

The United Nations and Atrocity Crimes: An Enquiry into the Development of International Regime

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Genocide, war crimes, and crimes against humanity and ethnic cleansing are the examples of the mass atrocities that continue to occur in many parts of the globe today. In response to the issue of systematic and widespread atrocities, states have created international rules and standards to stop and hold those who are committing the crimes. This article looks at the framework that is already in place for prevention and tries to help States that want to be proactive, understand their legal obligations, and most importantly, act on those obligations. One assessment method that should be used as best practice is to conduct an Atrocity Impact Assessment, which assesses a State's current impact in a nation or region as well as any potential steps it could take to help prevent mass atrocities.

1. Introduction

A complex and recently developed norm of international law known as the Responsibility to Protect aims to give the world community a way to stop mass atrocity crimes from happening inside the borders of a sovereign state. Following the humanitarian catastrophes in Bosnia, Rwanda, Kosovo, and Darfur in 2001, Responsibility to Protect (R2P) was heralded as a panacea. States that have a track record of persistently violating human rights and enjoying impunity for past crimes are more vulnerable to horrors in the future. It's critical to stop mass massacres for both tactical and moral grounds. Morality demands that individuals in positions of power respond thoughtfully and effectively in order to uphold the principle of humanity. This idea is fundamental to governments that see human rights as the cornerstone of the rule-based international order, and it is ingrained in current international law. Atrocity prevention strategically contributes to broader foreign policy goals by avoiding the higher costs associated with reacting to large-scale population relocation, unstable regional economies, and weakening international institutions. The international foreign policy community frequently lack a thorough understanding of these connections and the added value of atrocity prevention. It is not surprising that courts are

reluctant to enforce existing preventive obligations and that states themselves have described as a lack of clarity regarding what exactly international law requires of them when faced with warnings of impending atrocities. Debates on the failure to prevent atrocities are frequently framed in moral and political terms rather than legal ones. States preventive obligations are unclear because of the complicated legal system that oversees international crimes and because, as we will discuss further below, the legal bases for any duties to prevent war crimes, crimes against humanity, and genocide are separate from one another.

In light of this, this article explores the legal basis for states' duties to stop each atrocity crime and aims to offer practical advice to governments looking to carry out their preventative commitments under international law. The adoption of a particular tool—Atrocity Impact Assessments—to help States operationalize their preventative responsibilities is then suggested in this article.

2. The existing framework for prevention

Genocide, crimes against humanity, ethnic cleansing and war crimes have been combined into a single conceptual category known as mass atrocities, the commission of which threatens the peace, security, and well-being of the world in the

wake of the UN General Assembly's decision to support the Responsibility to Protect (R2P). Three distinct obligations are included in the idea of responsibility to protect: a) prevent, b) respond, and c) rebuild. This broadened the conceptual definition of intervention and created a multiphase conception of responsibility. It declared that, in addition to immediate action, sustained engagement is necessary to prevent future conflicts and to reconstruct society in the wake of mass atrocities.

1. Prevention under the genocide convention: The legal responsibilities connected to genocide are the most well-defined and firmly established in international law among all the atrocity crimes. This is partially due to the widespread ratification of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (henceforth, the Genocide Convention) and case law, which provides trustworthy court interpretations of the obligations included therein. According to the UN International Law Commission (ILC), the Convention contains several elements relating to prevention, rather than a single obligation to prevent genocide. These elements include a general preventive obligation (art. I), the duty to implement national policies to implement the Convention's provisions (art. V), and a provision requiring competent UN organs to take appropriate preventive action (art. VIII). In light of our argument, we look at a few important aspects of these preventative duties below.

(a) The extraterritorial nature of the obligation: The International Court of Justice (ICJ) ruled a landmark decision that Parties to the Genocide Convention have a direct responsibility to prevent genocide under Article I. This means that States are not allowed to commit acts of genocide themselves and are instead under positive responsibilities, to make every effort to prevent such acts from happening. Importantly, the Court found that rather than being limited to a State's territorial authority, the duty stretches wherever a State may be operating or may be able to act in ways relevant to satisfying the responsibilities in question.

The Court ruled that the duty to prevent genocide is governed by a due diligence standard rooted in each States Party's subjective ability to successfully influence the behaviour of those who are either committing or are about to commit genocide, thereby establishing the extraterritorial nature of the obligation depending on a multitude of elements, such as the State's geographic isolation and the degree of political and other relationships between the State's officials and the main participants in the events. In addition, the Court stated that legal standards need to be applied when evaluating the State's ability to influence, given that each State's capacity to intervene will differ depending on its unique legal position vis-a`-vis the conditions and individuals facing the threat, or the actuality, of genocide.

The International Court of Justice (ICJ) took a novel approach to elucidating preventive obligations in relation to genocide by characterising the obligation as extraterritorial in nature and based its application on a set of legal and factual criteria. In essence, this means that States parties

as long as they have the necessary ability to successfully influence the pertinent genocidal actors and are aware that there is a real risk that genocide might occur, the parties shall take all reasonable steps, both individually and collectively, to avoid genocide. Stated differently, a state must do more than it can do.

(b) An obligation of conduct, not of result: This requirement is one of activity rather than one of outcome, as with other due diligence responsibilities. States are not required to successfully avoid genocide; instead, they must use the reasonable measures at their disposal to attempt. In this regard, the Court has emphasised that a State will not automatically be held accountable for its failure to prevent a genocide simply because it occurs; rather, responsibility will arise if the State clearly neglected to take all reasonable precautions, which were within its authority and which could have helped prevent the genocide.

(c) The knowledge standard: Fourth, the ICJ ruled that a state's obligation to prevent genocide and its corresponding duty to act arise at the moment the State learns of, or need to have been aware that there is a substantial chance that genocide will occur. This is because the obligation to prevent genocide is not predicated on a State's actual knowledge of the risk of genocide, but rather under a standard of constructive knowledge. In fact, this constructive knowledge requirement is part of what distinguishes involvement in genocide from the failure to prevent genocide, which necessitates, among other things, real knowledge that a genocide is about to occur or is already underway.

(d) Ambiguities regarding breaches of the duty: There are still a lot of unanswered questions in spite of such recommendations, the most important of which may be about the beginning and length of any future violation of the obligation to avoid genocide. The Court addressed the matter by citing the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSWA) and determined that a State may only be held accountable for failing to stop a genocide if it is actually carried out. The duty to prevent genocide begins at the outset and continues for the duration of the genocide if the State does not take action to halt it. Simultaneously, the Court recognised that this: does not imply that the duty to prevent genocide only materialises when the act is being committed; that would be ludicrous, given that the goal of the obligation is to stop, or make an effort to stop, the act from occurring. The Court decided that even if a state may not be in violation of its duties to prevent genocide until the genocide actually occurs, the state nonetheless has an obligation to take action as soon as it should have discovered that there is a high risk of genocide.

While it makes sense theoretically to argue that committing an atrocity is a necessary condition for contesting the inability to avoid it, a more thorough look at the real-world implications of this theory exposes its flaws. First off, many observers have noted that it is inconsistent with the concept of an obligation of action to consider a state's compliance with its duty to prevent genocide only after a genocide has taken place. Furthermore, it is inconsistent with the very nature of mass atrocities, which are generally regarded to be predictable processes rather than random, unpredictable incidents, to

base the obligation on the occurrence of a single atrocity. Regardless of whether a genocide takes place, an objective state of the facts may be established regarding the presence of a substantial danger that one would be perpetrated, which should prompt preventative action. In other words, waiting for a genocide to occur before discovering a breach of preventative duties eliminates the opportunity to seriously contest any inaction on the part of the parties involved until the slaughter starts. This doesn't appear to fit with the definition of a duty to prevent.

2. The treaty-based duty to prevent war crimes: Moving on to war crimes, Common Article 1 of the Geneva Conventions is the primary legal provision pertaining to preventive duties, despite the fact that the Conventions are not defined in a single multilateral treaty. Under this article, High Contracting Parties are required to uphold the Conventions in all circumstances and to both respect and ensure their respect. The duty to respect and ensure respect in Common Article 1 can be seen as reflecting both internal and exterior elements, according to the International Committee of the Red Cross (ICRC). Internally, every High Contracting Party is expected to uphold and guarantee adherence to the Conventions concerning the behaviour of its military forces, other individuals and entities functioning on their behalf, and their people in general. This is recognised as a general obligation to stop individuals under a state's jurisdiction from violating the Conventions, depending on the state's resources, the likelihood that the violations would occur, and the extent of the state's control over the violators.

However, the external aspect of Common Article 1 is the most important to our argument since it suggests that the obligation to avoid war crimes may have an extraterritorial scope. According to the International Committee of the Red Cross (ICRC), the general consensus today is that States are required by Common Article 1 to guarantee third States adherence to the Geneva Conventions, including those that have not ratified the conventions. This perspective supports the idea enumerated in ICRC 2016a: para.119 that every high contracting party has a legal stake in the observance of the Conventions, regardless of the location or identity of the victims of a conflict, because the interests they protect are so basic to humankind. The external dimension of Common Article 1 is considered to encompass both positive and negative obligations, according to the ICRC's 2016 Commentary to Common Article 1. Positive obligations require High Contracting Parties to take all reasonable steps to prevent and end violations of the Conventions, while negative obligations forbid them from encouraging, aiding, or assisting in such violations. Once more, the duty is seen to be one of due diligence, requiring States Parties to take all reasonable actions to ensure that all other States uphold the standards of international humanitarian law.

The ICRC believes that States' due diligence obligations extend beyond merely preventing current violations; they also include preventing violations when there is a foreseeable risk that they will be committed. States' due diligence obligations are activated only if the event in question is genuinely foreseeable. While it

is true that there is a lack of State practice to establish an extraterritorial obligation to prevent war crimes and challenges with dividing the preventive burden among States, the extraterritorial duty to prevent genocide is also valid on both counts.

3. The treaty-based duty to prevent crimes against humanity: If there is one glaring omission in the codified legal framework controlling the prevention of atrocities, it is related to crimes against humanity. However, the ILC has been working on this treaty-drafting process since 2014. As a result, in 2019, the ILC adopted a series of Draft Articles on the Prevention and Punishment of Crimes against Humanity. The Draft Articles lay forth specific preventive responsibilities in an effort to provide the framework for a new agreement. Although they are not yet treaty law, the extensive submissions, discussions, and negotiations among States that went into their drafting reveal the general direction and potential scope of a future treaty-based duty to prevent crimes against humanity. These documents could serve as the foundation for a potential future convention. It is unclear at first whether the jurisdictional language in Draft Article 4(a) suggests an extraterritorial component. The phraseology used in Draft Article 4 is more expansive than a simple reference to the State's territory, which raises the question of whether, in some circumstances, States should take preventive actions domestically that would have an extraterritorial impact. In essence, this formulation explicitly establishes an obligation to take domestic measures to prevent conduct within a State's own territorial jurisdiction.

3. Operationalizing states preventive obligations

Taking the aforementioned into consideration, the main problems with the existing legal system before evaluating how States might most effectively operationalize their legal duties. The State has a duty to proactively examine its preventative capacities as soon as it becomes aware of a substantial danger of mass atrocities. It may accomplish this by carrying out with an Atrocity Impact Assessment.

According to the evaluation, there are three main problems with the existing legal system concerning the obligations to stop each atrocity crime. The first is that each crime's treaty-based duties are not aligned, which puts States in an unworkable position when trying to operationalize their commitments as soon as a danger arises. As previously noted, the treaty-based responsibility is well established with regard to war crimes and genocide; but it is not yet in place with regard to crimes against humanity, which raises a number of practical difficulties. In particular, the lack of such a treaty has resulted in three main issues: (1) impunity gap, which makes it harder to prosecute individuals for crimes against humanity; (2) State responsibility gap, since there is no compromiser clause to allow litigation over States' obligations over crimes against humanity before the ICJ; and (3) definitional uncertainty regarding whether a given atrocity qualified as a crime against humanity.

Furthermore, there are still discrepancies on the specifics of treaty-based duty to prevent since different terminology is used in existing treaties and multilateral conventions regarding States' preventative obligations for each atrocity crime. However, it can be challenging for those evaluating the risk to determine the type of atrocities that could ultimately be committed or proven in a particular situation. This depends on a number of factors, including the intent of the perpetrators, the existence and description of an armed conflict, and the capacity to classify harm to a population into specific legal categories. It might not be immediately apparent which crimes would be committed at the precise moment when danger materialises and States must act quickly. This is why it could be most practical to accept guidelines pertaining to the most complex legal norm now in use, which is genocide, to the degree that legal requirements vary between crimes. The second issue with the existing legal system is its inability to see prevention as a duty that should motivate action before to the start of violence. Too often, failing to prevent is equated with actually committing atrocities, but in reality, there are three things that need to be considered: (1) States must take preventive action when there is a risk, even if they cannot determine whether that risk will result in actual atrocities; (2) Atrocity crimes can still occur even in cases where preventive action has been taken; and (3) even in cases where complete failure to prevent is completely avoidable due to chance or uncontrollable circumstances. As soon as the State becomes aware of the possibility of atrocities, it is imperative that preventive action be done; otherwise, the concept of prevention would be illusory and States would essentially be engaged in mitigation.

The ambiguity around the nature of States preventative commitments is the third issue with the existing legal system. Even if States wished to act responsibly and proactively, there is a lack of clarity on the kind of preventative steps that must be taken in fulfilment of preventive duties, as several States have themselves emphasised. Furthermore, it is sometimes hard for States to know the preventative measures other States have taken, especially if such measures include covert actions like backdoor diplomacy or the covert withdrawal of financial or military assistance. In reality, a lack of interagency collaboration may seriously impede the ability of a State to conduct cogent assessments of its own preventative capability, even inside its own apparatus. Consequently, it is difficult to demand the consistent fulfilment of preventative responsibilities.

However, an evaluation of a State's preventive capacities must inevitably precede compliance with preventative duties. In fact, this would be a sensible first step before taking any further action to fulfil whatever duties a State may have with regard to prevention. Furthermore, having such an evaluation in place would be extremely helpful to States defending their chosen course of action in the unlikely event that their preventative record was contested. Thus, these capacity assessments, which is refer to as Atrocity Impact Assessments below are useful instruments for operationalizing the preventative duties that States have when they occur.

4. Atrocity impact assessment: a preventive tool

States may use a variety of instruments for their assessments of their preventative capabilities. Undertaking a focused evaluation of a State's actions, policies, and relationships with regard to possible atrocity crimes, as well as the particular tools that each State has at its disposal to avoid them, is one feasible method that we refer to as an Atrocity Impact Assessment (AIA). States should take this type of assessment into consideration as a best practice tool to make sure that, as previously mentioned, they are abiding by the law and taking all reasonable steps to prevent atrocity crimes. Below is a summary of the suggestion along with the general parameters of evaluation.

States are required to use due care in order to fulfil their obligation to prevent each atrocity crime. Impact analyses are frequently employed in relation to this criterion in the following additional contexts: Governments all throughout the world utilise human rights impact assessments (HRIAs), for instance, which are seen as a crucial part of human rights due diligence and which offer clarification about human rights impacts and opportunities for mitigation. Indeed, it seems that future legal developments will follow the same path as the Third Revised Draft of the Binding Treaty to Regulate, under International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. HRIAs can be carried out to evaluate the influence of a corporation or government in a certain nation, or to evaluate the results of a specific programme, endeavour, or item. The common consensus is that these evaluations contribute to the development of a proactive, as opposed to a reactive, approach to opportunities and hazards related to human rights.

The Arms Trade Treaty (ATT) is another example of a treaty that requires States to do due diligence risk assessments with particular reference to atrocity crimes. In accordance with Article 7 of the ATT, states that are thinking about exporting conventional arms are required to undertake a risk assessment, among other things, to determine whether there is a possibility that the weapons will be used to commit or enable grave violations of international humanitarian or human rights law. The State Party must also take into account if any actions might be made to lessen the risks that the risk assessment indicated. Together with recommendations for potential risk mitigation strategies, the ICRC has also put up a list of indications that States can consider in their risk assessments. Significantly, the risk assessment requirement is intended to control State behaviour without legally depending on wrongdoing that has actually occurred. Rather, it is a preventative measure meant to stop wrongdoing from occurring in the first place. Similar procedural measures might help shape proactive State action in the context of mass atrocities, where prevention should be operationalized prior to atrocities occurring.

In the context of atrocity prevention, the due diligence requirement essentially requires a State to make informed judgements regarding the most suitable course of behaviour and to provide an explanation for those decisions and subsequent actions. It does not, however, prescribe any specific type of preventative action. This interpretation of due

diligence is also consistent with the knowledge standard applicable to the obligation to avoid genocide, which is based on what a State should have known in addition to what it knew about danger, as we have already noted. It is possible to interpret the constructive knowledge component to suggest a risk assessment that, at the very least, closely aligns with the requirements of procedural due diligence. A State would evaluate an AIA's unique effects in a particular nation or area as well as the special steps it may take to stop atrocity crimes from being committed there. An AIA is best regarded as a tool that may assist governments in detecting and minimising their detrimental effects, much like impact assessments in the context of human rights or environmental legislation. In the case of atrocity crimes, risk or effect evaluations have actually been done before with significant success. For instance, as supplemental guidance to the State/USAID Conflict Assessment Frameworks, the US State Department and USAID jointly developed the Atrocity Assessment Framework during the Obama Administration. This framework was designed to help decision-makers understand the dynamics that underpin a situation where there are indications of atrocity risk or where atrocities are underway as well as identify and prioritise government options to reduce the risk of atrocity crimes. Crucially, the evaluations that fall under the purview of this paradigm involve determining the windows of opportunity for prevention as well as the triggers for the danger of atrocities.

According to the concept, an evaluation of atrocities ought to produce tangible results, such as important atrocity dynamics, trends to keep an eye on, and suggestions for atrocity reaction or prevention.

Therefore, without listing every situation in which an assessment is necessary, the following at the very least should result in an AIA: (1) an International Court of Justice judicial finding that there is a serious risk of atrocity crimes; (2) a similar finding by an international fact-finding mission; and (3) a notification from the Special Advisers on the Prevention of Genocide and the Responsibility to Protect regarding the serious risk of atrocity crimes. It would be difficult for a State to argue that it was unaware, either directly or indirectly, of the grave danger that atrocities would be perpetrated under any of these conditions. Any state that receives one of these warnings ought to conduct an AIA to assess its capacity to prevent atrocity crimes.

There are no templates for atrocity prevention or one-size-fits-all solutions for atrocity risk situations; they are as distinct as fingerprints. Because of this, each instance of atrocity risk will probably provide a different set of preventative suggestions from an AIA. Nevertheless, there are tools that should be regularly assessed for possible application. These include asset freezes, the suspension of economic or military aid, asset freezes, diplomatic missions, international inquiries, the possibility of prosecution in domestic and international forums, humanitarian assistance, bargaining, and refugee support.

Nonetheless, it is prudent to assume that subsequent interpretations of the twin duties would be consistent and that the International Court of Justice's rulings regarding the intentional similarities between the formulation of the responsibilities to prevent crimes against humanity and genocide, the extent, character, and substance of the responsibility to avoid genocide applies *mutatis mutandis* to the obligation to prohibit crimes against humanity. Furthermore, practically speaking, it is frequently unclear whether a danger of atrocity crimes would materialise as genocide rather than crimes against humanity or, in the case of an armed conflict, war crimes, prior to atrocities taking place. An evaluation of atrocities rather than genocides is therefore a more suitable line of action at the current moment when States need to operationalize the obligation to prevent.

5. Significance of the atrocity impact assessment

Conducting an AIA would essentially help to ensure that State actors are unable to slip into the transitional state of knowledge and ignorance. It would help move the focus of the States from responding to atrocities to actually averting mass violence at an earlier stage in the atrocity lifecycle. Additionally, Atrocity Impact Assessments would foster a collaborative approach across nations to jointly evaluate high-impact potential for preventive action and help normalise the practice of States proactively evaluating their capacity to prevent. Finally, from a practical standpoint, States would be made aware of a wider variety of possibilities for successful intervention, resulting in better and more focused preventative policies, by participating in rapid impact assessments earlier in the atrocity lifecycle.

6. Conclusion

For far too long, the duty of preventing atrocity crimes has been viewed as either a political platitude or a moral obligation. It's time to enshrine certain duties in legislation and demand that they be upheld. Even though there is still a lot of disagreement over preventative duties, international law has clarified that States have a commitment to prevent genocide and to take action in response to early signs. As a matter of best practice, we implore States seeking to satisfy their legal commitments to conduct an atrocity influence assessment, which would assess their present influence in a nation or area as well as any prospective steps they may take to help prevent mass atrocities. These evaluations would help to advance discussions about risk, mitigation strategies, and state capability at the critical juncture when they could effectively stop the world's most heinous crimes from being committed.

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References

1. Arbour, L. 2008. The Responsibility to Protect as a Duty of Care in International Law and Practice. *Review of International Studies* 34(3).
2. Barbora H., Hollie N. Nzitatira, Maartje Weerdesteijn. 2022. *The Oxford Handbook on Atrocity Crimes*. Oxford Handbook Press Inc. ISBN 0190915625
3. Barnridge, R., Jr. 2006. The Due Diligence Principle under International Law. *International Community Law Review* 8.
4. Bassiouni, M. 2010. Crimes against Humanity: The Case for a Specialized Convention. *Washington University Global Studies Law Review* 9(4)
5. Broache, M. 2016. Irrelevance, Instigation, and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case. *International Journal of Transitional Justice* 10(3).
6. Buchwald, T. and A. Keith. 2019. By Any Other Name How, When, and Why the US Government Has Made Genocide Determinations. *International Journal of Transitional Justice*.
7. Cécile Aptel. 2023. *Atrocity Crimes, Children and International Criminal Courts Killing Childhood*. Routledge. ISBN 9781032420554
8. D'Alessandra, F. 2017. The Accountability Turn in Third Wave Human Rights Fact-Finding. *Utrecht Journal of International and European Law* 33(84): 5976
9. D'Alessandra, F., K. Sutherland, and H. Wu. 2021. *Oxford Programme on International Peace and Security. Institute for Ethics, Law and Armed Conflict*. Blavatnik School of Government, University of Oxford.
10. Dormann, K. and J. Serralvo. 2014. Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations. *International Review of the Red Cross* 96(895-896).
11. Focarelli, C. 2010. Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble? *European Journal of International Law* 21(1).
12. Federica D'Alessandra, Shannon Raj Singh. 2022. Operationalizing Obligations to Prevent Mass Atrocities: Proposing Atrocity Impact Assessments as Due Diligence Best Practice. *Journal of Human Rights Practice*.
13. Forlati, S. 2011. The Legal Obligation to Prevent Genocide: Bosnia v. Serbia and Beyond. *Polish Yearbook of International Law* 31.
14. Gattini, A. 2007. Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. *European Journal of International Law* 18(4).
15. Gibney, M. 2007. Genocide and State Responsibility. *Human Rights Law Review* 7(4)
16. Global Justice Center. 2018. *Beyond Killing: Gender, Genocide, & Obligations Under International Law*. Global Justice Center.
17. Goodman, R. 2016. Two U.S. Positions on the Duty to Ensure Respect for the Geneva Conventions. *Polish Yearbook of International Law*.