

THE PERPETRATOR'S PURSE STRINGS: STRATEGIES FOR PREVENTING MASS ATROCITIES THROUGH SANCTIONS

I. INTRODUCTION

As President Obama stated when he created the Atrocities Prevention Board in 2011, the prevention of mass atrocities is “is a core national security interest and a core moral responsibility of the United States.”¹ But five years after the establishment of the Atrocities Prevention Board, the worthy goal set forth by President Obama of stamping out mass atrocities is not closer to realization. Atrocities continue unabated throughout the world—in places such in Syria, Iraq, the Democratic Republic of Congo, Nigeria, and the Central African Republic, to name but a few.

Preventing mass atrocities is no small feat; the root causes are legion, and require constant vigilance to remedy. Effective atrocity prevention requires a variety of tools and flexible approaches. At one side of the continuum of approaches is simply acknowledging that such atrocities are occurring and condemning them in the strongest manner. At the other end of the spectrum is the deployment of full-scale military force to stop the atrocities. However, there are many other options in between these two extremes that are often over-looked or under-utilized. A middle approach that requires positive action, but is less costly in blood and treasure, is intermediate measures such as financial, travel, and other sanctions. Sanctions will by no means eliminate atrocities, but they may be effective in certain situations to stigmatize and incapacitate and should remain in our atrocity prevention tool-kit for situations in which they can be effectively employed.

This paper explores the need for an atrocities prevention sanctions regime and also discusses what form such a regime should take. First, we will explore the scope of the mass

¹ PSD-10, <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>

atrocities problem we are seeking to remedy. Second, we will explain the structure and use of sanctions in the past by the United States, as well as other international sanctions regimes, notably the European Union and the United Nations. Third, we will offer substantive recommendations for a sanctions regime executive order, and have included a draft executive order as an appendix. Fourth, we will discuss the need for a forward-looking designation system for pre-atrocities situations. Such a system will allow the United States to get ahead of the problem, and thereby use sanctions as prophylactic instead of purely punitive measures. We will then explore and evaluate a variety of historical case studies of countries for which an atrocities prevention sanction regime may have been effective, and demonstrate how our proposed forward-looking designation system for pre-atrocities situations could have worked. This discussion will also examine early actions the United States could have taken to pressure perpetrators not to engage in the above atrocities before their onset. From these case studies, we will glean lessons learned as we move forward with atrocities prevention, including the challenges of evaluating the effectiveness of sanctions regimes.

Finally, before we begin, it is necessary to establish the scope of what we are seeking to prevent. Simply put, this paper addresses the potential utility of sanctions to prevent mass atrocities, which we define as genocide, crimes against humanity, and certain war crimes. In looking at the function and utility of sanctions, we are taking into account the current capacity of the various agencies and departments of the United States government to execute a sanctions regime. That is to say, this paper is not aspirational with respect to capacity and funding; rather we are seeking to demonstrate what the United States government can actually accomplish right now. For that reason, we are focusing on the worst and most egregious manifestations of human behavior—mass atrocities.

II. THE SCOPE OF THE MASS ATROCITIES PROBLEM AND WHY A NEW SANCTIONS REGIME IS NEEDED

Twenty years after world leaders and major international organizations pledged to create an atrocities prevention system that would ensure that another Rwanda would never happen, we are still constantly confronted with numerous instances of atrocities and genocidal violence. Even at the time of writing this paper, several atrocity situations continue to go unchecked across the world, from the Central African Republic, to Syria, and most recently, Burma. As atrocities continue in the present day, it is clear that the current atrocities prevention regime is failing. Through our country case studies (discussed in Section VII), we attempt to understand what parts of the United States' atrocities prevention regime are failing, which is integral to recognizing the requirements for a more successful regime. Since the United States' regime relies on sanctions as its main enforcement mechanism (as do the United Nations and the European Union), we analyzed the country case studies through the lens of sanctions, and thus kept out issue spotting within the realm of sanctions.

While we discuss the problems found at length later in this paper, there were a few glaring issues we found. First, many past and existing sanctions regimes target specific criminal behaviors, such as corruption, extra-judicial killings, suppression of free speech, and other gross violations of human rights. While these are necessary and worthy goals and the United States should continue strive to end these crimes, as we see again and again, addressing and sanctioning only these behaviors is not enough to prevent atrocities. Second, time and time again, there is a major problem of putting sanctions into effect only after the atrocities occur; this sluggishness of action stems from several different reasons, ranging from the red tape of government bureaucracy to delays associated with coming to a consensus across political parties

and government agencies. A third, and somewhat related issue to the slow motion of bureaucracy is the issue of resources. It takes money, time and extensive human brainpower to initiate an effective sanctions regime, all of which are often lacking as attempts at creating new sanctions are made. Fourth, many sanctions regimes fall short in not only targeting all (or even most) individuals and entities that are responsible for the atrocities and violence committed, but also for targeting individuals and entities that support and enable the main perpetrators. Finally, as is often seen with the more broad and all-encompassing sanctions, unwanted effects such as the disruption of aid create humanitarian crises, as vulnerable populations not involved in the conflict suffer.

Creating a sanctions regime that addresses the above issues is not something that can be done with ease or even with full success. However, after analyzing current and past sanctions regimes, we have a series of recommendations to be applied to future sanctions regimes. These recommendations, which will be discussed at length throughout this paper, include enacting a standing, targeted sanctions regime, which would be delivered in the form of an executive order. With respect to those individuals and entities who would be targeted, we recommend using both status and conduct as the main drivers of targeting. We believe that these recommendations would solve many of the issues with the current regime: first, an executive order allows for greater flexibility, and is the quickest way to instituting sanctions; second, a standing regime saves resources and energy that goes into creating a new regime every time a conflict arises, and also puts potential perpetrators on notice even before a crime is committed; and third, a targeted regime that relies on status and conduct would ensure that only those responsible for the atrocity and those aiding the main perpetrators would be sanctioned. We believe integrating these three

mechanisms into future sanctions regimes would create a much more effective and successful sanctions regime.

III. EUROPEAN UNION SANCTIONS REGIME

A. Sanctioning Bodies and Legal Authority

The European Union has a robust sanctions regime that includes both general, countrywide sanctions, as well as sanctions that target individuals and entities, which are known as “smart” or “targeted” sanctions. European Union sanctions can be imposed through one of two ways: either through resolutions mandated by the United Nations Security Council (under Chapter VII of the UN Charter), or by the European Union’s adoption of “autonomous” sanctions,² in which the European Union creates its own sanctions, separate from the United Nations Security Council.³ Usually this occurs when the European Union adds or expands sanctions mandated by the United Nations when it believes that these sanctions do not reach far enough.⁴ Such examples include adding more individuals and entities to the United Nations’ sanctions list, as well as expanding penalties.

The European Union’s sanctioning bodies receive the authority to impose sanctions not only through United Nations Security Council mandates, but also through, the European External Action Service (“EEAS”), an organization that helps create the European Union’s sanctions policies.⁵ The EEAS, which was created by the treaty of Lisbon in 2009, is the diplomatic service branch of the European Union⁶ and advises the High Representative for Foreign Affairs

² EU Commission - Restrictive measures; CEPS, “The EU’s Use of ‘Targeted’ Sanctions Evaluating Effectiveness” – By Clara Portela

³ CEPS, “The EU’s Use of ‘Targeted’ Sanctions Evaluating Effectiveness” – By Clara Portela

⁴ CEPS, “The EU’s Use of ‘Targeted’ Sanctions Evaluating Effectiveness” – By Clara Portela

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and Security Policy.⁷ The office of the High Representative, (who is the EU's head of foreign affairs), meanwhile, coordinates and implements the European Union's foreign and security policies, known as the Common Foreign and Security Policy ("CFSP") and the Common Security and Defence Policy ("CSPD"). The EEAS thus implements the European Union's CFSP, which is integral to the European Union's sanctions regime, as all autonomous sanctions created by the EU must be in pursuit of the CFSP's requirements and objectives.⁸ This authority to issue sanctions comes specifically from The Treaty on the European Union, Article XI (which is where the CFSP was also mandated).⁹

Sanctions are introduced through a document known as the Common Position. Common Position proposals are usually drafted by the country holding the European Union Presidency or by another Member State of the European Union. Proposals are analyzed and edited by certain Council groups, including the Foreign Relations Counsellors Working Group and the Committee of Permanent Representatives. Once these councils agree on a proposal, it must be published in the Official Journal of the European Union.¹⁰ As mentioned above, all sanctions must fit within the guidelines of the CFSP, and meet the CFSP's objectives.¹¹ To further help with general conformity, the European Union also created a special guide that lists basic formats, definitions, and languages to be used when creating sanctions, called "Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy"¹²

⁷ information taken from http://eeas.europa.eu/background/about/index_en.htm

⁸ EU Commission - Restrictive measures; the CFSPs objectives are outlined in Article 11 of the Treaty of the EU

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¹⁰ EU Restrictive Measures - 8

¹¹ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (2012) - 5

¹² EU- Restrictive Measures - 3

B. Types of Sanctions

The European Union has both general, countrywide sanctions that target governments, as well as sanctions that target individuals and non-entities.¹³ Some of the most common countrywide sanctions include arms embargoes, which include “a prohibition on the sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts,” as well as a “prohibition on the provision of financing and financial assistance and technical assistance, brokering services and other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types.”¹⁴ Items prohibited in arms embargos can be found in the European Union’s Common Military list; these embargos also include financial and technical sanctions targeting weapons accrual.

In addition to arms embargoes, other countrywide or general sanctions include financial restrictions, such as bans on the provision of specific financial services, withdrawal of tariff preferences, freezing funds, freezing financial transactions, and restricting export credits or investment. Also included in this category are trade restrictions (import/export bans on specific items) and flight bans, visa and travel bans, diplomatic sanctions (expulsion of diplomats, etc), ending cooperative agreements with other countries/entities, and even boycotts of cultural events, including sports.

In addition to general, countrwide sanctions, the European Union also uses targeted restrictive measures, called “smart sanctions” or “targeted sanctions.” As with country-specific sanctions, targeted sanctions can include financial restrictions (which include both the freezing of all assets and prohibiting any funding to those who are sanctioned) and travel bans. These

¹³ list of sanctioned groups/individuals: http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf

¹⁴ EU - Restrictive Measures - 4

sanctions are unique in that they target only certain individuals and entities, and must have “clear criteria, tailored to the specific case, for the purposes of determining who should be listed and de-listed.” In other words, these types of sanctions “target” individuals responsible for (or who influence) the issues that created the need to implement sanctions.¹⁵

Targeted sanctions attempt to “freeze all funds and economic resources of the targeted persons and entities and [create] a prohibition on making funds or economic resources available directly or indirectly to or for the benefit of these persons and entities.”¹⁶ Thus, the objective is to try to bring about change (or prevent bad behavior) in a way that only negatively affects those responsible, as opposed to an entire group of people. This is especially important when considering that the general populations of sanctioned countries often suffers the most when broad economic sanctions are imposed, as opposed to those who actually have the power and ability to stop poor behavior.

Recently, targeted sanctions have been used to combat terrorism. For instance, the European Union uses targeted sanctions under United Nations Security Council Resolutions 1267 and 1373, and has implemented additional targeted sanctions on individuals and entities identified as terrorists that are not listed in the United Nations resolutions. Specific measures against individuals and entities responsible for terrorism include Common Position 2001/931/CFSP (which includes criteria for identifying those involved in terrorist acts, defines actions that are terrorist acts, and includes a list of sanctioned individuals and entities) and Council Regulation (EC) No 2580/2001 (which places economic restrictions and asset freezes on those partaking in terrorism activities).¹⁷ In addition to these measures against terrorism, there are also specific measures (Council Regulation (EC) No 881/2002) against groups such as Al-

¹⁵ Clara Portela

¹⁶ EU - Restrictive measures - 4-5

¹⁷ The EU List of persons, groups and entities subject to specific measures to combat terrorism, 1

Qaida and the Taliban, which were implemented in response to UN Security Council Resolution 1390 (2002).¹⁸

However, most targeted sanctions often are travel bans to all European Union countries, as well as asset and account-freezing of European Union banks.¹⁹ Finally, it should be noted that certain recent actions that appear to be sanctions are not such. This includes the withdrawal of the Generalised System of Preferences (“GSP”), as well as the removal of aid. Both of these examples are worth mentioning many other countries and parties involved consider these to be sanctions.²⁰

C. Enforcement Mechanisms and Regulating Bodies

The European Union Commission, which oversees Member States, has the authority to make proposals for Common Positions, as well as create and edit lists of sanctioned individuals and entities. More importantly, the Commission also enforces and facilitates Member State cooperation and adherence to sanctions, and issues specific regulations and reporting requirements to Member States within Common Positions. Member states that do not adhere to reporting requirements face infringement procedures brought against them by the European Union Commission.²¹

Both European Union Member States and the European Union Commission are responsible for implementation and enforcement of sanctions. Member states are responsible for “determination of penalties for violations of the restrictive measures; the granting of exemptions; receiving information from, and cooperating with, economic operators (including financial and credit institutions); reporting upon their implementation to the Commission; [and] for UN

¹⁸ The EU List of persons, groups and entities subject to specific measures to combat terrorism, 1

¹⁹ Portela, 31

²⁰ Clara Portela

²¹ EU Restrictive Measures - 10

sanctions, liaison with Security Council sanctions committees, if required, in respect of specific exemption and delisting requests.”²² For implementation of United Nations sanctions, especially asset freezing, the European Union recognizes the importance of timely implementation in order to prevent the quick movement of money. Thus, the European Union allows for Member States to implement interim national measures. Additionally, the European Union created guidelines that ensure necessary measures in place no later than 30 days after United Nations Security Council resolutions have been adopted.²³

In addition to this, it is also important to note that European Union law decrees that once financial and economic sanctions are instituted, all entities and individuals covered by European Union law must respect all sanctions, which usually includes ceasing all business with sanctioned entities, countries and individuals.²⁴ Thus, European Union sanctions are only applicable to where there are “links” to the European Union, including “the territory of the European Union, aircrafts or vessels of Member States, nationals of Member States, companies and other entities incorporated or constituted under Member States’ law or any business done in whole or in part within the European Union”²⁵ Economic sanctions are meant to be all-encompassing, and there is no tolerance for individuals or organizations covered under EU law that continue to do business with those on the sanctions list. In order to monitor those who are currently on the sanctions list, Credit Sector Federations, which are comprised of several EU banks and banking groups, maintain a database of current sanctions targets.²⁶

²² EU Restrictive Measures - 9

²³ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (2012) - 16

²⁴ http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf

²⁵ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy (2012) - 20

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IV. THE STRUCTURE AND USE OF SANCTIONS BY THE UNITED STATES

In this section, we explore past and current United States sanctions regimes. We first explore the legal authority and mechanics of United States sanctions. Second, we explain the different structures and approaches used and evaluate which structures would be best suited for atrocity prevention. Then we discuss whether a standing sanctions regimes or the use of *ad hoc* regimes based on emergent situations would be better suited for the prevention of atrocities. In this section we conclude that the preferable sanction utilization method to prevent atrocities is to create a standing, targeted sanctions regime that combines both status and conduct-based designations.

A. THE LEGAL AUTHORITY AND MECHANICS OF United States SANCTIONS

United States sanctions regimes arise from either from legislation or executive order. Congress, in a variety of instances, has passed legislation mandating sanctions for certain nations and activities.²⁷ An example of such a statutory sanctions regime include the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (“Magnitsky Act”), which mandated sanctions for certain acts of corruption and violation of human rights within the Russian Federation.²⁸ In addition to legislation, a variety of sanctions regimes are created through executive order.²⁹ Presidential authority for the creation of sanctions regimes through executive order arises from a variety of sources of United States law. The main sources of U.S. law that are invoked when promulgating sanctions through executive order are

²⁷ Iran Threat Reduction and Syria Human Rights Act of 2012, H.R. 1905 (January 3, 2012).

²⁸ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Accountability Act of 2012, Public Law 112-028 (December 14, 2012) [hereinafter Magnitsky Act] [ADD OTHERS]

²⁹ *E.g.* Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015.

the International Economic Emergency Powers Act (“IEEPA”) and the National Emergencies Act (“NEA”).³⁰ Upon the determination of existence of national emergency and of an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States,” the IEEPA grants the President authority to take a variety of economic measures, including the freezing or blocking of assets.³¹ The NEA provides authority to declare national emergencies, as well as provides procedural and reporting requirements for such declarations.³² The President has invoked IEEPA dozens of times to promulgate sanctions regimes by way of executive order.³³

The current interpretation of the scope of what constitutes a national emergency for the purposes of IEEPA is extraordinarily broad. Indeed, national emergencies have been invoked in a variety of countries and for a variety of situations, which seem to have on first glance little connection to United States national security.³⁴ Furthermore, the duration of the national emergencies declared for the purposes of IEEPA have been quite long.³⁵ For instance, the

³⁰ International Emergency Economic Powers Act, 50 U.S.C. 35 [hereinafter IEEPA]; National Emergencies Act, 50 U.S.C. 1601, 1621, 1622 [hereinafter NEA].

³¹ IEEPA, § 1701 (a), 1702 (a). Section 1701 (a)(B) confers authority to: “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States[.]”

³² NEA, *supra* note [].

³³ For a list of sanctions regimes under IEEPA, see Sanctions Program and Country Information, Office of Financial Assets Control, United States Department of Treasury, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

³⁴ See Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015; *see also* Executive Order 13667 (Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic), dated May 13, 2014; *see also* Executive Order 13348 (Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia), dated July 23, 2004; *see also* Harold Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair, 47–48 (1990).

³⁵ Executive Order 12808 (Blocking "Yugoslav Government" Property and Property of the Governments of Serbia and Montenegro), dated May 30, 1992. The national emergency declared pursuant to Executive Order 12808 was modified in 2001, but remains in place to this day. Executive Order 13304 (Termination of Emergencies With Respect to Yugoslavia and Modification of Executive Order 13219), dated June 26, 2001; Executive Order 13219 (Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans), dated June 27, 2001.

sanctions regime promulgated under IEEPA following the Balkan War lasted over twenty years.³⁶ The current scope of presidential authority to declare national emergencies for the purposes of IEEPA has so far escaped challenge. In any case, the scope of such authority is likely non-justiciable.³⁷ It is also important to note that while the President's authority to declare national emergencies for the purposes of IEEPA is quite broad, and has been utilized extensively, the President has not fully employed all available measures available under IEEPA when establishing sanctions regimes.³⁸ For instance, the IEEPA confers authority to:

(A) investigate, regulate, or prohibit--

- (i) any transactions in foreign exchange,
- (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
- (iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;³⁹

Such broad authority could be used to prohibit or limit financial transactions such as the establishment or maintenance of correspondent accounts and/or pay-through accounts ("PTAs") for foreign financial institutions within the jurisdiction of government's engaging in mass atrocities, but has not been utilized in this manner as of yet. We will explore the details of such transactions in Section VI when discussing our substantive recommendations for a sanctions regime.

³⁶ *Id.*

³⁷ *See Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191, 1193 (D. Mass. 1986), *aff'd* 814 F.2d 1 (1st Cir. 1987); *see also* Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, 47-48 (1990).

³⁸ *See* Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015; *see also* Executive Order 13667 (Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic), dated May 13, 2014; *see also* Executive Order 13348 (Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia), dated July 23, 2004.

³⁹ IEEPA, *supra* note [], § 1702(a)(A)(i-iii).

In addition to IEEPA and NEA, authority under the Immigration and Nationality Act of 1952 (“INA”) is regularly invoked when promulgating sanctions regimes through executive order,⁴⁰ and is the source of presidential authority to promulgate travel and visa bans.⁴¹ In addition to this, the United Nations Participation Act (“UNPA”) can also be a source of executive authority to enact sanctions regimes, in certain situations.⁴² Section 5 of UNPA gives the President authority to take promulgate rules and regulations to satisfy the obligations of the United States that arise through United Nations Security Council Resolutions under Article 41 of the United Nations Charter, which provides the Security Council authority to enact economic sanctions.⁴³

Once a sanctions regime is enacted, either through legislation or executive order, it is largely administered by the Office of Foreign Assets Control (“OFAC”) within the Treasury Department. A sanctions regime will normally provide a set of criteria for identifying the entities to be sanctioned.⁴⁴ Additionally, a sanctions regime may contain an appendix with certain entities pre-determined to be targets of the sanctions regime.⁴⁵ The determination of whether certain entities satisfy the criteria is delegated to a handful of United States government officials depending on the nature of the regime.⁴⁶ This authority is usually assigned to either the Secretary

⁴⁰ *E.g.* Executive Order 13660 (Blocking Property of Certain Persons Contributing to the Situation in Ukraine), Sec. 2, dated March 6, 2014.

⁴¹ Immigration and Nationality Act of 1952, 8 U.S.C. 1182(f), § 212(f) [hereinafter INA].

⁴² *See, e.g.* Executive Order 13667 (Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic), dated May 13, 2014.

⁴³ United Nations Participation Act, 22 U.S.C. 287c, § 5 [hereinafter UNPA]; The Charter of the United Nations, art. 41 (June 26, 1945).

⁴⁴ *E.g.* Magnistky Act, *supra* note [], § 404.

⁴⁵ *E.g.* Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015, Sec. 1(a)(i).

⁴⁶ Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015, Sec. 1(a)(ii); Executive Order 13664 (Blocking Property of Certain Persons with Respect to South Sudan), dated April 3, 2014, Sec. 1(a).

of State, the Secretary of the Treasury, the Attorney General, or some combination of the three.⁴⁷ Even if principle authority is assigned to a single official, that official is often directed to consult with one or two of the other officials when designating entities pursuant to the sanctions regime.⁴⁸ For instance, an often found formulation allows for sanction designation “if the Secretary of State, in consultation with the Secretary of Treasury” so determines.⁴⁹ Once a list of designated entities is promulgated, OFAC the measures set forth in the sanctions regime for those entities. In addition, sanctions regimes often grant the official responsible for designation pursuant to the regime with the authority to promulgate rules and regulations as necessary to carry out the sanctions regime.⁵⁰ These rules and regulations will often serve to clarify the designation criteria or facilitate designation and execution of measures required by the sanctions regime.⁵¹

B. THE STRUCTURES AND APPROACHES OF UNITED STATES

SANCTIONS

There has been considerable evolution in the structures and approaches of United States sanctions over the last half-century. The majority of the sanctions employed in the 20th century were broad-based country and sector sanctions.⁵² The sanctions impose blanket bans or

⁴⁷ Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015, Sec. 1(a)(ii); Executive Order 13664 (Blocking Property of Certain Persons with Respect to South Sudan), dated April 3, 2014, Sec. 1(a).

⁴⁸ Executive Order 13962 (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 9, 2015, Sec. 1(a)(ii); Executive Order 13664 (Blocking Property of Certain Persons with Respect to South Sudan), dated April 3, 2014, Sec. 1(a).

⁴⁹ *E.g.* Executive Order 13664 (Blocking Property of Certain Persons with Respect to South Sudan), dated April 3, 2014, Sec. 1(a).

⁵⁰ Executive Order (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), dated March 8, 2015, Sec 8-9.

⁵¹ “Clarification of licenses for the exportation of agricultural commodities, medicine and medical devices,” 72 FR 12980-07 (Sudan Sanctions Regulations).

⁵² Smart Sanctions: A Short History, Foreign Policy (Apr. 23, 2012), available at: <http://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/>

restrictions on trade between some or all of the sectors of the targeted nation’s economy, and often entail severe limits on travel both to and from the targeted nation.⁵³ Examples of this sort include sanctions imposed on Cuba after the communist revolution in the 1950s, and the sanctions imposed on Iraq following its invasion of Kuwait in the 1990s.⁵⁴ Over the last 15 years, however, the United States and its allies have relied increasingly on targeted or “smart sanctions” to accomplish their policy objectives.⁵⁵ Targeted sanctions focus on individuals rather than nations or specific sectors of a nation’s economy.⁵⁶

The United States currently administers almost thirty targeted sanctions regimes.⁵⁷ The United States use of targeted sanctions falls into two broad categories—country-specific targeted sanctions and activity-based targeted sanctions. Country-targeted sanctions regimes target perpetrators within a specific country for certain actions, such as violations of human rights or corruption.⁵⁸ For example, the current Venezuela sanctions regime directs the imposition of sanctions once the President determines that an individual “has ordered or otherwise directed the arrest or prosecution on a person in Venezuela primarily because of the person’s legitimate exercise of freedom of expression or assembly[.]”⁵⁹ Activity-based sanctions are global in nature.⁶⁰ They target actors engaged in certain activities anywhere in the world.⁶¹ Examples of

⁵³ Cuba Democracy Act of 1992, 22 U.S.C. §§ 6001-6010.

⁵⁴ *Id.*; Executive Order 12724 (Blocking Iraqi Government Property And Prohibiting Transactions With Iraq), dated August 9, 1990.

⁵⁵ Smart Sanctions: A Short History, Foreign Policy (Apr. 23, 2012), available at: <http://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/>

⁵⁶ *E.g.* Executive Order 13664 (Blocking Property of Certain Persons with Respect to South Sudan), dated April 3, 2014, Sec. 1(a).

⁵⁷ For a complete list of United States sanctions regimes, see OFAC Resource Center, Office of Foreign Assets Control, United States Department of Treasury, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>

⁵⁸ *E.g.* Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), dated May 16, 2012, Sec. 1(a-b).

⁵⁹ Venezuela Defense of Human Rights and Civil Society Act of 2014, Sect. b (2).

⁶⁰ *E.g.* EO 13382, Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, dated June 29, 2005, Sec. 1.

⁶¹ *Id.*

such activities previously targeted are terrorism, narco-trafficking, weapons of mass destruction proliferation, and transnational organized crime.⁶²

Targeted sanctions are often more desirable because broad country or sector-based sanctions have the potential to harm entire populations through economic hardship.⁶³ It is often undesirable to punish an entire population for the actions of a few perpetrators. Furthermore, as our country-based sanctions regimes most often occur in countries with authoritarian regimes, the democratic feedback spurred by the economic losses felt by the population is absent. That is, sanctions that usually target an entire economy in order to produce desired change, must create a pain felt by the populace that is then expressed through the ballot box. However, with authoritarian regimes, no such process is available and the causal chain is therefore broken. So absent a revolution or coup, such broad sanctions are likely ineffective.

Additionally, because of other United States policy goals and bilateral relationships, it is often untenable to sanction an entire country. An ally may play host to a handful of perpetrators engaging in activities the United States disapproves of, but the value of the ally's cooperation in other areas may outweighs the damage being done by those few perpetrators. To target such a country with a broad sanctions regime would therefore not be in the United States' national security interests. Targeted sanctions that exist independent of a country regime allow nations to influence those perpetrators without unnecessary and undesirable spillover into other areas of foreign policy. In that way, targeted sanctions allow the United States to use sanctions as a scalpel, as opposed to a sledgehammer. A targeted sanctions regime based on conduct, rather

⁶² *Id.*; Executive Order 13581 (Blocking Property of Transnational Criminal Organizations), dated July 25, 2011; Transnational Criminal Organizations; Executive Order 12798 (Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers), dated October 22, 1995; Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), dated September 24, 2001).

⁶³ Joy Gordon, Smart Sanctions Revisited, *Ethics & International Affairs*, Vol. 25, 315–35 (2011).

than nationality, better lends itself to the atrocity prevention imperative than more broad-based regimes. Hence the best strategy for atrocity prevention sanctions is a geographically unmoored regime.

Targeted sanctions regimes may target individuals based on their conduct or their status. Conduct targeting seeks to identify specific individuals actually engaged or complicit in the bad actions. For example, a sanctions regime utilizing conduct targeting may target an individual determined to have violated human rights or are engaged in narco-trafficking.⁶⁴ On the other hand, status targeting targets individuals by virtue of their position. For instance, if a military engages in a certain conduct, a sanctions regime might target senior military and government leaders for sanctions.⁶⁵ Likewise, family members of those engaged in certain activities will be often be targeted.⁶⁶ Although there are some exceptions, status targeting is more often found within country-focused targeted sanctions regimes.⁶⁷ Conduct targeting is found in both country-based and activity-based targeted sanctions regimes.⁶⁸

Conduct and status targeting have advantages and disadvantages. Conduct targeting has the advantage of actually putting pressure on those engaged in the acts. But making the designation is often more difficult, because it requires a determination that a particular individual

⁶⁴ Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), dated July 25, 2008, Sec.1(a)(v); Executive Order 12798 (Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers), dated October 22, 1995, Sec. 1(a)ii.

⁶⁵ Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), dated May 16, 2012), Sec. 1(b).

⁶⁶ Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), dated July 25, 2008, Sec.1(a)(iv).

⁶⁷ *Compare* Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), dated July 25, 2008, Sec.1(a)(iv) *and* Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), dated May 16, 2012), Sec. 1(b) *with* Executive Order 13581 (Blocking Property of Transnational Criminal Organizations), dated July 25, 2011; *and* Executive Order 12798 (Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers), dated October 22, 1995 *and* Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), dated September 24, 2001).

⁶⁸ *E.g.* Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), dated May 16, 2012), Sec. 1(b); Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), dated September 24, 2001).

has committed, or is going to commit, a certain bad act. This can be notoriously difficult in certain areas of the world where the sanctioning country does not have granular intelligence about perpetrators. Status targeting, by contrast, requires a determination that a bad action occurred or is occurring, but the determination of the individuals to target is easier. That is, it is a simpler task to determine if a person is a senior official of a government, militia, or political party, for example, than to determine if an individual actually engaged in the atrocity.

Status targeting also has the advantage of being more exportable to United States allies, Europe in particular. European partners of the United States, due to decisions by the European Court of Justice (“ECJ”) (the *Kadi* judgment in particular) find it difficult to engage in effective conduct designations absent the sort of rigorous proof that will likely be unattainable in the timeline necessary to prevent atrocities.⁶⁹ While status targeting has many advantages, it suffers from the fact that it might not identify the people actually engaging in the bad acts, and may be unfairly over-inclusive. Because of the advantages and limitations of conduct and status targeting, it is our contention that any atrocity prevention sanctions regime should involve liberal use of both approaches.

An additional decision that must be made in designing sanctions regimes is whether the goal of atrocity prevention would be better served through a standing sanctions regime or an *ad hoc* approach based on emergent situations. The major factor weighing in favor of a standing sanctions regime as opposed to the *ad hoc* approach is simply the time it takes to establish a sanctions regime. Legislation takes months and years to craft. Even an executive order takes months to put in place. Once legislation or an executive order is finalized, gathering information

⁶⁹ The *Kadi* judgment at the European Court of Justice held rigorous proof is required to designate persons pursuant to financial sanctions regimes. The level of proof and procedural rights of challenge prior to execution of sanctions make conduct-based sanctions more difficult to employ than in the United States. See Case C-402/05 P and C-415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351; see also Juliane Kokott & Christoph Sobotta, 23 *European Journal of International Law* 4, 1020 (2012).

and designating persons pursuant to the sanctions regime can take additional weeks and months. Pre-atrocity situations flare up and deteriorate into acts of atrocities in a much shorter time frame. A catalyzing event can occur and flare up into an atrocity in a matter of weeks or even days.⁷⁰ Simply put, an *ad hoc* approach will ultimately amount to a fruitless game of sanctions whack-a-mole—potentially punitive, but not a prophylactic tool. In sum, if the goal is to have a sanctions regime that is truly preventive, then a standing sanctions regime is the only viable option.

Furthermore, the signaling function of a standing sanctions regime puts potential perpetrators on notice and may achieve a deterrent effect. An *ad hoc* approach introduces uncertainty as to how the United States will respond to a particular mass atrocity. The goal should be to remove all uncertainty, at least as far as sanctions are concerned. That is, we want to make it crystal clear to potential perpetrators what the sanctions response from the United States will be should they engage in mass atrocities. On the other hand, *ad hoc* approaches do allow greater flexibility in crafting a sanctions regime specifically tailored to each situation. While this ability to tailor no doubt has benefits, these benefits are far outweighed by the drawbacks discussed. Therefore, we conclude that a standing sanctions regime for mass atrocity prevention preferable to the *ad hoc* approach.

In sum, after reviewing the structure and use of previous actions by the United States, the European Union and the United Nations in the past, we conclude that the best sanctions approach is to enact a standing targeted sanctions regime, which utilizes both status and conduct targeting. For the reasons discussed, this approach will provide the United States with the best sanctions tool to prevent mass atrocities.

⁷⁰ See Part V.

V. IDENTIFYING PRE-ATROCITY SITUATIONS AND POTENTIAL PERPETRATORS: COUNTRY CASE STUDIES

In addition to analyzing United States and European Union sanctions regimes, we also analyzed the efficacy of United States sanction regimes (or lack of), specifically that of individual sanctions. We looked at conflicts in eight “case study” countries through the lens of United States action: Burma (Myanmar), Democratic Republic of the Congo (“DRC”), Federal Republic of Yugoslavia (“FRY”), Kenya, Kyrgyzstan, Rwanda, Sri Lanka, and Sudan. Each country had a period in which it experienced varying levels of unrest, violence, and political upheaval, with those responsible for these events primarily coming from positions of power and authority. United States responses to these countries were as varied as the events that occurred in each one, ranging from light warnings to strict (and long-lasting) individual sanctions.

In looking back at historical, “real-life” situations, not only did we gain better knowledge and understanding regarding the “red flags” and indicators (including financial tails) leading up to potential conflict and unrest, but we also learned more about the individuals (and their motivations) behind these conflicts. Once we established this baseline, we looked at the entirety of United States sanctions and responses toward those individuals who played major roles in the conflicts. From this analysis, we drew conclusions about what are effective actions against those about commit (or who are in the process of committing) atrocities, as well as what future legislation and executive orders should address. Additionally, since United States action occurred almost entirely after each of these conflicts began, we addressed preemptive actions the United States could take before true carnage actually occurs.

The following section is thus divided into four parts: Parts A and B address “lessons learned.” Part A analyzes the countries that received sanctions and is further divided into three sections: 1) a summary of the sanctions regimes, 2) a discussion of the conflict enablers and their

financial tails, and 3) problems identified from these regimes. Part B analyzes countries that did not receive sanctions, and is also divided into three sections: 1) a summary of the international responses that did occur 2) a discussion of the conflict enablers and their financial tails, and 3) the robustness of the international responses. Part C then addresses conflict warning signs and issues to consider when monitoring for potential conflict, as well as a discussion of potential guidelines to include in an Executive Order.

A. Lessons Learned: Country Case Studies with Sanctions Regimes

Four of the countries analyzed contained a combination of sanctions; while Sudan, Burma and the FRY experienced sanctions that targeted individuals, entities and the full country, the DRC was subjected only to individual sanctions. It is not surprising three of these countries were subjected to such wide-reaching sanctions regimes; both Burma and Sudan were widely recognized as international pariah states, and the FRY was mired in conflict in the Balkans and later Kosovo during both of the sanctions regimes implemented. Sudan, meanwhile, has been repeatedly accused of supporting and financing terrorism-related activities as well as condoning and committing atrocities against its own citizens. Burma, until recently, was infamous for its repression of political dissent and control of information, to the point where it was second to only the Democratic People's' Republic of Korea in terms of isolation from the international community.

In looking at the “lessons learned,” we identified major takeaways from the United States sanctions regimes of these four countries. First, we briefly analyzed the sanctions themselves, including what their targets were. Next, we analyzed events and trends leading up to the conflict (along with the conflict itself) to determine whether there were any obvious financial tails or markers created by the main actors in the conflict. We also looked at whether the sanctions included measures for enablers and supporters of sanctioned individuals, and if so,

what these entailed. Finally, we analyzed the robustness of each sanction regime, focusing on measures that were unsuccessful. In doing this, we specifically addressed the problems sanctions failed to resolve, in addition to problems or complications that arose since the issuance of sanctions.

1. Summary of Sanctions Regimes

Targeted or “individual” sanctions were commonly used in the country case studies. These sanctions were often divided into three categories: visa/travel bans, financial restrictions, and asset (property) freezing. With respect to travel bans, these usually resulted in visa bans to targeted individuals, such as travel restrictions placed not only on Burmese individuals, but also on their family members. The second category, financial restrictions, often included enacting prohibitions on access to financial services to those on the sanctioned list. This could be seen in some of the later sanctions in the FRY, such as Executive Order 13192, which blocked all property and interests in property of individuals who provided material support or resources to any designated persons, and Executive Order 13219, which blocked all property and interests in property of individuals who materially assisted in, sponsored, or provided financial or technological support for, or goods or services in support of, such acts of violence or obstructionism.⁷¹ The third category, asset freezing, often froze or blocked United States assets of designated individuals. A good example of this could be seen with the DRC, where Executive Order 13413, affected “all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches,” declaring any such articles

⁷¹ EO 13192, EO 13219

“of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in[.]”⁷²

Meanwhile, the U.S. government’s sanctions in Burma, the DRC, and FRY targeted individuals and entities, while only individuals were targeted in Sudan. Additionally, FRY’s sanctions regime was initially very general and country-wide, with individual and targeted sanctions introduced only later in the conflict. In looking at who was targeted, patterns begin to emerge across sanction regimes. For instance, individual sanctions in Burma and FRY included both Burmese and Serbian government officials and military leaders, but the immediate family of these listed individuals as well. Further, both Burmese and FRY sanction regimes also targeted leading business figures who were either economically associated with sanctioned individuals, or who completed business activities within that sanctioned country. In addition to this, the DRC sanctions regime also targeted leaders in Congolese and foreign armed groups involved in the conflict, as well as individuals who used child soldiers. The DRC sanctions regime (and later on the FRY regime) were expanded further to include anyone who threatened peace, security, or stability, who undermined democracy, who targeted civilians and peacekeepers, obstructed humanitarian assistance, or who supported the above through illegal trade in natural resources. Thus, while targeted sanctions in Burma were normally aimed at a named list of individuals, their families, and related business associates, the DRC, and to an extent the FRY, sanctions were more action-based, in that they focused on those who committed prohibited acts.

Besides individual sanctions, entities were often sanctioned. Common sanctioned entities included state-owned companies such as banks, transportation companies (including airlines), and extractive and mining companies. Further, most of the sanctions included measures against

⁷² EO 13412 - DRC

any company or institution doing business with sanctioned individuals and entities or supporting (including financially, materially, or technologically) sanctioned individuals and entities.

2. Financial Tails and Enablers

Several of the case study countries' sanctions addressed the financial tails of sanctioned individuals by taking measures against businesses and companies that sanctioned individuals were associated with. For instance, in Burma, every business or company more than 50% owned by a sanctioned individual (as well as companies run or owned by the Burmese government) were included in the sanctions lists. Additionally, major Burmese financial institutions (including Burmese banks) were sanctioned. The United States Burmese sanctions regime took this a step further by also including restrictions against enablers of designated individuals, such as vendors, financial institutions and export entities. Almost all Burmese Executive Orders and Acts mention enablers, and any individual or financial institution that found to be linked to sanctioned individuals faced severe financial penalties. Finally, many Burmese financial institutions and businesses directly linked to sanctioned individuals were also included in sanctions lists.

With respect to the DRC, entities were explicitly incorporated into the Executive Orders with the goal of preventing external financial entities from providing support for war-related activities and operations. The DRC sanctions also included specific provisions against indirect support via the trade of conflict minerals is a wide net aimed at targeting companies that benefitted from the resources and preventing substantial funds from reaching the conflict. That being said, it is interesting to note that state-based entities were not expressly targeted.

Finally, as mentioned above, the FRY regime also targeted enablers. In addition to Executive Orders 13192 and 13219, enablers and business interests were also targeted in Executive Order 12810, which prohibited the performance by any United States person of any contract, including a financing contract, in support of an industrial, commercial, public utility, or

governmental project in the FRY, as well as any commitment or transfer, direct or indirect, of funds, or other financial or economic resources by any United States person to or for the benefit of the Government of the FRY or any other person in the FRY.

3. Problems with the Sanctions Regimes

The analysis of the above regimes brings to light several issues with the regimes themselves, as well as problems that occurred post-designation or post-conflict. The first issue is that of enablers, in that too little was done to reach them, specifically foreign institutions and individuals that were financially linked to sanctioned individuals and entities. This the case with Burmese sanctions, which did not include many individuals who were known enablers. A similar issue was the inability to target business connections and partners, which was a problem in both Burma and Yugoslavia. With little information available regarding ownership, within these two countries, it was difficult to determine affiliated business partners. Further, many of the sanctioned individuals (as well as sanctioned companies) also had several names and aliases, and changed names and aliases in order to avoid sanctions. Finally, many Burmese companies registered in Singapore, while many FRY companies and businesses had accounts in Russia and Cyprus. This was done to avoid the United States sanctions regime and do business directly with designated entities and individuals.

The third major issue concerns the robustness of current lists. As shown in Burma and the FRY, the list of designated persons often missed many individuals. For instance, many high-ranking members of the military, individuals who had direct connections to the military or other sanctioned businesses, and many persons related to sanctioned individuals were not included on sanctions lists. In looking at specific examples, the United States' Burmese sanction list paled in comparison to other countries' lists. For instance the United States list currently contains 118

individuals and entities, Australia's sanctions list names 392 individuals, while the European Union's sanctions list names 656 individuals and entities, in addition to 1,207 companies in the timber, metals and gem industries. Adding to list robustness issues is the fourth issue we identified - the high level of unknown leaders and instigators of violence. In many countries, (especially the DRC) several leaders and perpetrators of the conflict remain unmentioned and often unknown. This is in part because much of the violence in the DRC has been perpetrated at a local level, in lawless areas, where tribal factions rule and no financial trail exists.

Finally, a fifth issue is difficulty enforcing specific sections within the Executive Orders and Acts. A good example of this can be seen in the issues of enforcing Section 1502 of the Dodd-Frank Act, regarding the conflict in the DRC. Specifically, companies found it extraordinarily difficult to verify that Congolese minerals are "conflict free," leading to a veritable Western exodus from that market and allowing other less well-known (and potentially even less scrupulous) firms take their place, ensuring the flow of funds continues. Similar issues could also be seen in the FRY, where fraudulent travel licenses were often used to get around sanctions placed on ordinary shipping and transit corridors. Finally, apart from fraudulent shipping licenses, actual enforcement of sanctions was also a problem in the FRY, where many neighboring countries were unable enforce them. Borders were porous during some of the worst parts of the conflict, and some neighboring countries had issues effectively preventing banned items (including weapons) from entering the FRY.

B. Lessons Learned: Country Case Studies with No Sanctions Regimes

Four of the countries analyzed in the case studies, Rwanda, Sri Lanka, Kyrgyzstan, and Kenya, did not have sanctions issued against them. In looking at the "lessons learned" for these countries, in lieu of sanctions, we addressed actions taken by the international community before,

during, or after the conflicts. Additionally, we also analyzed events and trends leading up to the conflict (along with the conflict itself) to determine whether there were any obvious financial tails created by the main actors in the conflict, as well as whether there were any obvious third party enablers or supporters of parties involved in the conflict. Finally, as we did in the prior section, we analyzed the robustness of the international community's responses, and discussed potential reasons why sanctions were not issued in these instances.

1. Summary of the international community's responses

The international responses varied in all four case studies. With respect to Kenya, while no United States sanctions were imposed on the architects of the conflict, the United States did issue travel bans to 12 unnamed government officials and politicians days after the violence erupted.⁷³ This ban was also extended to the immediate family of these officials, including those currently studying in the United States.⁷⁴ That being said, the United States embassy in Nairobi later stated that the travel ban was not an outright ban, but instead an "indication that the individuals may not be welcome in the United States."⁷⁵ However, in a step in the right direction, the United States later threatened to issue travel bans for 15 high-ranking Kenyan officials if they did not deliver on the government's promise of election reform.⁷⁶ In addition to the threat of travel bans, perhaps more profound was the fact that the International Criminal Court ("ICC") opened an investigation into the violence surrounding the 2007 election. This investigation began in July 2009, when Kofi Annan delivered a list of high-ranking Kenyan officials believed to be

⁷³ <http://fpc.state.gov/documents/organization/101803.pdf>

⁷⁴ <http://allafrica.com/stories/200802061187.html>

⁷⁵ <http://allafrica.com/stories/200802061187.html>

⁷⁶ <http://news.bbc.co.uk/2/hi/africa/8272872.stm>

responsible for the violence. The following year, the ICC sought to indict six individuals from this list, although it is believed that there were more than six names on that list.⁷⁷

In Kyrgyzstan, the lack of an international response was similar to Kenya. Interestingly, the Kyrgyz government called for assistance early in the violence, including requesting an international police force to help stop the violence, but no international entity gave assistance in a timely fashion. In fact, the only entity that responded was the Organization for Security and Cooperation in Europe (“OSCE”), which made public statements and created an agreement for the deployment of a modest international police force, but only after a month of discussion. While, various arms of the United Nations did discuss the Kyrgyz government’s call, there was little action, as no Security Council resolution was passed. Finally, with respect to United States involvement, it mostly consisted of public statements denouncing the violence, as well the provision of humanitarian assistance and reconstruction aid.

Similar to Kyrgyzstan and Kenya, no sanctions were issued before and during the genocide in Rwanda. However, in March 2009, the United States issued travel bans and asset freezes against former Rwandan military and militia leaders believed to be architects of the genocide, or for taking part in war crimes associated with the conflict in the DRC (the UN also issued similar sanctions against four of these individuals). Additionally, many of the main architects and leaders of the genocide faced criminal prosecution at the International Criminal Tribunal for Rwanda (“ICTR”), which indicted a total of 93 individuals.

The final case study country, Sri Lanka, has seen no formal sanctions against individuals for their role in the Sri Lankan civil war. In fact, discussion of sanctions in the international community did not begin until the final months of the conflict, when reports of atrocities

⁷⁷ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx

committed by the armed forces against civilian Tamil populations were being published. That being said, in 1997, the United States listed the Liberation Tigers of Tamil Eelam (“LTTE”) as a terrorist organization under Executive Order 13224, which addresses financial tails of designated terrorist organizations. Following this designation, the Tamil Rehabilitation Organisation (“TRO”) was placed on the sanction list as a “charitable organization that acts as a front to facilitate fundraising and procurement for the LTTE.”⁷⁸

2. Financial Tails and Enablers

As discussed above, in addition to targeting individuals, targeting enablers such as financial institutions can prove effective at atrocity prevention. This was especially apparent in Kyrgyzstan. Due to the nature of violence, removing sources of funds to the government likely would not have been useful. That being said, if the national government did directly commit atrocities, then sanctioning the Kyrgyz State Bank and targeting the government’s revenue source in the mineral and gas sectors would have been a useful measure. In this particular case, it may have been efficacious to target the sources of funds for nationalist political parties such as Al-Jurt.

Meanwhile, in looking at the Rwandan genocide, one of the more disturbing realizations was the international community’s financial role in the violence. While usually it is the international community’s lack of response comes under scrutiny, here, a large amount of weapons funding came from the international community in the form of balance-of-payments aid.⁷⁹ Aid money provided by organizations such as the IMF and the World Bank was deposited in Rwanda’s Central Bank (controlled by Hutu leaders), which used these funds to purchase

⁷⁸http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities_execorder_13224-pp.aspx

⁷⁹ <http://www.globalresearch.ca/imf-world-bank-policies-and-the-rwandan-genocide/5376752>

weapons. Additionally, France also contributed money and weapons to Rwanda's military in the years leading up to the genocide.

Finally, the Sri Lankan conflict is worth mentioning, as the TRO was the sole organization sanctioned, with the specific goal of capturing external financial entities from providing support to or cover for the war-related activities and operations of the LTTE.

3. Robustness of the international community's responses

With respect to the conflict in Kenya, the country's alliance with the United States⁸⁰ complicates potential sanction regimes. Kenya is allied with the United States in the War on Terrorism, plays a large role against counterterrorism, and is viewed by the United States as a peacemaker and leader among other countries in the region. There is thus concern that sanctions on Kenya's political elite could potentially harm the overall peacefulness and stability of the country. This can be seen in the fact that Kenya's president and vice president were indicted by the ICC for their roles in the 2007 election violence.

Other complicating factors involve the fact that the United States' reaction to the 2007 elections was mixed, as it initially congratulated those who may have directly encouraged and organized the violence, which it then followed by issuing private warnings to unnamed individuals. Taking a non-uniform stance such as this make it more difficult for potential sanctions to be issued against those who were previously condoned by the United States. Finally, the violence was sudden and short; in the time it would have taken to issue sanctions, there was a strong possibility that the violence would have ended. Finally, while there was tension leading up to the elections, it is unclear as to whether the international community believed that this tension would result in violence. Thus, there may not have been enough evidence or cause to issue sanctions in this instance.

⁸⁰ <http://fpc.state.gov/documents/organization/218521.pdf>

In looking at Kyrgyzstan, the international response was almost non-existent. While the OSCE was the most active participant, overall it is unclear whether the efforts by the OSCE had a significant effect on the cessation of the violence. There was also a lack of United Nations Security Council sanctions, most likely due to Russian opposition, as it viewed the conflict as an internal matter. Efforts within the Collective Treaty Security Organization (CTSO) likely failed for similar reasons. Notably, Uzbekistan remained fairly muted during these events. Finally, the United States was likely reticent to take concrete unilateral measures against the Kyrgyz government due to the need to keep Manas Air Base (leased within Kyrgyzstan) open to facilitate the transfer of supplies and troops into and out of Afghanistan.

Besides lack of international response, perhaps the biggest issue with respect to potential sanction designations is the ability to identify actors prior to the onset of widespread violence. Quick and efficient identification of actors is especially key so that sanctions can be put in place as soon as the pre-atrocity situation is identified, or at the latest, at the onset of violence. At least some of the individuals listed above were readily identifiable early in pre-atrocity situations. Using certain steps listed below, it would have been possible to identify these actors well before the pre-atrocity situation erupted into widespread violence.

Turning to Rwanda, this was the perfect situation for sanctions; there were numerous warning signs and indicators of impending violence, yet almost no action was taken by the international community. Even small action, such as threats to reduce aid, or increasing the size of the international peacekeeping presences (as opposed to decreasing it, which occurred in this situation), could have been the difference-maker in preventing genocide. While it is true that after the genocide subsided, the United Nations created the International Criminal Tribunal for Rwanda (“ICTR”) in order to prosecute those who committed genocide, this was only effective

for the main architects of the violence, as hundreds of thousands of individuals participated in the genocide. While the ICTR was a step in the right direction, it did not have the capacity to prosecute everyone who participated in the violence. While traditional tribal justice systems known as gacacas were created to confront and assess punishment at the local level, many believe that this system was too forgiving with respect to the heinousness of the crimes committed,.

In addition to issues with bringing justice to those responsible for the genocide, after the Rwandan Patriotic Front (“RPF”) took control of Rwanda, many Hutus involved in the genocide fled to Uganda and the jungle in the DRC, where thousands live to this day. Continued conflict and violence in these areas continues, with RPF-backed militias entering the DRC in an attempt to find and kill those involved with the genocide. As is discussed in the DRC case study, this has led to a host of issues and violence, which are discussed above.

Finally, with respect to Sri Lanka, the limiting focus of the sanctions on a single organization (and the designation of the LTTE as a terrorist entity) allowed for a simple, but inadequate framework for curbing the violence. Unlike other groups, both leaders of the involved parties (the LTTE and the armed forces) were well known, and similarly much of the funding and support networks for the two sides were not a matter of mystery.

C. Guidelines to consider when monitoring for potential conflict

In completing the case studies, the below analysis looks at key takeaways. Part 1 consists of a list of indicators (also known as “triggers” or warning signs) for potential or future violence and conflict. Part 2 consists of a list of “identifiers” (taken from warning signs in Part 1) that are useful when considering whether to issue sanctions. Taken together, Parts 1 and 2 contain valuable information that can be used when constructing future sanctioning mechanisms, which

is discussed Section D (our suggestions for future EOs). Most of the below information was taken from Rwanda and Kyrgyzstan, both of which had many indicators of impending violence.

1. Poignant warning signs include:

- a) **Extensive history of ethnic tension.** In Rwanda, there was an ongoing war between two major ethnic groups. Leading up to the genocide, there was continued and increased tension between the Hutus and the Tutsis, including ethnic-led riots
- b) **Targeted violence against political leaders.** Examples include the mid-flight destruction of the plane killing Rwandan president Habyarimana, and the assassination of many of Rwanda's top leaders and their United Nations security detail hours after the president's plane was shot down.
- c) **Targeted violence against international observers and aid workers.** In Rwanda, this was seen in the targeting of Red Cross and other foreign aid organizations, including killing 10 United Nations peacekeepers, and attacking United Nations patrols
- d) **Targeted attacks on civilians of a certain ethnic or religious background.** In Rwanda, small attacks against Tutsi civilians leading up to the genocide were common. These were often very organized and targeted specific Tutsi civilians.
- e) **Organization of ordinary citizens into militias and self-defense groups.** In Rwanda, the organization of Hutu militias began months before the genocide. There were also "self-defense" meetings held by the Rwandan military six months before the

massacre, as well as military and weapons training of Hutu militia and Hutu political party youth.

- f) **Mass purchasing and distribution of weapons.** This included the issuance of machetes and grenades to Hutu militias and Hutu youth political parties months leading up to the Rwandan genocide.
- g) **Constant and prolonged broadcasting of hate speech.** In Rwanda, death threats and instructions on how and when to kill Tutsis were broadcasted on the radio before and during the genocide. During this time, there were also anti-Tutsi speeches and editorials given by prominent Hutu leaders.

2. **“Identifiers” include:**

- a) **Identifying developing multi-ethnic countries with strong nationalist elements.** Based on the Kyrgyzstan example, as well as Rwanda, the Balkans and the 2002 Gujarat riots, it is often that developing multi-ethnic countries with strong nationalist elements are particularly at risk.
- b) **Identifying when a power vacuum occurs within one of these at-risk countries.** Power vacuums can be taken as opportunities by ethnic groups to settle scores.
- c) **Identifying the regions or cities within these countries that exhibit a high degree of ethnic heterogeneity.** Because of proximity, ethnic heterogeneity can lead to violence, as seen in Kyrgyzstan and in Rwanda.

- d) Identifying the local governmental and other political actors within cities or regions that are particularly nationalistic or have mistreated ethnic minorities in the past.** The local government officials, politicians and political parties that espouse nationalistic rhetoric and policies are more likely to be involved in violence, as could be seen in Rwanda and Kyrgyzstan.
- e) Identifying leaders of the security apparatus likely to play a role in violence.** While leaders of the security apparatus will not always be involved and may attempt to stop the violence, it is important to identify these actors beforehand so they can be targeted for sanctions if they are complicit with the violence.
- f) Paying attention to events unfolding on the ground to determine who should be targeted for sanctions.** As leaders of ethnic groups emerge, it is important to identify them quickly, so if they become perpetrators of violence, they can be targeted for sanctions.
- g) If applicable, identify sources of funds for these particular actors.** If the national government is widely involved in atrocities, then national banks and sources of income, such as the Kumptor Gold Mine in Kyrgyzstan, should be targeted.

D. Potential points/guidelines to include in an executive order (EO)

Based on the above country analysis, we suggest potential guidelines of an EO that aim at preventing both direct perpetrators and financial enablers from carrying out conflict and violence. They include:

- 1. Establishing automatic triggering events that create sanctions.** This would solve instances where either promised reforms have stalled or triggering events have reappeared. For instance, in Burma, promised reforms have yet to be completed, but certain “bad” behavior has continued. As soon as there are indications of a return to bad behavior, a new round of sanctions would be automatically triggered, such as re-listing individuals who were formerly delisted.
- 2. Adding more individuals and companies to current sanctions lists, and making future lists more robust.** As seen in Burma, there are many individuals and organizations that are on other countries’ sanctions lists, that do not appear on United States’ lists. Current lists should be expanded to include additional individuals such as high-level members of the military, political leaders and organizers, businesspersons who have financial connections with those on the sanctions list, family members of sanctioned individuals and enabling organizations (with a focus on financial and business organizations that have both direct and indirect financial links to sanctioned individuals and entities).
- 3. Include specific language with respect to enabling individuals and entities.** While language exists in prior EOs and Acts, this language can be rewritten to include specific actions that are prohibited, or actions that the

United States government views as “enabling.” This could include language aimed at companies and institutions that have both direct business dealings with sanctioned individuals and entities, as well as relationships with companies and individuals linked to those on the sanctions list. It should be noted, however, that a major issue with expanding enabling language is that it will implicate individuals and institutions (and even countries) that have major business interests in the United States or with United States companies and citizens. Navigating such a political maze has its own set of issues.

4. **Better enforcement of sanctions against aggressors, and better effort in determining “who” the aggressors are.** The fatal flaw of the individual sanction approach, especially in the DRC, is the depth of foreign involvement, intervention, and meddling, often at the state level. Rwanda (and to a lesser extent Uganda) has been at or near the root of every major conflict in the past two decades. Similarly, an EO would need to list all individuals responsible for violence, regardless of their political party. Any EO that lists individuals from one side or one political group would be portrayed as one-sided and unfair. Thus when there is the possibility of conflict from either party, it is important to sanction individuals from each group contributing to the conflict.
5. **Requirement of increased response times once sanctions are issued.** Delays in responding to potential outbreaks of conflict (and the conflict

itself) are disastrous, completely undermining any chance of preventing atrocities.

6. **Addressing aid issues:** Many countries included in the case studies are recipients of United States aid and support. Should a sanctions regime be instituted, most likely much needed aid would be cut, thus endangering these countries' most vulnerable population (see Burma as an example). Thus, any EO must address ways to create sanctions that effectively reach those being sanctioned while not undermining humanitarian aid efforts.
7. **Focusing on status and activity-based sanctions as opposed to listing and sanctioning individuals.** As could be seen in Kenya, the violence from the 2007 elections was swift and ended just as quickly, thus making it both hard to predict and difficult to issue relevant sanctions. However, creating an EO that orders automatic sanctioning of individuals who plan or instigate violence or those who are known associates of certain political groups could serve as a future deterrent of violence. Further, creating a sanctions regime that targets actions over individuals would be politically neutral.
8. **Cutting monetary aid:** Sometimes just the threat to cut aid could be enough to prevent atrocities, as is evidenced with Rwanda, which was dependent on aid. This can be illustrated by the fact that the French government, one of Rwanda's largest donors, was successful in preventing Hutus from targeting a hotel where many Tutsis were hiding during the genocide.

9. **Including provisions that cut technological communications:** Blocking all types of communication and technology. For instance, before and during the Rwandan genocide, the RTLMC was responsible for spreading hate speech about the Tutsis, as well as instructions with regarding when, where, and how to kill Tutsis.

10. **The automatic issuance of sanctions once certain events or indicators are “triggered.”** With respect to Rwanda, there were several warning signs and “triggering” events that arose before the genocide. Moving forward, potential Executive Orders should contain an “automatic triggering” section that kicks into effect as soon as certain “triggering” events occur. In addition to the automatic triggering of sanctions, there should also be required installation of neutral or third party observers in areas where these triggers occur.

11. **Include language that guarantees that sanctions will not be lifted *until poor behavior has completely ended.*** During the first sanctions regime in Yugoslavia, the United States lifted some sanctions before the fighting ended and before a peace agreement was signed. The same is currently occurring in Burma, where the United States scaled back sanctions, even though the sanctioned behavior has not ceased. Including language indicating that sanctions will not be lifted until all problematic behavior ceases gives an Executive Order even more “teeth” and dissuades perpetrators from believing that they can continue their action without continued consequences.

VI. RECOMMENDATIONS FOR LEGISLATION/EXECUTIVE ORDER

In Sections III and IV, we offered structural recommendations for using sanctions to prevent mass atrocities. We concluded that a standing targeted sanctions regime, which utilizes both conduct and status targeting, is the preferred approach. In this section, we discuss our substantive recommendations for that regime. We first discuss who and what we should target for sanctions. Next, we discuss what measures should be taken against those targeted. The vast majority of the language and approaches we recommend are not novel, but reflect sanctions formulations, precedents and strategies the United States has utilized on a number of occasions. Additionally, our recommendations incorporate and reflect definitions and approaches in other sources of extant United States law, such as the War Crimes Act, various federal regulations, and materials from the International Criminal Tribunal for the Former Yugoslavia.⁸¹ Nothing in our recommendations is particularly radical, and instead are reflective of current and past United States policies. However we do advocate some new approaches and language. For instance, based on both the gravity of the crimes and difficulty of preventing atrocities, we believe that we must move further than prior and existing sanctions regimes and employ the full extent of executive authority granted by the International Emergency Economic Powers Act (IEEPA). That being said, the vast majority of our recommendations are firmly grounded in precedent. All recommendations contained in this section have been collated into a draft executive order. This draft executive order can be found in Appendix [].

Before delving into our substantive recommendations, it is important to address the form they take—an executive order. We chose the form of an executive order rather than legislation

⁸¹ 18 U.S. Code § 1091 (Genocide); 18 U.S. Code 2411 (War Crimes); Presidential Proclamation dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses; United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2 INA 212(F)(b)(2).

for three reasons. First, despite the existence of statutory sanctions, an executive order is the form sanctions regimes most often take. Second, an absence of a statutory mandate leaves the executive branch with greater flexibility in its foreign policy prerogatives. That is, legislative sanctions may tie the executive branch's hands in certain situations and result in unintended harm to national security. Third, for pragmatic reasons, passing legislation is a long process and may fail for political reasons not associated with the merits of a bill; an executive order is simply easier. That being said, the materials and approaches contained in our draft executive order are completely transferable to legislation should that path be preferred.

A. WHO TO TARGET

In this subsection, we will discuss our recommendation for who should be targeted in a standing atrocity prevention regime. As discussed in Section II, we recommend use of both status and conduct-based targeting. We will first address conduct-based targeting.

We recommend targeting those who have committed mass atrocities. These are the individuals actually engaging in the acts we seek to prevent. Targeting these actors must be central to any effort to prevent atrocities through sanctions. But those perpetrators that actually engage in the killing, torture, rape, and other actions which constitute mass atrocities are not the only actors culpable for mass atrocities. For those that organize, plan, incite, and order others to engage in such acts certainly bear responsibility as well. To be sure, random acts of mobs that rise to the level of mass atrocities violence targeted at religious, ethnic, and racial groups do occur, but the vast majority mass atrocities that have occurred over the last century were instigated and organized by people in positions of power.⁸² For this reason, it essential that the

⁸² See Alex J. Bellamy, *Responsibility to Protect: A Defense*, 21–23 (Oxford Univ. Press 2014); see also Michael Pryce, *How to prevent a mass atrocity*, *Genocide Watch*; see also

United States target those actors as well—those who bear responsibility for mass atrocities. Defining responsibility, however, can be a thorny issue. Luckily, we had ample precedent to guide us. After examining United States and international law, executive orders, and policy guidance, we arrived the following definition for responsibility: having planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through superior responsibility, or incited others to engage in mass atrocities, or attempted or conspired to do so.⁸³

The targeting of those who commit or bear responsibility for mass atrocities is a largely punitive measure, however. True, such targeting will have a deterrent effect for some, but to achieve the prophylactic goal of a sanctions regime, it is necessary to target those likely to commit or bear responsibility for mass atrocities before such acts occur. For that reason, we recommend a sanctions regime that allows designation of persons who pose a significant risk of committing or bearing responsibility for mass atrocities. Sanctioning actors before they become perpetrators has been an element of United States sanctions regimes in the past. For instance, in the current anti-terrorism sanctions regime, persons are designated who bear a significant risk of committing acts of terrorism.⁸⁴ Of course, the task of ferreting out such actors will no doubt be difficult, but the problem is not insurmountable. As we will discuss in the next section, there are often telltale signs that appear prior to the occurrence of a mass atrocity. By identifying those signs of a pre-atrocity situation, the United States can identify those actors who will likely be

Secretary of State Hillary Rodham Clinton, Speech at United States Holocaust Memorial (July 24, 2012), <http://dbsjeyaraj.com/dbsj/archives/8520>.

⁸³ This definition comes almost entirely from that contained in Presidential Proclamation dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses. The “attempted or conspired” elements comes directly from the United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2 INA 212(F)(b)(2). The element of incitement is original. This incitement element could be problematic on First Amendment grounds for those who have a constitutional presence in the United States.

⁸⁴ Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), Sec. 1(b), dated September 25, 2001 (“... to have committed, or to pose a significant risk of committing, acts of terrorism[.]”)

involved. In the next section, we will demonstrate how this can work in practice based on our analysis of case studies.

In addition to targeting those who commit or bear responsibility for mass atrocities, we also recommend targeting those who provide support, supply, or assist or such perpetrators. Doing so may deprive perpetrators of the weapons, money, or logistical support needed to engage in mass atrocities. We also recommend targeting those entities that are owned or controlled by the perpetrators of mass atrocities for the same reason. These two approaches are normally present in United States sanctions regimes.⁸⁵ Finally, we recommend targeting those who are subject to a standing indictment, arrest warrant, or summons to appear by an international criminal tribunal. This is a novel approach, but serves to lessen the investigative burden on the United States government. An indictment, arrest warrant or summons to appear at an international criminal tribunal is more than sufficient evidence to designate pursuant to a sanctions regime.⁸⁶ Using this shortcut prevents unnecessarily duplicative investigation on the part of the United States. Of course to avoid any unintended consequences, we recommend qualifying this designation criterion with the caveat that it is satisfied for only those under indictment, arrest warrant, or summons to appear before an international criminal tribunal for crimes punishable by such a tribunal prior to January 1, 2015. This will prevent the crime of aggression from being targeted, which should come within the jurisdiction of the International

⁸⁵ *E.g.* Executive Order 13382 (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.), Sec. 1(a)(ii), (iv), dated June 28, 2005; Executive Order 13581 (Blocking Property of Transnational Criminal Organizations), Sec. 1(a)(ii)(B), dated July 24, 2011.

⁸⁶ The standard for an arrest warrant or summons to appear under the Rome Statute of the International Criminal Court is: “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” Rome Statute of the International Criminal Court, art. 58(a)(1), (7). The standard for an indictment at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia is the establishment of a *prima facie* case. Statute of the International Criminal Tribunal for Rwanda, art. 18; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 19. Reasonable grounds or a *prima facie* case certainly amount to sufficient evidence for designation under an Executive Order.

Criminal Court in 2017.⁸⁷ Further, such a qualification would prevent inclusion of other crimes that could become punishable in international criminal tribunals at a later date.

Now that we have discussed our substantive recommendations for conduct-based targeting, we will explain our recommendations for status-based targeting. First, we recommend targeting political or military leaders or officials of entities responsible for mass atrocities. A entity may consist of a state or an organization such as a political party or militia. If mass atrocities occur within a state's territory or by a state's forces, presumably senior political and military leaders had some role, either direct or indirect, in the mass atrocity. But even if this presumption proves incorrect, targeting such senior leaders may serve to persuade them to use their power to stop such acts. Additionally such an approach will put officials on notice that they will be targeted, and perhaps dissuade those who would otherwise turn a blind eye such acts. The practice of targeting such leaders is normally present in United States country-specific sanctions regimes.⁸⁸ Finally, we recommend targeting the spouses and dependent children all of those designated under this sanctions regime, which has been used in the past by the United States.⁸⁹ Close family is often used to hide funds and therefore sidestep the intended effect of these sanctions. Of course this particular status-based designation has the potential to target those who are blameless, thus doing so may therefore not always be within the interests of the United States. For this reason, we recommend only using such an approach if sufficient discretion is provided to the official charged with designating pursuant to the sanctions regime.

B. WHAT CONDUCT TO TARGET

⁸⁷ Resolution RC/Res.6, International Criminal Court, Sec. (3)(3) (June 11, 2012).

⁸⁸ *E.g.* Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), Sec. 1(b), dated May 16, 2012.

⁸⁹ *E.g.* Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), Sec. 1(a)(vi) , dated July 25, 2008.

As discussed above, the conduct we seek to prevent is mass atrocities, which we define as genocide, crimes against humanity, and grave war crimes. Our recommendations for the precise definitions of these three crimes are sourced whenever possible from United States law, regulations, and policy guidance. Doing so serves to make our recommendations more palatable to those who are suspicious of using international law in domestic settings. Where United States law was not available to provide definitions, however, we utilized international law.

First, we recommend use of the definition of genocide contained in the 18 U.S. Code § 1091 (Genocide):

(a) Basic Offense.— Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent births within the group; o
- (6) transfers by force children of the group to another group;⁹⁰

This definition contained therein is largely congruent with that contained in the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), to which the United States is a party, and the Rome Statute of the International Criminal Court.⁹¹ Next we recommend the following definition of crimes against humanity:

the term “crimes against humanity” means certain acts, including but not limited to: murder, extermination, enslavement; deportation or forcible transfer of a civilian population; imprisonment or other severe deprivation of physical liberty; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender

⁹⁰ 18 U.S. Code § 1091 (Genocide).

⁹¹ *Compare* 18 U.S. Code § 1091 (Genocide) *with* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2 *and* Rome Statute of the International Criminal Court, art. 6.

grounds; enforced disappearances of persons, apartheid, or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health, that are committed as part of a widespread and systematic attack, directed against a civilian population, where the attack is pursuant to or in furtherance of a state or organizational policy to commit such an attack. The act itself must be committed with knowledge of the larger attack. The attack need not amount to, or occur in the context of, an armed conflict.

Because no United States statutory law defining crimes against humanity exists, we drew this definition from the State Department Foreign Affairs Manual, which is largely congruent with current definitions in international law, such as the Rome Statute.⁹² Finally, we recommend using the definition of war crimes contained in the War Crimes Act (18 U.S. Code 2411):

(c) Definition.— As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.⁹³

This definition of war crimes has the added benefit of incorporating the term “grave” into the definition. The grave qualifier ensures only the most egregious acts will result in designation pursuant to this sanctions regimes, and hence avoids any unintended consequences should an ally commit an act that would technically qualify as a violation of the laws and customs of war, but

⁹² Compare United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2.1 Sec. (b)(2) with Rome Statue of the International Criminal Court, art. 7.

⁹³ 18 U.S. Code 2411 (c).

which does not rise to the level of heinousness of a mass atrocity. This two-tiered approach to violations of the laws and customs of war (grave and everything else) is the approach taken by international criminal tribunals in the past to ensure only the worst crimes fall within the jurisdiction of these courts.⁹⁴

C. WHAT MEASURES TO TAKE

Now that we have discussed who and what conduct to target, we now discuss what measures should be taken. As explained above, the measures taken in United States sanctions regimes are almost always blocking and freezing of assets. Although the wording will vary slightly, an oft-found formulations is:

notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby order that all property and interests in property of the following persons that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons (including any foreign branch) are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in[.]⁹⁵

Sanctions regimes will often then clarify that these prohibitions include:

- (a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and
- (b) the receipt of any contribution or provision of funds, goods, or services from any such person.⁹⁶

We see no reason to depart from the above tried and true formulations for asset freezes in an atrocity prevention sanctions regime, and therefore recommend their wholesale importation. We do not, however, stop there. As discussed above, such measures do not exhaust executive

⁹⁴ See Rome Statute of the International Criminal Court, art. 8; see also Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3 (Sep. 2009).

⁹⁵ E.g. Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), dated July 25, 2008, Sec.1(a).

⁹⁶ *Id.* at Sec. 1(b-c).

authority under IEEPA and because of the gravity of the crimes involved, we recommend utilizing the full scope of the authority granted by IEEPA in certain critical situations.

These critical situations are those in which it has become apparent that a mass atrocity is occurring or is about to occur, and further, that it has become apparent that a foreign government is complicit. The language we recommend using is:

if the Secretary of State, in consultation with the Secretary of Treasury, determines a mass atrocity is occurring or is imminent, and further determines a foreign government is complicit in, directing, engaging in, or preparing to engage in acts that would constitute mass atrocities, or if mass atrocities otherwise are or likely will be attributable to the state[.]⁹⁷

In this special situation, we recommend crafting a sanctions regime that will allow measures to be taken beyond the asset blocking and freezes normally employed. In these situations, we recommend taking measures to prevent the establishment and block the usage of correspondent bank accounts and pass-through accounts (PTAs).

Correspondent bank accounts are: “any account established for a foreign financial institution to receive deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution, or to handle other financial transactions related to such foreign financial institution.”⁹⁸ For example, a bank within jurisdiction A, in order to service customers in jurisdiction B, can either set up a foreign branch within jurisdiction B or open a correspondent account within a third financial institution in jurisdiction A. Because opening a branch in a foreign jurisdiction is often infeasible, the opening of a correspondent account is the least complicated and route more often taken to service customers and transfer funds to another jurisdiction. Having a correspondent account is like having an agent in a foreign jurisdiction. A

⁹⁷ The *Tadic* criteria for state attribution can be used for this purpose. Our draft executive order in Appendix A reflects this criteria. *The Prosecutor v. Tadic (“Prijeedor”)*, Case No. IT-94-1-A, ICTY AC, July 15, 1999, para. 131.

⁹⁸ USA PATRIOT Act Final Regulation and Notice of Proposed Rulemaking, Financial Crimes Enforcement Network, Department of Treasury, Sec. 312, http://www.fincen.gov/news_room/rp/rulings/html/312factsheet.html.

pay-through account (PTA) is another route that foreign financial institutions can utilize to conduct transactions in another jurisdiction. A foreign financial institution will request a PTA for a customer who wants to conduct transactions in another jurisdiction. The PTA allows this customer to draw on funds from the foreign financial institution's account at the financial institution in the other jurisdiction.⁹⁹

The technical details of correspondent banks and PTAs are highly complicated, and beyond the scope of this paper, but the important thing is to know that these tools are how financial institutions in foreign jurisdictions gain access to foreign markets. If one particular foreign financial institution is prohibited from opening a correspondent account or PTA in another jurisdiction, it is essentially frozen out of that jurisdiction. Limiting the ability of foreign financial institutions to open correspondent accounts or PTAs can act like a stranglehold on that institution to conduct business internationally, and could provide an extremely useful sanctions tool to prevent atrocities. Because of this we recommend, in those situations where an atrocity is occurring or imminent and it is apparent that a foreign government is complicit, to limit and/or prohibit the opening or maintaining by foreign financial institutions within the jurisdiction of that government correspondent or PTAs in the United States. Furthermore, we recommend prohibiting or limiting the ability of third-party banks that engage in business with financial institutions within the jurisdiction of that foreign government to open correspondent accounts or PTAs in the United States. This would mean for example, if a mass atrocity was occurring in Country X and the government of country X was complicit, if a financial institution in Country X engaged in business with a bank in Country Y, then the bank in Country Y would be unable to open a correspondent account or PTA in the United States. Because the ability to do business in

⁹⁹ "Pay-through Accounts—An Overview," Bank Secrecy Act/Anti-Money Laundering InfoBase, Federal Financial Institutions Examination Council, https://www.ffeic.gov/bsa_aml_infobase/pages_manual/OLM_051.htm.

the United States is almost certainly more valuable to a foreign financial institution, such actions have the potential to completely financially isolate a complicit government, starving it of the financing needed to fund its mass atrocities. While such an approach may seem radical, it is nothing new. This is exactly the approach the United States is currently using in its Iran statutory sanctions regime, the Comprehensive Iran Sanctions and Divestment Act of 2010 (CISADA).¹⁰⁰ We simply recommend adopting this measure, previously used in a country-specific sanctions regime, to the standing activity-based atrocity prevention we advocate.

In addition to financial measures, we recommend employing travel and visa bans for those designated pursuant to this sanctions regime. As discussed in Section [], the executive derives its authority for such bans from the Immigration and Nationality Act, and the inclusion of such measures in sanctions regime has become commonplace. The most often found formulations is:

I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons.¹⁰¹

Such measures serve both to stigmatize those designated as well as harm those who engage in travel to places under the jurisdiction of the United States. We recommend the use of the above quoted language. Now that we have offered our substantive recommendations on who to target, what conduct to target, and what measures to take, we will briefly address the unique challenges to determining effectiveness of sanctions regimes.

VII. THE PROBLEM OF EFFECTIVENESS

¹⁰⁰ Comprehensive Iran Sanctions and Divestment Act of 2010 (CISIDA), Sec. 104.

¹⁰¹ In addition to appearing in multiple Executive Orders, the Presidential Proclamation, dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, sets out similar prohibitions.

The effectiveness of sanctions as a tool to influence state and individual behavior is contested. Unfortunately, the existing academic literature is of little use. Most studies focus on the sanctions efforts when broad sector and country-based sanctions were the norm and give short shrift to the evolution of the sanctions model into the targeted approach. Furthermore, determining the efficacy of sanctions is notoriously difficult because of the challenge of establishing an effective control for study and the elusiveness of counterfactuals.

But before we speak about the effectiveness of sanctions, it is important to first define what we are seeking to accomplish by sanctioning. First and foremost, sanctions seek to alter behavior. For broad country and sector sanctions, the hope is that the economic pain and isolation caused to the country, coupled with the stigma and disruption caused by being sanctioned, will encourage its leaders to reevaluate their course of action. For targeted sanctions, the hope is that the economic and reputational harm will cause individual perpetrators to desist and deter those potential perpetrators from engaging in such actions in the future. The problem of course is that to evaluate the effectiveness of such sanctions with respect to a particular goal, one must get inside the head of the perpetrator and determine whether and to what extent the pain from the sanctions altered their decision-making calculus. Even in clear-cut cases where the United States has sanctioned perpetrator X and perpetrator X subsequently ceased the undesirable behavior, establishing the causal link is problematic. To simply point to such an example as proof of effectiveness would be to fall into the *post hoc ergo propter hoc* trap. But aside from the unlikely event of a candid interview from a perpetrator, such proof of effectiveness is likely unattainable.

Realizing these inherent limitations in determining the effectiveness of sanctions limitations should not cause us to despair for we *can* say some things about the effect of

sanctions. Sanctions do negatively affect for those sanctioned in many instances. A broad country or sector sanction causes pain for the population. A blocking or confiscation of assets or travel ban causes pain for the individual targeted. That is, it can be said with reasonable certainty that sanctions exert pressure on those sanctioned. Redefining effectiveness in terms whether they exert some degree of pressure instead of whether they actually are the deciding factor in determining a course of action largely frees us from the empirical constraints discussed above. Effectiveness is therefore not an either/or proposition, but rather a question of the magnitude of impact exerted on the target. We seek to exert pressure on the perpetrators of the world, and sanctions exert such pressure.

The magnitude of the impact will be determined by a number of factors. Some of those include the location of assets, the individual's travel habits, the degree of economic interconnectedness, and reputational value. For instance, financial sanctions, travel-bans, and stigmatization may cause considerable pain for globe-trotting autocrats with foreign bank accounts who value the opinion of the international community, but cause little pain for the Joseph Kony's of the world. But between the globetrotting autocrats and Joseph Kony, there is a wide range of potential perpetrators whom will experience different magnitudes of pain. The key is to categorize such individuals to determine what magnitude of pain targeted sanctions can reasonably accomplish. Once we have determined the magnitude of pain sanctions can inflict on an individual, the question is not should we or should we not target that individual for sanctions, but what measures should we take in addition to sanctions.

In addition to the purely pragmatic pressure inducing effect of sanctions, sanctions can be deemed effective at providing some measure of solace to victims. To be sure, the primary purpose of sanctions is to exert pressure and, it is hoped, change a course of action, but this

secondary function of sanctions should not be discounted. The act of naming and shaming perpetrators through targeted sanctions lets the United States government express with more than words that this particular person is worthy of opprobrium. This may provide some measure of solace to the victims of the perpetrator. In countries where there is little hope that such perpetrators will be brought to justice, and absent trial before an international tribunal, such solace may be the only attainable by victims. Furthermore, sanctions have a signaling function. They are a way for the United States to demonstrate resolve regarding particular conduct. They put those engaging or thinking about engaging in mass atrocities know that the United States will not stand by and let such acts occur in silence. While these secondary aspects of sanctions should definitely not be overemphasized, but at the same time it is important to realize that sanctions have some effect outside the exertion of pressure. Of course for sanctions to have this potential effect, they must be publicly announced. For this reason, targeted sanction lists should be unclassified whenever national security interests permit.

IX. CONCLUSION

Our research into the different sanctions methods has led us to conclude that the preferable sanction utilization method to prevent atrocities is to use standing, targeted sanctions regimes, which combines both status and conduct targeting. Such a regime is a hybrid approach, because it resembles activity-based sanctions regimes of the past, but makes use of status targeting previously absent from such regimes.

APPENDIX A. DRAFT EXECUTIVE ORDER [Tres]

Executive Order []—Blocking Property and Prohibiting Transactions To Prevent Mass Atrocities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)) (INA), and section 301 of title 3, United States Code,

I, [insert President’s name], President of the United States of America, find that the existence of threat of mass atrocities constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and hereby declare a national emergency to deal with that threat.¹⁰²

Sec. 1. Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby order that all property and interests in property of the following persons that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons (including any foreign branch) are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: foreign persons the Secretary of State determines, in consultation with the Secretary of Treasury,

(a) to have committed or bear responsibility for, or pose a significant risk of committing or bearing responsibility for, mass atrocities;¹⁰³ or

¹⁰² The existence of an emergency based on the threat of an event occurring in the future was used in part to justify Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), dated September 25, 2001. That being said, this justification for invoking the IEEPA and NEA is likely stretching the bounds of executive authority. In all likelihood, however, the bounds of authority under IEEPA and NEA are non-justiciable.

¹⁰³ Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism), Sec. 1(b), dated September 25, 2001 contains similar language: “. . . to have committed, or to pose a significant risk of committing, acts of terrorism[.]”

(b) to be a political or military leader or senior official of a state or other entity, if mass atrocities are attributable to that state or other entity;¹⁰⁴ or

(c) to have a standing indictment, arrest warrant, or summons to appear by an international criminal tribunal for crimes punishable by an international criminal tribunal prior to January 1, 2015;¹⁰⁵ or

(d) to materially contribute or to have materially contributed, or pose a significant risk of materially contributing to persons designated pursuant to this order;¹⁰⁶ or

(e) to assist or provide financial or technological support for or goods or services in support of, persons designated pursuant to this order;¹⁰⁷ or

(f) to be owned or controlled by, or to act for or on behalf of, or be purported to act for or on behalf, directly or indirectly, persons designated pursuant to this order;¹⁰⁸ or

(g) to be a spouse or dependent child of any person whose property and interests in property are blocked pursuant this order. The Secretary of State, may, in his or her discretion, suspend application of this subpart, if he or she determines the interests of the

¹⁰⁴ Country sanctions Executive Orders will often target senior political and military leaders (e.g. Executive Order 13611 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen), Sec. 1(b), dated May 16, 2012, stating: “be a political or military leader of an entity that has engaged in the acts described in subsection (a) of this section[.]”) This exact language may work as an alternate formulation in lieu of the attribution language used above. The current language is broader in that it captures all senior state officials once state attribution for mass atrocities has been determined, not just those individuals determined to be engaging in the mass atrocities. Status-based targeting is often simpler to execute and is more exportable to our European allies due to their limitations under ECtHR judgments (e.g. *Kadi*).

¹⁰⁵ Indictment by an international criminal reaches the current threshold of proof required for determination under an Executive Order. This criterion alleviates the need for independent investigation prior to designation pursuant to this order. That being said, this part should only play a minor role in the implementation of this draft Executive Order, as its goal is to prevent mass atrocities, and indictments by international criminal tribunals will always issue after a mass atrocity has occurred. The date criterion is meant to prevent the crime of aggression from being targeted under this order, which should come within the jurisdiction of the ICC in 2017. Further, it is intended to prevent unintended consequences should further actions become punishable in international criminal tribunals at a later date.

¹⁰⁶ Executive Order 13382 (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,), Sec. 1(a)(ii), dated June 28, 2005, contains similar language: “. . . in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery[.]”

¹⁰⁷ Similar language is contained in multiple Executive Orders (e.g. Executive Order 13581 (Blocking Property of Transnational Criminal Organizations), Sec. 1(a)(ii)(B), of July 24, 2011).

¹⁰⁸ Executive Order 13382 (Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,), Sec. 1(a)(iv), dated June 28, 2005, contains similar language: “. . . to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order[.]”

United States would not be served by targeting the spouse or dependent child of persons designated pursuant to this order.¹⁰⁹

Sec. 2. The prohibitions in section 1 of this order include but are not limited to:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.¹¹⁰

Sec. 3. I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).¹¹¹

Sec. 4. Further, I prohibit:

(a) any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order.

(b) any conspiracy formed to violate any of the prohibitions set forth in this order.¹¹²

Sec. 5. I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by United States persons to persons determined to be subject to

¹⁰⁹ Several country sanction Executive Orders contain similar targeting of family members (e.g. Executive Order 13469 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe), Sec. 1(a)(vi), dated July 25, 2008). As targeting spouses and children may be unpopular and in some cases unproductive, the final sentence is intended to make discretionary such measures.

¹¹⁰ Section 2 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma), Sec. 4, dated July 11, 2012).

¹¹¹ In addition to appearing in multiple Executive Orders, the Presidential Proclamation, dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses, sets out similar prohibitions for the acts targeted in this draft Executive Order.

¹¹² Section 2 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma), Sec. 7, dated July 11, 2012).

this order would seriously impair my ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided by section 1 of this order.¹¹³

Sec. 6. Further, if the Secretary of State, in consultation with the Secretary of Treasury, determines a mass atrocity is occurring or is imminent, and further determines a foreign government is complicit in, directing, engaging in, or preparing to engage in acts that would constitute mass atrocities, or if mass atrocities otherwise are or likely will be attributable to the state, the Secretary of Treasury shall:¹¹⁴

(a) prescribe regulations to prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution ordinarily resident in or under the jurisdiction of that foreign government. These regulations shall fully exercise executive powers under Section 1702 (A) and Section 1702 (B) of IEEPA.

(b) prescribe regulations to prohibit, or impose strict conditions on, the opening or maintaining correspondent accounts of third country financial institutions that engage business with the banks under the jurisdiction of that foreign government. These regulations shall fully exercise executive powers under Section 1702 (A) and Section 1702 (B) of IEEPA.

(i) If the Secretary of Treasury, in consultation with the Secretary of State, determines that application of this provision would harm the interests of the United States, he or she may suspend application of this provision.

Sec. 7. For the purposes of this order:

(a) the term “person” means an individual or entity;

(b) the term “entity” means a government, militia, partnership, association, corporation, or other organization, group or subgroup;

(c) the term “United States person” means any United States citizen or national, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States;

¹¹³ Section 5 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma), Sec. 4 dated July 11, 2012).

¹¹⁴ This section does not appear in any prior Executive Order, but similar language as contained parts (a) and (b) does appear in Section 104 of the Comprehensive Iran Sanctions and Divestment Act of 2012. Section (b) is quite broad, as that it targets third parties. It will therefore likely be controversial. For this reason, a final sentence was added to part (b) allowing discretion in implementation by the Secretary of Treasury.

(d) the term “foreign person” means any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States) or any entity not organized solely under the laws of the United States or existing solely in the United States;¹¹⁵

(e) the term “mass atrocity” means acts that would constitute genocide, crimes against humanity, or war crimes, or any other acts that would be punishable by an international criminal tribunal prior to January 1, 2015.

(i) the definition of “genocide” contained in 18 U.S. Code § 1091 shall be utilized for the purposes of this order.

(ii) the term “crimes against humanity” means certain acts, including but not limited to: murder, extermination, enslavement; deportation or forcible transfer of a civilian population; imprisonment or other severe deprivation of physical liberty; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds; enforced disappearances of persons, apartheid, or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health, that are committed as part of a widespread and systematic attack, directed against a civilian population, where the attack is pursuant to or in furtherance of a state or organizational policy to commit such an attack. The act itself must be committed with knowledge of the larger attack. The attack need not amount to, or occur in the context of, an armed conflict.¹¹⁶

(iii) the definition of “war crimes” contained in 18 U.S. Code § 2441 shall be utilized for the purposes of this order. The war crimes targeted in this order are only those that are large-scale or undertaken as part of a plan or policy.¹¹⁷

(f) the term “committed mass atrocities” means directly engaging in the acts defined in part (e)(i-iii) of this section.

¹¹⁵ This definition often says “but not to include a foreign government” in other Executive Orders as well.

¹¹⁶ There is no statutory definition of The definition for “crimes against humanity” was taken from the United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2.1 Sec. (b)(2). This definition is largely congruent with the definition of crimes against humanity contained in the Article 7 of the Rome Treaty of the International Criminal Court.

¹¹⁷ The last sentence in this definition is meant to direct this order toward only the most egregious war crimes and not towards isolated incidents that would technically amount to violation of International Humanitarian Law. The last sentence is paraphrased from Art. 8 (1) of the Rome Statute of the International Criminal Court.

(g) the term “bears responsibility for mass atrocities” means having planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through superior responsibility, or incited others to engage in the acts defined in part (e)(i-iii) of this section, or attempted or conspired to do so. Engaging in crimes attendant to mass atrocities, such as public corruption, illegal arms trafficking, and money laundering, shall constitute assistance.¹¹⁸

(h) the term “attributable to the state or other entity” means that the state or other entity wields or has wielded overall control of the group that committed or is committing mass atrocities; not only by equipping and financing the group, but also by coordinating or helping in the general planning of its activity. It is not necessary that the state should issue, either to the head or to members of the group, instructions for the commission of specific acts that would constitute mass atrocities for mass atrocities to be attributable to the state or other entity.¹¹⁹

Sec. 8. For those persons determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.¹²⁰

Sec. 9. The Secretary of Treasury is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out this order with the exception of Section 3. The Secretary of Treasury may re-delegate these functions to other officers and agencies of the United States consistent with applicable law. All agencies and departments of the United States Government shall take all appropriate measures within their authority to assist the Secretary of State in the execution of this order.

Sec. 10. The Secretary of State is hereby authorized to take such actions, including the promulgation of rules and regulations, to employ all powers granted to the President under

¹¹⁸ This definition comes almost entirely from that contained in Presidential Proclamation dated August 4, 2011, regarding the Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses. The “attempted or conspired” elements comes directly from the United States Department of State Foreign Affairs Manual, 9 FAM 40.8 N2 INA 212(F)(b)(2). The element of incitement is original to this draft Executive Order. This incitement element could be problematic on First Amendment grounds for those who have a constitutional presence in the United States.

¹¹⁹ The definition is almost verbatim from the *Tadic* opinion of the International Criminal Tribunal for the Former Yugoslavia. *The Prosecutor v. Tadic (“Prijedor”)*, Case No. IT-94-1-A, ICTY AC, July 15, 1999, para. 131.

¹²⁰ Section 8 is standard language used in multiple Executive Orders (e.g. Executive Order 13619 (Blocking Property of Persons Threatening the Peace, Security, or Stability of Burma), Sec. 9, dated July 11, 2012).

IEEPA and INA to carry out Section 3 of this order.¹²¹ Further, the Secretary of State shall maintain and update quarterly a list of countries it determines to be in danger of mass atrocities occurring within their territory. This list will contain a list of persons within such countries determined to be the likely perpetrators of future mass atrocities to enable rapid designation under this order if necessary. The use of information and reports from Non-Governmental Organizations, Inter-Governmental Organizations, as well as that gathered by the United States Government, is permitted when maintaining and updating this list, as well as when designating persons pursuant to this order. This list shall be, to the extent allowable by national security, unclassified. To the extent national security considerations do not allow this list to be published fully in an unclassified form, the unclassified portion of the list will be published with a classified annex appended. The Secretary of State may redelegate responsibility for maintaining and updating this list, as well as the designation of persons pursuant to this order to an appropriate bureau or office within the Department of State.¹²² All agencies and departments of the United States Government shall take all appropriate measures within their authority to assist the Secretary of State in the execution of this order.¹²³

Sec. 10. The Secretary of State and other relevant departments and agencies shall make all relevant efforts to cooperate and coordinate with other countries, including through technical assistance, as well as bilateral and multilateral agreements and arrangements, to achieve the objectives of this order, including the prevention and cessation of mass atrocities, the denial of financing and financial services to those responsible for mass atrocities, and the sharing of intelligence about funding activities in support of those committing mass atrocities.¹²⁴

Sec. 11. The Secretary of State is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 12. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

¹²¹ The bifurcation of rule-making authority is present in: Executive Order (Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela), Sec. 8-9, dated March 8, 2015.

¹²² Placing this responsibility in the Department of State is justified under 22 U.S.C. 8213 (Investigations of violations of international humanitarian law), which states: “The President, with the assistance of the Secretary, the Under Secretary of State for Democracy and Global Affairs, and the Ambassador-at-Large for War Crimes Issues, shall collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law.”

¹²³ Section 10 is largely original, with the exception of several standard sentences and phrases taken from various Executive Orders.

¹²⁴ This section was taken from Executive Order 13224 (Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism), Sec. 6, dated September 25, 2001. This is the only instance where such language appears.