal statute prohibits any formal cooperation with the Court.²⁵⁰ As noted above, in 2002, Congress passed the ASPA, prohibiting and restricting ICC cooperation.²⁵¹

IV. COHERENCE: PRIORITIZING COOPERATION AND JUSTICE FOR VICTIMS

How then can U.S. global criminal justice policy transcend contingency and achieve *coherence*? At the dawn of the new Trump Administration, this Part will argue that the best way to achieve coherence is for the U.S. government to prioritize *cooperation* over codification and creation—especially to achieve justice for victims.

The ideal institutional and process reforms imagine new intra-executive structures and alternative proposals for criminal law in foreign relations.²⁵² However, such reforms are unlikely for the foreseeable future: The nature of the interagency process—and the distinctive equities of enforcement (DOJ), foreign relations (State Department), and security (DOD)—inhere in the very structure of the executive branch. Furthermore, as noted above, criminal law minimalism augurs in favor of non-prosecutorial possibilities.²⁵³ Thus, alternative foreign

²⁴⁵ DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 20 (2012) (“She seized the opportunity to make her mark quickly in the council on a subject that everyone could understand and which conveniently did not conflict with any other Washington priority for the new administration.”).

²⁴⁶ President Bill Clinton, Remarks Honoring Genocide Survivors in Kigali, Rwanda (Mar. 25, 1998).

²⁴⁷ John B. Bellinger III, Legal Advisor to the Sec’y of State, Remarks at the Fletcher School of Law and Diplomacy, U.S. Perspectives on International Criminal Justice (Nov. 14, 2008), <https://2001-2009.state.gov/s/l/rls/111859.htm> [<https://perma.cc/QA3Y-YSR8>].

²⁴⁸ Press Release, U.S. Dep’t. of State, Secretary Clinton’s October 30–November 1 Visit to Cambodia (Oct. 30, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/10/150193.htm> [<https://perma.cc/4GNV-W7V9>].

²⁴⁹ Press Release, The White House, President Bush Meets with Leader of the Parliamentary Majority in Lebanon, Saad Hariri (Oct. 4, 2007), <https://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071004.html> [<https://perma.cc/D3BC-DLZR>].

²⁵⁰ Koh, *Criminal Justice*, *supra* note 24, at 533–34.

²⁵¹ *See supra* note 231 and accompanying text.

²⁵² *See, e.g.,* KOH, NATIONAL SECURITY, *supra* note 53, at 153 (calling for structural political branch reforms to rebalance foreign affairs authority toward Congress and away from executive branch).

²⁵³ *See supra* Section II.A.

policy tools—diplomacy, agreements, foreign aid—must prevent victim atrocities globally.²⁵⁴

Then, the internal policy priority must be cooperation when criminal law is deployed globally. Compared to the alternatives, cooperation is most likely to resolve many of the internal structural issues within the executive branch. Cooperation will promote long-standing relationships across borders in which the majority of cases occurring extraterritorially are meaningfully distributed to the appropriate prosecutorial venue. Once cooperation processes are implemented, they reduce contestation because such processes endure over time. By contrast, codification and creation are more discrete, isolated events requiring greater interagency consensus with each iteration.

Furthermore, cooperation serves deeper criminal justice policy goals. Third-party states such as the United States are non-ideal as a prosecutorial forum and will almost certainly have mixed foreign policy consequences. And the bureaucratic challenges of novel, *sui generis* international criminal courts similarly favor only limited-use creation.

A. *Prioritizing Cooperation: Relationality and Interest Alignment*

Of the three levers, the priority should always be cooperation—rooted in *relationships* and *alignment* of interests.

In criminal law, the heavy presumption is always to prosecute where the atrocity has occurred.²⁵⁵ Criminal law is distinctly local. While certain conduct is criminalized at the federal, state, or local level, most U.S. criminal prosecutions occur at the state and local level.²⁵⁶ The U.S. Constitution even twice guarantees that prosecution should occur where the crime was committed.²⁵⁷ Broader policies increase or decrease law enforcement officers' and prosecutors' ability to bring charges under such rules. For example, the Violence Against Women Act of 1994 amended federal law to facilitate

²⁵⁴ See *Strategic Prevention*, U.S. DEP'T OF STATE, BUREAU OF CONFLICT & STABILIZATION OPERATIONS, <https://www.state.gov/strategic-prevention> [<https://perma.cc/8GE5-6Q9D>] (last visited Oct. 8, 2025).

²⁵⁵ This is not solely a question of positive law, but has also guided criminal justice scholarly reform efforts. Much domestic scholarly criminal law discourse has centered on bringing criminal justice back to the local level. See, e.g., Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1702-03 (2017). But see, e.g., John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 739 (2020).

²⁵⁶ See generally Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837 (2020).

²⁵⁷ See U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."); U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . ."); see also Antonio Cassese, *The Rationale for International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 123 (Antonio Cassese ed., 2009) ("Whenever a criminal offence occurs, the best judicial forum for its prosecution is the court of the territory where the crime has been committed.").

prosecution of crimes against women, but also to establish an institutional office within DOJ to prosecute such crimes. The Act allocated funding for violence prevention and introduced other civil legal causes of action and remedies for such conduct.²⁵⁸ This regime is not unique to the United States: The same rationale also underscores opposition to “local” prosecution in any foreign jurisdiction.

This axiom serves as a guidepost for U.S. global criminal justice policy. It emphasizes *cooperation* to facilitate prosecution in foreign courts, ensuring that domestic actors have “local justice” with evidence gathered from the particular place alongside legal actors best suited to understanding the realities on the ground as well as providing redress for victims.

Such cooperation is and must be highly *relational*, driven by personal and institutional relationships within and across jurisdictions and institutions. Indeed, a highly overlooked aspect in legal scholarship is the reality of legal practice between individuals and institutions engaged in a longstanding relationship. When I was a federal prosecutor in DOJ’s Criminal Division, I was struck by how many of the prosecutors within the Department knew prosecutors and members of foreign ministries of justice by first name. A longstanding working relationship existed between the parties. On an annual basis, we would meet with our foreign counterparts in-person, either in the United States or in their country. We also attended law enforcement-related meetings of the Organization of American States (“OAS”),²⁵⁹ the Five Eyes,²⁶⁰ and engaged with Europol, Eurojust, and Interpol.²⁶¹

²⁵⁸ Violence Against Women Reauthorization Act of 2013, Pub. L. 103-322, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. §§ 13931-14045).

²⁵⁹ The Meetings of Ministers of Justices, other Ministers, Prosecutors and Attorney Generals of the Americas (“REMJA”) seeks to improve legal efficiency and cooperation between OAS and its State Members. *Cooperation in Justice-REMJA*, ORG. OF AM. STATES, <https://www.oas.org/en/sla/dlc/remja-en/remja.asp> [<https://perma.cc/EX4G-RY6J>] (last visited Oct. 8, 2025). While the Meeting of Ministers Responsible for Public Security in the Americas (“MISPA”) political forum seeks to “promote the exchange of ideas and experiences in public security management through the promotion of long-term, comprehensive state policies under which human rights are also fully observed.” *Department of Public Security-MISPA*, ORG. OF AM. STATES, https://www.oas.org/en/sms/dps/dps_mispa_vi_en.asp [<https://perma.cc/FP9P-JWBD>] (last visited Oct. 8, 2025).

²⁶⁰ Press Release, FBI Nat’l Press Off., FBI Hosts Five Eyes Summit to Launch Drive to Secure Innovation in Response to Intelligence Threats (Oct. 16, 2023), <https://www.fbi.gov/news/press-releases/fbi-hosts-five-eyes-summit-to-launch-drive-to-secure-innovation-in-response-to-intelligence-threats>.

²⁶¹ Press Release, U.S. Dep’t. of Just., Off. of Pub. Affs., EU-U.S. Joint Statement Following the EU-U.S. Ministerial on Justice and Home Affairs, (June 21, 2023), <https://www.justice.gov/opa/pr/eu-us-joint-statement-following-eu-us-ministerial-justice-and-home-affairs> [<https://perma.cc/X39P-QX34>]; Merrick B. Garland, U.S. Att’y Gen., Remarks at the U.S.-EU Justice Home Affairs Meeting in Stockholm (June 21, 2023), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-us-eu-justice-home-affairs-meeting> [<https://perma.cc/8BJ2-SY3W>]; Press Release, U.S. Dep’t. of Just., INTERPOL Washington, Director Hughes Leads U.S. Delegation at INTERPOL

The relational nature of global criminal justice policy is not aberrational. In many respects, this relationality drives legal decision-making in any aspect of U.S. legal practice. Law is a social and institutional practice at its core—knowledge of people and institutions is thus critical to understanding how law functions. It is for this reason that “Big Law” corporate law firms prefer to hire attorneys who have clerked for federal judges and/or worked for DOJ or U.S. Securities and Exchange Commission.²⁶² Such attorneys have better intuition for how law enforcement decision-making will play out.²⁶³

When a relationship between legal actors exists, it may foster *alignment* of interests in a given case. Alignment often arises in foreign relations: each nation has discrete interests that sometimes align to allow for synergies (e.g., North American free trade agreements). At other moments, they will not (e.g., U.S. policy on North Korean nuclear capabilities). The same may be said of the various forces animating U.S. global criminal justice policy. At certain moments, domestic political realities will align with foreign counterparts and international tribunals, leading to substantive change or advancement of criminal investigations. At other times, the various legal actors will fail to align.

B. *The Risk of Codification and the Challenge of Creation*

By contrast, codification and creation are more discrete, isolated events requiring greater interagency consensus each time. However, in more isolated circumstances, the U.S. government should also consider the remaining policy options: codification and creation.

1. Codification: Prosecution in Foreign Policy

U.S. courts are a desirable forum for prosecution only when it is in the investigative, prosecutorial, and broader federal interest to prosecute individuals already in U.S. territory who have perpetrated serious crimes abroad. While not ideal, it could be true that individuals in the United States perpetrated such crimes, and the foreign jurisdiction lacks capacity to prosecute. In such limited instances, the United States ensures that it is not a haven for individuals who have committed serious crimes, as has historically been true on many occasions. Consider this stance in contrast to, for example, Nazi Adolf Eichmann’s safe haven in Argentina until his capture by Israeli Mossad and prosecution in Israel.²⁶⁴ Another such example is former Ugandan President Idi Amin’s safe haven in Saudi Arabia until his death in 2003—unlike Eichmann, however, he

General Assembly, (Nov. 29, 2023), <https://www.justice.gov/interpol-washington/pr/director-hughes-leads-us-delegation-interpol-general-assembly> [<https://perma.cc/7D9Z-6FZB>].

²⁶² JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* 19, 194, 198-99 (2017).

²⁶³ *See id.*

²⁶⁴ *See generally* HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

was never prosecuted, despite his regime's perpetration of widespread crimes estimated in the hundreds of thousands of victims.²⁶⁵

How, then, should the United States decide when to prosecute atrocities in the Russia-Ukraine War? The answer lies in contextualizing criminal prosecution within the broader universe of foreign policy modalities—diplomacy, cooperation and association agreements, trade, economic sanctions, military force, and the use of foreign aid.²⁶⁶ What makes criminal justice distinct? First, it is *individualized*: targeting foreign nationals one at a time as opposed to, for example, foreign aid. Second, it is *retrospective*, an ex-post intervention to promote accountability for past actions, in contrast to negotiations of prospective bilateral agreements. Third, it involves a *high degree of process*. In contrast to the six foreign policy modalities like military force, a criminal case must wind through domestic criminal legal process—indictment by grand jury, judges, conviction, appeals, etc.—and sometimes through transnational criminal legal processes such as extradition. And finally, it results in *incarceration or execution*, meaning that it implicates the deprivation of liberty. Such sanction is the ultimate hallmark of criminal justice domestically; when compared to foreign policy, it is more overtly punitive than diplomatic negotiations but less coercive than use of broader military force. The sum total of these criteria means that the United States should prosecute in limited, discrete cases wherein: (1) a suspect is in the United States; (2) the suspect has clearly perpetrated serious crimes (e.g., war crimes) abroad; (3) the foreign jurisdiction cannot prosecute; and (4) DOJ has sufficient evidence to prove such crimes beyond a reasonable doubt. Surely, this will be a rare occurrence given the desirability of prosecution in other fora and availability of other foreign policy modalities—such as diplomacy, sanctions, or the use of force—that more meaningfully and prospectively impact the conclusion of the war or prevention of atrocities.

Prosecution could have positive foreign policy implications for countries invested in the cases the United States brings or facilitates. Ukraine, for example, would likely want the United States to prosecute Russian war criminals here in the United States to provide justice for victims, compensate for a failure of Ukrainian prosecutorial capacity, and signal globally the wrongfulness of Russian actions. Should the United States do so, it would likely be a foreign policy “win” for the United States in the eyes of Ukrainians.

Such a “win-win” occurred with the El Chapo extradition and prosecution in 2017. In that case, Mexico extradited notorious Sinaloa drug cartel head Joaquin “El Chapo” Guzman to the United States after he escaped from Mexican detention twice—thus achieving the goal of incapacitating and incarcerating the Mexican criminal.²⁶⁷ El Chapo perpetrated serious crimes in both jurisdictions,

²⁶⁵ MARK LEOPOLD, IDI AMIN: THE STORY OF AFRICA'S ICON OF EVIL 8, 296 (2021).

²⁶⁶ See Koh, *Foreign Relations*, *supra* note 35, at 739.

²⁶⁷ Azam Ahmed, *El Chapo, Mexican Drug Kingpin, Is Extradited to U.S.*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/world/el-chapo-extradited-mexico.html>.

but the Mexican government lacked the capacity to detain and incarcerate him effectively.²⁶⁸ For its part, the United States succeeded in prosecuting him in the Eastern District of New York, and he is now in “ADX” (formally, the United States Penitentiary, Administrative Maximum Facility Florence in Colorado)—the leading U.S. federal maximum security prison.²⁶⁹

But prosecution may also have harmful effects when seen abroad as geopolitically motivated. For example, in 2019, the U.S. Attorney’s Office for the Eastern District of New York indicted Huawei CFO Meng Wanzhou for financial fraud charges for violating U.S. sanctions on Iran.²⁷⁰ When Canada arrested her on a U.S. extradition request, China responded by arresting Canadian nationals, even sentencing one to death.²⁷¹ The trilateral foreign policy standoff was ultimately resolved in 2021 via a deferred prosecution agreement, wherein Meng admitted to wrongdoing, the Chinese released the Canadians, and DOJ agreed to dismiss all charges once the deferral period ended a year later, so long as Meng refrained from committing further crimes in the interim.²⁷²

Similarly, U.S. *non*-prosecution may also trigger foreign policy crisis. The Trump-era DOJ’s arrest of former Mexican defense minister General Salvador Cienfuegos Zepeda outraged the Mexican government, which threatened to expel every American drug enforcement agent from the country in response.²⁷³ Consequently, it only took DOJ two weeks to walk back the arrest and drop all charges, due to “sensitive and important foreign policy considerations.”²⁷⁴ However, the decision to drop charges against Zepeda potentially compromised accountability for crimes on U.S. soil, as Ranking Member of the Senate Foreign Relations Committee Bob Menendez (D-NJ) warned that this would undermine

²⁶⁸ *Id.*

²⁶⁹ Alan Feuer, *El Chapo Found Guilty on All Counts; Faces Life in Prison*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/nyregion/el-chapo-verdict.html>; *One Year After Being Sentenced, ‘El Chapo’ Is Hoping an Appeal Can Get Him out of Supermax, His Lawyer Says*, CBS NEWS (July 22, 2020, 9:45 AM), <https://www.cbsnews.com/colorado/news/el-chapo-supermax-colorado-prison/> [<https://perma.cc/YRY9-78M7>].

²⁷⁰ See Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [<https://perma.cc/97XW-SUQM>]; Koh, *Foreign Relations*, *supra* note 35, at 745-51.

²⁷¹ *Michael Kovrig and Michael Spavor: China Charges Canadians with Spying*, BBC NEWS (June 19, 2020), <https://www.bbc.com/news/world-asia-china-53104303> [<https://perma.cc/V3Z7-YKZW>]; Koh, *Foreign Relations*, *supra* note 35, at 745-51.

²⁷² Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), <https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution> [<https://perma.cc/F6HB-3MD5>].

²⁷³ Alan Feuer & Natalie Kitroeff, *Mexico, Outraged at Arrest of Ex-Official, Threatened to Toss U.S. Agents*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/world/americas/mexico-cienfuegos-barr.html>.

²⁷⁴ Motion to Dismiss at 1, *United States v. Zepeda*, No. 19-366 (E.D.N.Y. Nov. 16, 2020).

“faith in the U.S. justice system and [encourage] impunity at the highest levels in Mexico.”²⁷⁵ Indeed, although U.S.-Mexican cartel cooperation continued after the dismissal, the Mexican President subsequently claimed the U.S. had “fabricated” the charges.²⁷⁶

In sum, criminal law can be a clumsy and, at worst, perilous channel of U.S. power. The ultimate “hard case making bad law” scenario is the possibility of a *global arrest game*, in which countries worldwide engage in retaliatory arrest and/or extrajudicial killing.²⁷⁷ At the same time, such countries may also engage in one or more of the six foreign policy modalities. Take, for example, the case of Fethullah Gülen, who the Turkish government under President Erdogan believed orchestrated a 2016 coup attempt.²⁷⁸ The Turkish government has repeatedly requested Gülen’s extradition from the United States, and the U.S. government has resisted because the Turkish government has failed to make the requisite showing of probable cause.²⁷⁹ Troublingly, the Turkish government also explored the possibility of kidnapping Gülen with Michael Flynn and, likely, Rudy Giuliani.²⁸⁰ In addition to these tactics, Turkish authorities have resorted to pressuring the United States to extradite Gülen by arresting U.S. citizens in Turkey. Serkan Golge, a NASA scientist, was detained after an

²⁷⁵ Press Release, Senate Foreign Rels. Comm., Menendez Reaction to Trump Administration’s Retreat on Drug Trafficking Case Against Former Mexican Defense Minister (Nov. 18, 2020), <https://www.foreign.senate.gov/press/dem/release/menendez-reaction-to-trump-administrations-retreat-on-drug-trafficking-case-against-former-mexican-defense-minister> [<https://perma.cc/JMD8-CA7Z>].

²⁷⁶ Mary Beth Sheridan, *López Obrador Lashes Out at DEA After Mexico Exonerates Ex-Minister on Drug Charges*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/world/amlo-attacks-dea-salvador-cienfuegos-mexico-defense-minister/2021/01/15/3f6aad0c-573f-11eb-acc5-92d2819a1ccb_story.html.

²⁷⁷ See Shahshahani, *supra* note 189, at 139.

²⁷⁸ Michael Werz & Max Hoffman, *The Process Behind Turkey’s Proposed Extradition of Fethullah Gülen*, CTR. FOR AM. PROGRESS (Sept. 7, 2016), <https://www.americanprogress.org/article/the-process-behind-turkeys-proposed-extradition-of-fethullah-gulen/>; Koh, *Foreign Relations*, *supra* note 35, at 742 n.17.

²⁷⁹ Werz & Hoffman, *supra* note 278.

²⁸⁰ Julian Borger, *Ex-Trump Aide Flynn Investigated Over Plot to Kidnap Turkish Dissident—Report*, GUARDIAN (Nov. 10, 2017), <https://www.theguardian.com/us-news/2017/nov/10/michael-flynn-trump-turkish-dissident-cleric-plot> [<https://perma.cc/G326-2BV2>] (noting that Flynn reportedly discussed with Turkish government possibility of having Gülen kidnapped and sent to Turkey in exchange for \$15 million); Carol D. Leonnig, Ellen Nakashima, Josh Dawsey & Tom Hamburger, *Giuliani Pressed Trump to Eject Muslim Cleric from U.S., A Top Priority of Turkish President, Former Officials Say*, WASH. POST (Oct. 15, 2019), https://www.washingtonpost.com/politics/giuliani-pressed-trump-to-eject-muslim-cleric-from-us-a-top-priority-of-turkish-president-former-officials-say/2019/10/15/bf43d1ec-ef68-11e9-b648-76bcf86eb67e_story.html (“Rudolph W. Giuliani privately urged President Trump in 2017 to extradite a Turkish cleric living in exile in the United States . . .”).

“anonymous tip” linked him to the 2016 coup.²⁸¹ American officials, including President Trump, demanded Turkey release Golge from solitary confinement, given the lack of incriminating evidence against him, and eventually succeeded in securing his return to the United States in June 2020.²⁸²

2. Creation: Nuremberg’s Long Legacy

Cooperation is the ideal first option for the United States in geopolitical crisis, followed by codification and prosecution in domestic U.S. courts. Sitting alongside codification is creation—another lever that may redress criminal wrongdoing without embroiling the United States directly in foreign policy conflict.

As noted above, the United States has a long history of supporting such *sui generis* institutions, from Nuremberg to the ICTY and, now, to the hybrid tribunal in Ukraine.²⁸³ Such institutions have many salutary benefits. One benefit is their compensation for failures in foreign states, as they deliver more impartial justice when a state is compromised. For example, the ICTY—generally considered to be the most successful in the modern era of international tribunals—prosecuted President Slobodan Milošević, President Radovan Karadžić, and General Ratko Mladić, each of whom were accused and/or convicted of genocide, war crimes, and crimes against humanity.²⁸⁴ General Mladić, nicknamed “The Butcher of Bosnia,” was ultimately convicted, *inter alia*, of perpetrating a genocide against thousands of Bosnian Muslims in Srebrenica in July 1995.²⁸⁵ Victims of these atrocities have lauded the judgments.²⁸⁶ By most accounts, such justice would not have been delivered but for the tribunal’s creation by the U.N. Security Council.

At the same time, such tribunals have many defects. They may be slow: The ICTY took decades to engage in its criminal justice mission.²⁸⁷ It may be accused of “victor’s justice,” a criticism levied against the Nuremberg tribunal, which

²⁸¹ Carlotta Gall, *NASA Scientist Jailed in Turkey for 3 Years Recounts His Ordeal*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/world/europe/turkey-erdogan-nasa-scientist-golge.html>.

²⁸² *Id.*

²⁸³ See *supra* text accompanying notes 246-50.

²⁸⁴ See Prosecutor v. Milošević, IT-99-37-I, Indictment, ¶¶ 90-99 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999); *The ICTY Indicted 161 Individuals*, UNITED NATIONS INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/cases/key-figures-cases> [https://perma.cc/J8N4-LXRN] (last updated Sept. 2023).

²⁸⁵ Marlise Simons, Alan Cowell & Barbara Surk, *Mladic Conviction Closes Dark Chapter in Europe, but New Era of Uncertainty Looms*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/world/europe/ratko-mladic-conviction-yugoslavia-bosnia.html>.

²⁸⁶ *Id.*

²⁸⁷ Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L L. 79, 80 (2009).

some believe violated the principle of legality.²⁸⁸ It may be ineffective, as was the case of the Special Tribunal for Lebanon, which closed after a failure to apprehend any suspects.²⁸⁹ It may fail to affect the very transitional justice it aims to achieve given that it operates far from the territory where the crimes occurred.²⁹⁰ The unifying thread of these critiques is that such tribunals are *created de novo*, meaning that such institutions must establish new working patterns for prosecution, defense, and adjudication. This is a lengthy, imprecise task and opens the institution to the contingency of bureaucratic inertia and, at the extreme, dysfunction. Thus, while creation yields certain benefits, the institutional investment and bureaucratic uncertainties render it a non-ideal option, after cooperation and alongside codification.

CONCLUSION

The U.S. response to the Russia-Ukraine, Israel-Gaza, and Syrian Wars highlights the process of contested criminalization in U.S. foreign relations. The United States may pull three policy levers—*codification, cooperation, and creation*—which collectively result in U.S. global criminal justice policy. Such criminalization is contested due to the divergent equities of Congress and the State Department, DOJ, and DOD. With the aim to center their voices, the U.S. government should listen first to victims. Following this, it may then emphasize cooperation with foreign and international criminal justice mechanisms. The United States has a limited role as a criminal law forum and creator of new tribunals, but a more robust one to play in facilitating global accountability efforts given the gravity of the conduct and mass scale of victims.

Let us return to our original hypothetical to understand the work this Article has done. Imagine you are a White House policymaker in January 2025. Wars are coming to an end in Ukraine and the Middle East. There are widespread reports of horrific war crimes—civilians targeted, hostages tortured, sexual violence perpetrated on and off the battlefield. Victims' voices are rapidly emerging as they flee the country. Many are calling for accountability as they begin to process the trauma they endured. President Trump asks you for criminal legal remedies. What should you do?

You now realize the importance of limited criminal justice intervention to provide justice for victims. And you can now see clearly that the relevant policy area is called *U.S. global criminal justice policy*—the collective U.S. laws and policies that govern the administration of and relationship to the domestic (i.e.,

²⁸⁸ Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 213-14 (2005).

²⁸⁹ See Mia Swart, 'No Gleaming Success': Special Tribunal for Lebanon to Close Because of Funding Shortage, AL JAZEERA (June 13, 2021), <https://liberties.aljazeera.com/en/special-tribunal-for-lebanon-to-close-its-doors> [<https://perma.cc/MC7T-LY67>].

²⁹⁰ See, e.g., DIANE ORENTLICHER, SOME KIND OF JUSTICE: THE ICTY'S IMPACT IN BOSNIA AND SERBIA (2018) (detailing fragmented viewpoints regarding war and ICTY's function on ground in former Yugoslavia).

U.S. courts), transnational (i.e., cross-border relationships), and international (i.e., war crimes tribunals) criminal legal systems. You can pull three levers: *codification*, *cooperation*, and *creation*.

Regarding codification, you should rally Congress to amend U.S. federal law to facilitate domestic prosecution of war criminals in U.S. courts—something they are likely to do given Congressional predisposition toward criminalization as a policy matter. In doing so, you may seize on longstanding executive agency goals to amend specific statutes, such as changing the jurisdictional regime around war crimes prosecutions.

Regarding cooperation, you should engage DOJ to strengthen cross-border law enforcement relationships with Ukraine and other countries—something it already does on a routine basis in cross-border criminal cases. And you can foster U.S. cooperation with international criminal courts, including the ICC or a hybrid international war crimes tribunal within Ukraine, first through legislative action and then through facilitation of such information-sharing through executive agencies. If necessary, you must consider use of White House authority to override resistance from various agencies with divergent equities.

And regarding creation, you can push for a new hybrid aggression tribunal to prosecute President Putin, ideally one within Ukraine itself to offset risk of the institutional challenges of a novel, *sui generis* international justice mechanism.

From a normative perspective, to what extent should the United States even use criminal law? In answering this question, you may draw on the contemporary lessons of American criminal law discourse to realize that criminal sanction should be used minimally, but you should not presume that the American approach is best. Instead, you should listen to and center the voices of victims abroad. Here, the confluence of atrocity crimes, mass victims, and calls for justice indicates that criminal accountability is appropriate. Prosecutions should ideally occur in the foreign countries themselves, lending strength to *cooperation* as the preferred U.S. policy option, rooted in relations across borders and alignment of mutual interests. Prosecution in U.S. courts should be deemphasized, limited to instances wherein a suspect is in the United States, has clearly perpetrated serious crimes (e.g., war crimes) abroad, the relevant foreign jurisdiction cannot prosecute, and DOJ has sufficient evidence to prove such crimes beyond a reasonable doubt.²⁹¹ Prosecuting in such limited fashion mitigates risk of embroiling the United States in complex foreign policy conflict. Lastly, you must acknowledge that the creation of new tribunals offers some promise but also creates significant bureaucratic challenges—thus weighing in favor of local criminal prosecution.

²⁹¹ See *supra* Section IV.B.1.