

The Impact of Public Health Emergencies on Atrocity Prevention and the Conflict Landscape

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Abstract

Public health emergencies raise important questions as to their effects on economic, social and political cohesion. They may be classified as threats to international peace and security, necessitating comprehensive and restrictive measures, as well as the coordination of global efforts. Amidst the recent global public health emergency, COVID-19, particularly vulnerable populations appear to be neglected in the consideration and implementation of management and containment measures. A public health emergency of this magnitude has the potential to cause significant damage, particularly in already fragile States, the deterioration of at-risk conflict situations and the disruption to crisis and atrocity management systems.

This article argues that, even in times of public health emergencies, States continue to incur positive obligations to protect vulnerable populations from and to prevent genocide, war crimes and crimes against humanity (combined ‘atrocity crimes’). To do so, it first addresses how public health emergencies have the potential to create threats to international peace and security. The preliminary effects of COVID-19 on the conflict landscape, with a primary focus on vulnerable populations and fragile States in the Asia-Pacific and conflict areas, are considered in light of States’ obligations to protect populations from atrocity crimes. The article then explores States’ legal obligations for atrocity prevention within existing international treaty and customary law, arguing that third States ought to engage more to fulfil their obligations, even amidst a public health emergency. In doing so, the article identifies trends vis-à-vis public health emergencies and social instability.

I INTRODUCTION

The outbreak and classification of COVID-19 as a public health emergency of international concern (‘PHEIC’), and subsequently as a pandemic raises important questions regarding its direct and indirect effects on various

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sectors.¹ COVID-19 not only poses a substantial threat to economic, but also to social cohesion, and its effects on global politics remain to be seen. In the past, PHEICs have been recognised for their potential to significantly disrupt the stability of societies,² their devastation on development and various sectors, and as threat to international stability and security.³ A PHEIC of this magnitude has the potential to cause significant damage, the deterioration of at-risk conflict situations and the disruption to crisis and atrocity management systems.

While governments frequently focus on people particularly at risk of COVID-19, such as the elderly or those with underlying health issues, they appear to neglect some of the most vulnerable groups who are at a heightened risk of exposure.⁴ This includes marginalised groups, such as minority groups, conflict- or atrocity-affected populations, and those in internal displacement and refugee camps or informal settlements.⁵ These groups appear largely forgotten by governments, as preventive diplomacy measures have largely been suspended and humanitarian aid appears of lesser priority. With reports of COVID-19 reaching refugee camps,⁶ it is necessary to assess the extent to which States continue to be required to employ all reasonably available measures to protect vulnerable populations from harm.

¹ Tedros A Ghebreyesus, WHO Director-General, 'Statement of IHR Emergency Committee on Novel Coronavirus (2019-nCoV)' (Speech, 20 January 2020). See 'WHO Coronavirus Disease (COVID-19) Dashboard' <https://covid19.who.int/?gclid=EAlaIqobChMIpsDj5f_46QIV2nwrCh1PLg3OEAAAYASAAEgL2_vD_BwE>. A PHEIC has the potential to affect multiple States and may require a coordinated international response. See also art 1(1) of the International Health Regulations (2005), (World Health Organisation, 3rd ed, 2016). A pandemic, while there is no widely accepted definition, is generally considered to be a global epidemic. Tedros A Ghebreyesus, WHO Director-General, 'Opening Remarks at the Media Briefing on COVID-19' (Speech, 11 March 2020).

² SC Res 1983, UN Doc S/RES/1983 (7 June 2011).

³ SC Res 1308, UN Doc S/RES/1308 (17 July 2000); SC Res 2177, UN Doc S/RES/2177 (18 September 2014); Kofi Annan, UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc A/59/2005 (21 March 2005) [78].

⁴ See Part III.

⁵ The remainder of the article focuses on at-risk and vulnerable groups in the sense of marginalised groups, conflict- or atrocity-affected populations, and those in internal displacement and refugee camps or informal settlements, as well as States which could be considered as being susceptible to atrocity crimes.

⁶ See, eg, 'Coronavirus: 20 including 8 doctors home-quarantined in Cox's Bazar, South Tekpara area under lockdown', *The Daily Star* (online, 24 March 2020) <<https://www.thedailystar.net/country/news/saudi-arabia-returnee-tests-positive-coronavirus-1885261>>; 'The Gaza Strip and COVID-19: Preparing for the Worst', *International Crisis Group* (online, 1 April 2020) <<https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/israelpalestine/b75-gaza-strip-and-covid-19-preparing-worst>>; Katy Fallon, 'Greece quarantines camp as 20 refugees test positive for COVID-19', *ALJAZEERA* (online, 2 April 2020) <<https://www.aljazeera.com/news/2020/04/woman-greece-refugee-test-positive-coronavirus-20040111738369.html>>.

COVID-19 is more than a medical emergency, in that it has the potential to have an unprecedented effect on atrocity prevention as the world is forced to change in unparalleled ways. Numerous States have taken extraordinary actions to flatten the infection curve, at the cost of human rights.⁷ However, this article argues that, even amidst a PHEIC or pandemic, the legal obligations incurred by States to prevent genocide, war crimes and crimes against humanity (combined ‘atrocity crimes’) cannot be set aside. States must employ their best efforts to protect all populations from risk and harm, not only in relation to the containment of the spread of COVID-19. Atrocity crimes are generally not spontaneous or small-scale events, but are commonly systematic, heinous acts of severe gravity. They are considered to be serious crimes, not only against vulnerable populations, but against the dignity of humanity.

The article first considers and compares the United Nations Security Council’s (‘UNSC’) and the United Nations General Assembly’s (‘UNGA’) responses to and their assessment of past public health emergencies and the current pandemic vis-à-vis international peace and security, before observing preliminary effects of COVID-19 on atrocity prevention and the conflict landscape. By examining these responses, it is possible to identify emerging trends in relation to atrocity prevention amidst a pandemic. Subsequently, the legal obligations for atrocity prevention under general international law, international human rights (‘IHL’) and humanitarian law (‘IHL’) instruments, with a focus on the obligations of third States vis-à-vis at-risk States and vulnerable populations, are outlined. It is argued that while PHEIC and pandemics are not the cause of atrocity crimes, the extraordinary challenges they pose to economic and social cohesion may be conducive to the exacerbation of risk factors of atrocity crimes, necessitating positive (collective) action by third States to address the continued risk and imminent threat of atrocities.

II THE ASSESSMENT OF PUBLIC HEALTH EMERGENCIES AS THREATS TO INTERNATIONAL PEACE AND SECURITY

The outbreak of COVID-19 and its rapid spread has seen the virus be compared to previous public health emergencies.⁸ The most notable

⁷ See, eg, Diane Desierto, ‘The Myth and Mayhem of “Build Back Better”: Human Rights Decision-Making and Human Dignity Imperatives in COVID-19’, *EJIL:Talk* (online, 25 May 2020) <<https://www.ejiltalk.org/the-myth-and-mayhem-of-build-back-better-human-rights-decision-making-as-the-human-dignity-imperative-in-covid-19/>>; Rebecca Ratcliffe, ‘Teargas, beatings and bleach: the most extreme COVID-19 lockdown controls around the world’, *The Guardian* (online, 1 April 2020) <<https://www.theguardian.com/global-development/2020/apr/01/extreme-coronavirus-lockdown-controls-raise-fears-for-worlds-poorest>>.

⁸ Marko Svicevic, ‘COVID-19 as a Threat to International Peace and Security: What place for the UN Security Council?’, *EJIL:Talk* (online, 27 March 2020) <<https://www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-what-place-for-the-un-security->

parallels may be drawn with the outbreak of HIV/AIDS, the Severe Acute Respiratory Syndrome ('SARS') outbreak in 2003, and the Ebola outbreak in West Africa in 2014. Each had varying effects on development, trade, peace and security, and resulted in a range of responses globally. This section observes the assessment of past public health emergencies and determines whether any such assessment may indeed be comparable to COVID-19.

While some PHEICs were not formally addressed by the UN Security Council, such as the SARS outbreak, it did recognise others for their potential significant disruption to the stability of societies, their devastation on various sectors and development and as threats to international stability and security. In considering the HIV/AIDS outbreak, UNSC Resolution 1308 (2000) was the first to determine that a public health crisis could pose a threat to stability and security due to the potential of, firstly, its 'uniquely devastating impact on all sectors and levels of society', secondly, its 'growing impact on social instability', and finally, its damaging impact on peacekeeping operations.⁹

The Council reaffirmed and considered additional factors as relevant in the determination of whether a PHEIC may pose a threat to international peace and security when deliberating on the Ebola outbreak in 2014. The organ considered four factors to be particularly relevant to the determination of a PHEIC as a threat to international peace and security, in accordance with art 39 of the UN Charter: firstly, the threat of the virus' rapid outbreak and its mortality rate; secondly, the possibility of capacity requirements to address and contain an outbreak surpassing response capabilities of States, particularly within domestic health services; thirdly, the threat it posed to the stability of States most affected, as well as its economic, social and political impacts; and finally, its threat to peacebuilding and development efforts in at-risk States.¹⁰ These factors were instrumental in the UNSC's conclusion that the Ebola outbreak in West Africa did pose a threat to international peace and security.

COVID-19 appears to satisfy all these factors: firstly, as at 17 November 2020, a year after the first case was reported and nearly 10 months after its classification as a PHEIC on 30 January 2020, the World Health Organization ('WHO') recorded over 54,770,000 confirmed positive cases of COVID-19 globally, including over 1,320,000 deaths, and has

council/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2>.

⁹ SC Res 1308, UN Doc S/RES/1308 (17 July 2000). See Megan Cribbs, 'Expanding the Responsibility to Protect: Saving Populations from HIV/AIDS' (2013) 85(4) *Temple Law Review* 879, 904–5.

¹⁰ SC Res 2177, UN Doc S/RES/2177 (18 September 2014); UNSC, 7268th mtg, UN Doc S/PV.7268 (18 September 2014). See Svicevic (n 8).

continuously warned of the disease's capacity for rapid transmission.¹¹ Secondly, across the world, extraordinary measures were taken to 'flatten the curve' so as to not overload States' public health services in response to COVID-19. Thirdly, the threat posed by COVID-19 to social cohesion, transitional justice and other sectors has been widely reported, although the extent of its impact remains to be seen.¹² Finally, with increasing infections in Africa and Asia, political consequences, particularly for States at risk of atrocity crimes, or those within delicate post-conflict situations are probable.¹³ COVID-19 poses a direct threat to atrocity prevention efforts, exacerbated through measures intended to contain the pandemic which, in practice, may amplify risk factors of atrocity crimes.

The recent COVID-19 outbreak shares several features of the Ebola outbreak, although the most notable difference has been its global impact. The response to and the measures taken to contain COVID-19 are more aggressive than those taken to contain any past PHEIC. Yet, UNSC Resolution 2532 merely recognised the 'likely' threat of COVID-19 to the maintenance of international peace and security.¹⁴ The UNSC did, however, demonstrate a focus on fragile and at-risk States devastated by armed conflict, humanitarian crises or within post-conflict situations, acknowledging that these States are dependent on humanitarian aid. This is particularly relevant as at-risk and fragile States may already be significantly limited in their capacity to protect their populations from exacerbated violence and, where a risk is emerging or present, atrocity crimes. The resolution further called for a durable humanitarian pause in support of the UN Secretary-General's call for an immediate global ceasefire. The Council failed to adopt a more robust resolution largely due to the political considerations of its permanent members. A resolution to this end could authorise the implementation of a variety of comprehensive measures in accordance with Chapter VII of the UN Charter, enabling an enhanced coordination of the global fight against COVID-19 and its broader effects. While primary measures focus on the management and containment of COVID-19, secondary measures are required to mitigate its economic and social impact. Fragile and at-risk States, in particular, are

¹¹ WHO Coronavirus Disease (COVID-19) Dashboard (n 1). Figures are rapidly increasing. It is currently not possible to calculate an accurate mortality rate, case fatality rate or infection fatality rate as the total number of cases of COVID-19 is not known, due to limited testing.

¹² See, eg, Nikki Marczak, 'Does COVID-19 pose a threat to world peace?', *ABC* (online, 2 April 2020)

<<https://www.abc.net.au/religion/coronavirus-as-threat-to-global-peace/12114862>>;

'Atrocity Alert Special Issue: COVID-19, conflict and the threat of atrocities', Global Centre for the Responsibility to Protect (GCR2P) (online, 1 April 2020)

<<https://www.globalr2p.org/publications/aa-si-covid19/>> ('Atrocity Alert Special Issue').

¹³ See, eg, the death of the President of Burundi, likely related to COVID-19. Jason Burke, 'Burundi president dies of illness suspected to be coronavirus', *The Guardian* (online, 10 June 2020) <<https://www.theguardian.com/world/2020/jun/09/burundi-president-dies-illness-suspected-coronavirus-pierre-nkurunziza>>.

¹⁴ SC Res 2532, UN Doc S/RES/2532 (1 July 2020).

reliant on enhanced preventive diplomacy measures, preventive deployments and humanitarian aid in times of a PHEIC.

Other organs of the international organisation appear to have been more vocal in addressing the pandemic: the UN Secretary-General ('UNSG') called for an immediate global ceasefire on 23 March 2020 to enable the focus of resources not on armed conflict but on reallocation to the health sector in the fight against COVID-19.¹⁵ The UNGA further unanimously adopted a resolution calling for international cooperation, multilateralism, the respect for human rights and solidarity in the fight against COVID-19, recognising its unprecedented effects.¹⁶ Additionally, 130 States reiterated their shared commitment to fight the disease in a WHO resolution adopted by consensus in May 2020.¹⁷ The Peace and Security Council of the African Union also indicated grave concerns regarding the potential threat the virus may pose to the peace and security on the African continent.¹⁸ In reality, a focus must also remain on atrocity prevention for the protection of vulnerable groups and populations, particularly in light of the heightened risk of atrocity crimes exacerbated through PHEICs. The following section considers the virus' preliminary impact on atrocity prevention and the conflict landscape. Importantly, as is demonstrated below, violence and instability are exacerbated through the pandemic and vice versa.

III COVID-19 AS A THREAT TO INTERNATIONAL PEACE AND SECURITY VIS-À-VIS ATROCITY PREVENTION

Although the UNSC has merely acknowledged COVID-19 as a 'likely' threat to international peace and security, public health emergencies of this magnitude have the potential and are likely to exacerbate the risk factors of atrocity crimes.¹⁹ PHEICs have the potential to cause devastation to conflict- and atrocity-affected populations due to their already weak healthcare systems, and their social and economic strain in at-risk and fragile States. Globally, nearly 80 million people are currently living in conditions which make them more vulnerable to COVID-19 due to being

¹⁵ António Guterres, UN Secretary-General, 'Virtual press encounter on the appeal for global ceasefire' (Statement, 23 March 2020). The UNSG reiterated the call for a global ceasefire on 20 October 2020 before the UNSC. António Guterres, UN Secretary-General, 'Remarks at the Security Council Meeting on the "Maintenance of International Peace and Security: Comprehensive Review of the Situation in the Persian Gulf Region"' (Statement, 20 October 2020).

¹⁶ GA Res 74/L.52, UN Doc A/RES/74/L.52 (27 March 2020); GA Res 74/270, UN Doc A/RES/74/270 (2 April 2020).

¹⁷ *COVID-19 Response*, WHO Res 73.1, WHO Doc WHA73.1 (19 May 2020).

¹⁸ African Union, Peace and Security Council, 910th mtg, PSC/PR/BR.(CMX) (13 February 2020).

¹⁹ For a comprehensive overview of risk factors and indicators of atrocity crimes see United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes* (UN, 2014).

forcibly displaced inter alia by conflict and atrocities,²⁰ while in the Asia-Pacific region, over 9 million people are of particular concern as their risk of exposure to the pandemic is heightened.²¹

PHEICs and pandemics are not the cause of atrocity crimes. However, the extraordinary challenges they pose to economic and social cohesion may be conducive to the exacerbation of risk factors of atrocity crimes and their exploitation. In a relatively short period, COVID-19's effects on at-risk situations have already begun to emerge. This section considers the preliminary effects of COVID-19 on the conflict landscape with a focus on the heightened risk of discrimination and serious violations of human rights aimed at marginalised populations, which are conducive to the risk and commission of atrocity crimes. Atrocity crimes are generally not spontaneous or small-scale events, but are commonly systematic, heinous acts of severe gravity. They require a relevant mens rea and are generally preceded by potentially widespread or systematic serious violations of IHRL and IHL, which are frequently associated with the discrimination or exclusion of vulnerable groups or populations. Where such serious violations of IHRL and IHL occur on a large scale, they may themselves amount to atrocity crimes where they satisfy the necessary objective and subjective elements. These regimes therefore have the potential to overlap. The identification of risk factors and relevant indicators is therefore paramount in assessing the susceptibility or risk of atrocity crimes. Due diligence must be exercised in identifying human rights abuses as warning signs of the imminent risk of atrocity crimes, particularly in already conflict-affected States, which are likely to be amplified by the direct or indirect effects of the pandemic.

Persistent patterns of discrimination, based on real or perceived differences on the basis of nationality, ethnicity, race or religion, which are successful in the establishment of divisions within a society, may serve as a material cause and perceived justification for group violence.²² Reports indicate an increase of xenophobia and hate speech globally as a result of COVID-19.²³ Such situations are conducive to further human rights abuses and the outbreak of violence.²⁴ In Indonesia, Malaysia and the Philippines,

²⁰ Refugee Agency, 'Figures at a Glance' (online, 2020) <<https://www.unhcr.org/ph/figures-at-a-glance>>.

²¹ Refugee Agency, *Global trends: forced displacement in 2019* (UNHCR, 2020).

²² *Framework of Analysis for Atrocity Crimes* (n 19) 18.

²³ Atrocity Alert Special Issue (n 12). See also Baroness Lawrence's review demonstrating the effects of structural race discrimination on the spread of COVID-19 and vice versa in the United Kingdom. Baroness Doreen Lawrence, *An Avoidable Crisis: The Disproportionate impact of Covid-19 on Black, Asian and minority ethnic communities* (Review, 2020) available at <https://uploads-ssl.webflow.com/5f5bdc0f30fe4b120448a029/5f973b076be4cadec5045fad3_An%20Avoidable%20Crisis.pdf>.

²⁴ Past pandemics indicate evidence of scapegoating of marginalised groups, for example the treatment of Pagans during the first plague in the 6th Century and that of Jews in the 14th

discrimination against minority Chinese communities has reportedly increased.²⁵ An increase in similar responses can be expected as the social and economic strains amongst populations intensify. Since the outbreak of COVID-19, some armed groups and military forces are accused of abusing measures and restrictions implemented by governments to contain the pandemic through excessive measures as national and international security resources were refocused. This allows the virus to function as a justification for further discrimination of already targeted and vulnerable populations.²⁶ For example, in Sri Lanka, ethnic tensions are exacerbated through the militarisation of public health measures to address COVID-19, which appear to affect minority groups disproportionately.²⁷ Coupled with increased discrimination, human rights abuses and economic crises, the potential exists for the exacerbation of violence against marginalised groups.

In other instances, governments are accused of exploiting the pandemic for their own gain at the cost of human rights, or of using the need for containment as justification for their inaction on other critical issues, including atrocity prevention or post-conflict rehabilitation.²⁸ In the Philippines, the rehabilitation of conflict-affected populations in Mindanao appears to be of lesser priority.²⁹ In yet other situations, vulnerable communities and populations find themselves without the humanitarian aid they have become reliant on to survive.³⁰ Densely populated areas, such as refugee or displacement camps, are faced with exacerbated threats from the pandemic, and increased vulnerability due to a heightened risk of violence and discrimination.

States with underlying root causes for conflict, or where discrimination or persecution are prevalent, may be at a heightened risk of the commission of atrocity crimes, such as Myanmar, regions within the Philippines, Southern Thailand and West Papua.³¹ In many instances, States at risk of

Century during the Black Death. Their treatment appears consistent with the reported treatment of ethnic Chinese and those of East Asian appearance in the current crisis. Scapegoating during pandemics frequently extends to other minority groups, which are frequently already subject to persecution, as well. See, eg, Marczak (n 12).

²⁵ Asia-Pacific Centre for the Responsibility to Protect, 'COVID-19 and Atrocity Crime Prevention in the Asia Pacific' (Briefing Memo, 8 April 2020) ('APCR2P Briefing Memo').

²⁶ See, eg, Ratcliffe (n 7); Atrocity Alert Special Issue (n 12).

²⁷ Boram Jang, 'Sri Lanka: vulnerable groups pay the price for militarization of COVID-19 response', *International Commission of Jurists* (online, 27 October 2020) <<https://www.icj.org/sri-lanka-vulnerable-groups-pay-the-price-for-militarization-of-covid-19-response/>>.

²⁸ Atrocity Alert Special Issue (n 12). See Marczak (n 12).

²⁹ APCR2P Briefing Memo (n 25).

³⁰ See, eg, Sally Hayden, 'Libya's refugees face being cut off from aid due to coronavirus', *The Guardian* (online, 24 March 2020) <<https://www.theguardian.com/global-development/2020/mar/24/libyas-refugees-face-being-cut-off-from-aid-due-to-coronavirus>>.

³¹ Marczak (n 12).

atrocity crimes may suffer from weak public health systems, a general lack of public trust and limited, if any, access to timely information.³² Syria, for example, has been ravaged by armed conflict for nearly a decade, and is now faced with an impoverished public health system and response capacities to emergencies. The High Commissioner for Human Rights, Michelle Bachelet, and the Under-Secretary-General for Humanitarian Affairs, Mark Lowcock, both expressed their continued concern regarding the ongoing dire humanitarian situation in Syria and reported increased incidents of civilian killings.³³ Various belligerent parties further appear to be utilising the pandemic to regain control and inflict violence, including the Islamic State ('ISIS'), which called on its members to continue their war amidst the pandemic.³⁴ In relation to the armed conflict in Yemen, international human rights bodies, such as the UN Human Rights Council, have indicated that there are 'reasonable grounds to believe' that serious violations of IHRL and IHL, some of which may amount to war crimes, have been and continue to be committed by the parties to the armed conflict, even amidst the pandemic.³⁵ Indeed, the added complexities of a PHEIC are only expected to augment the risk of further war crimes.

Similarly, the management of COVID-19 may be utilised to justify further persecution and discrimination of vulnerable groups. In Myanmar, authorities have been accused of decades of 'oppressive and systematic restrictions', including the systemic denial of legal rights to members of the Rohingya group.³⁶ In its management of the pandemic, the State is additionally accused of abusing measures to further persecute and extort members of the Rohingya while they already suffer from lack of necessary resources, limited access to medical support, deteriorating shelters and the continued threat of genocide.³⁷ It does not appear as if the government of Myanmar has taken many, if any, appropriate measures to fulfil its obligations under the International Court of Justice's ('ICJ') provisional measures order on 23 January 2020 to prevent the commission of genocide

³² Ibid.

³³ Mark Lowcock, Under Secretary-General For Humanitarian Affairs and Emergency Relief Coordinator, *Briefing to the Security Council on the humanitarian situation in Syria* (Briefing, 29 January 2019); Marc Lawcock, Under Secretary-General For Humanitarian Affairs and Emergency Relief Coordinator, *Briefing to the Security Council on the humanitarian situation in Syria* (Briefing, 19 May 2020).

³⁴ 'Contending with ISIS in the Time of Coronavirus', *International Crisis Group* (online, 31 March 2020) <<https://www.crisisgroup.org/>>.

³⁵ Human Rights Council, *Situation of human rights in Yemen, including violations and abuses since September 2014*, 45th sess, Agenda item 2, UN Doc A/HRC/45/6 (28 September 2020).

³⁶ Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, 42nd sess, Agenda item 2, UN Doc A/HRC/42/CRP.5 (16 September 2019).

³⁷ Nadia Hardman and Param-Preet Singh, 'Pandemic Adds New Threat for Rohingyas in Myanmar', *Human Rights Watch* (online, 29 May 2020) <<https://www.hrw.org/news/2020/05/29/pandemic-adds-new-threat-rohingyas-myanmar>>.

against the Rohingya.³⁸ Contrary to a presidential directive ordering State organs not to commit acts within the scope of the *Genocide Convention*,³⁹ new military clearance operations have been announced, and Myanmar's armed forces have refused to cease its operations directed against ethnic armed groups.⁴⁰ The increased use of measures, particularly against already persecuted minority groups, such as the Uighur population in China, in the guise of the management and containment of the COVID-19 pandemic are further cause for concern for increased risk of atrocity crimes.⁴¹

Reports of abuse and inaction may indicate violations of States' obligation to prevent the infringement of peoples' rights by the State or third parties on one hand, and atrocity crimes, where States fail to protect populations from genocide, war crimes and crimes against humanity amidst the pandemic on the other. While priorities and resources may be redistributed to directly address the spread of COVID-19,⁴² States' obligations to prevent atrocity crimes remain.

³⁸ The provisional measures indicated by the Court require Myanmar to 'take all measures within its power to prevent the commission of all acts within the scope of Article II' *Genocide Convention*, particularly (a)–(c) and (d), and 'ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in [Article II *Genocide Convention*], or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide' *inter alia*. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Order)* [2020] ICJ General List No. 178, [86(1)], [86(2)] ('*Rohingya Genocide Provisional Measures Order*').

³⁹ *Compliance with the Convention on the Prevention and Punishment of the Crime of Genocide* (Myanmar), Office of the President, Directive No. 1/2020 (8 April 2020). *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

⁴⁰ The ICJ further required Myanmar to submit a report to the Court on all measures taken to give effect to the Order on provisional measures within four months of the date of the order, and every six months subsequently until the final judgement of the Court. *Rohingya Genocide Provisional Measures Order* (n 38) [86(4)]. As these reports are confidential, any consideration of Myanmar's response or compliance is based on the reports of other international bodies and human rights organisations. See, eg, APCR2P Briefing Memo (n 25) 1; Param-Preet Singh, 'What Myanmar Is and Is Not Doing to Protect Rohingyas from Genocide', *Human Rights Watch* (online, 23 July 2020) <<https://www.hrw.org/news/2020/07/23/what-myanmar-and-not-doing-protect-rohingyas-genocide>>. For measures the ICJ deemed insufficient to fulfil Myanmar's obligation to prevent genocide in its consideration of provisional measures, see section IV.A.1.

⁴¹ APCR2P Briefing Memo (n 25) 3.

⁴² See *inter alia* Art 4(2) of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

IV THE LEGAL FRAMEWORK OF ATROCITY PREVENTION

In order to ascertain the obligations and expectations of States vis-à-vis at-risk situations, it is necessary to determine the nature of any obligation to prevent atrocity crimes. In practice, prevention obligations may either require the prevention of an outcome (obligations of result) or to take preventive measures (obligations of conduct).⁴³ Obligations of conduct require the application of due diligence, the degree of which is dependent on the content of the relevant primary obligation and the circumstances *in concreto*.⁴⁴

The following section argues that the obligations to prevent atrocity crimes are obligations of conduct, which arise from multiple sources of international law. To fulfil their international obligations of prevention, States must take positive action and employ all reasonably available means at their disposal in accordance with international law to prevent atrocity crimes as far as possible. As the notion of due diligence is inherently flexible, it requires the subjective assessment of a State's capacity, the means reasonably available to it and their suitability to avert harm within the specific context.⁴⁵ This section first outlines the legal obligations of States to prevent atrocity crimes generally, and subsequently explores the obligations of third States vis-à-vis at-risk States and vulnerable groups and populations in light of PHEICs by example of COVID-19.

A The Legal Obligation to Prevent Atrocity Crimes

Numerous international legal instruments address gross human rights violations, which also places international legal obligations on States to prevent genocide, war crimes, and crimes against humanity. Their legal obligations arise from treaty, custom and general principles of international law.⁴⁶ These obligations are further supported by the adoption of the

⁴³ Rachael Johnstone, 'State Responsibility for Wrongful Conduct', in Rachael Johnstone (ed), *Offshore Oil and Gas Development in the Arctic under International Law: Risk and Responsibility* (Brill Nijhoff, 2015) 211.

⁴⁴ Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the nature of the International Responsibility of States' (1992) 35 *GYIL* 9, 49.

⁴⁵ Vassilis Tzevelekos, 'Revisiting the Humanisation of International Law: Limits and Potential' (2013) 1 *Erasmus Law Review* 62, 73.

⁴⁶ Particularly noteworthy are the *Genocide Convention* (n 39); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949*

political principle of the Responsibility to Protect ('R2P') in 2005, which provides for the commitment of all States to protect vulnerable populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁴⁷ This principle finds its basis in existing international norms and is demonstrative of States' efforts to prevent atrocity crimes.⁴⁸ It is in itself, however, only legally binding on States insofar as it reflects customary international law norms. Atrocity prevention is rooted in human and international security and peace.

1 *The Legal Obligation to Prevent Genocide*

The obligation to prevent genocide is largely codified in art I of the *Genocide Convention*: '[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish' (emphasis added).⁴⁹ The provision provides for a general and broad obligation of prevention, but otherwise lacks guidance.⁵⁰ Acts of interpretation, particularly through domestic and international courts, have led to the legal development of otherwise vague provisions of the *Genocide Convention*.⁵¹ These acts of

and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, opened for signature 12 December 2005, 2404 UNTS 261 (entered into force 14 January 2007); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2(2) ('CAT'); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*'); International Law Commission ('ILC'), *Draft Articles on Crimes against Humanity*, UN Doc A/74/10 (2019), at Chapter IV ('Draft Articles on Crimes against Humanity'). See also *Reservations to Convention on Prevention and Punishment of Crime of Genocide (Advisory Opinion)* [1951] ICJ 15 ('*Genocide Convention Advisory Opinion*'); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ 42 ('*Bosnian Genocide Case*'); *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ 136 ('*Wall Advisory Opinion*'); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ 168 ('*Armed Activities case*'). See Luke Glanville, 'The Responsibility to Protect Beyond Borders' (2012) 12(1) *Human Rights Law Review* 1; Gentian Zyberi, 'Responsibility of States and Individuals for Mass Atrocity Crimes' in André Nollkaemper, Ilias Plakokefalos and Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (CUP, 2017) 236.

⁴⁷ GA Res 60/1, UN Doc A/RES/60/1 (6 September 2005) [138–40].

⁴⁸ See, eg, Anne Peters, 'The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members', in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, 2011) 297; Alexander Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Polity Press, 2009).

⁴⁹ *Genocide Convention* (n 39) art 1.

⁵⁰ William Schabas, 'Prevention of Crimes against Humanity' (2018) 16(4) *Journal of International Criminal Justice* 705, 707.

⁵¹ See, eg, *Genocide Convention Advisory Opinion* (n 46); *Bosnian Genocide Case* (n 46).

interpretations have further allowed for the parallel development of customary international law.⁵²

In the *Bosnian Genocide Case*, the ICJ found the obligation to prevent genocide to be an obligation of conduct, affirming that States are required 'to employ all means reasonably available to them, so as to prevent genocide so far as possible'.⁵³ In the *Rohingya Genocide Case*, the ICJ indicated that 'reparation initiatives, intentions to promote ethnic reconciliation, peace and stability' in the affected geographical area as well as accountability for violations of IHRL and IHL in themselves are not sufficient to fulfil a State's obligation to prevent genocide under the *Genocide Convention*, and address the continued systemic oppression and persecution of the Rohingya. Instead, what is required are concrete, reasonably available measures.⁵⁴ The obligation arises when a State gains knowledge, or could have been expected to have gained knowledge, of the serious risk of genocide. A State is considered to have failed to fulfil its obligation with the commission of genocide if it did not employ the necessary due diligence standard.⁵⁵

Importantly, the ICJ further found that third States may also incur a prevention obligation vis-à-vis at-risk States where they are in a position of influence.⁵⁶ Article I thereby provides for an *erga omnes partes* obligation of every State party, which may be able to enact some influence or control over a specific situation which has the capacity to evolve into genocide.⁵⁷ Similarly, this obligation arises when States 'should normally have been aware of the serious danger that acts of genocide would be committed'.⁵⁸ The scope of art I was effectively expanded to not only encompass an obligation of the territorial State, but also a third-State obligation owed to the population of another, where they possess the ability to enact influence over a situation. These legal developments and acts of interpretation have led to a more universal prohibition of genocide and its prevention.⁵⁹

2 The Legal Obligation to Prevent War Crimes

IHL encompasses a complex regime crossing treaty and customary international law.⁶⁰ The obligation to prevent war crimes is enshrined in

⁵² Yuval Shany, 'The Road to the Genocide Convention and Beyond', in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP, 2009) 3, 4.

⁵³ *Bosnian Genocide Case* (n 46) [430].

⁵⁴ *Rohingya Genocide Provisional Measures Order* (n 388) [73].

⁵⁵ In accordance with Article 14(3): International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53rd sess, 283rd mtg, Agenda Item 2, (31 May 2001). See also Glanville (n 46) 19–20.

⁵⁶ *Bosnian Genocide Case* (n 46) [434]–[435].

⁵⁷ William Schabas, 'Genocide and the International Court of Justice: Finally a Duty to Prevent the Crime of Crimes' (2007) 2 *Genocide Studies and Prevention* 101, 102.

⁵⁸ *Bosnian Genocide Case* (n 466) [432].

⁵⁹ Shany (n 52) 4–5.

⁶⁰ See (n 4646).

both. Any consideration of an obligation to prevent war crimes requires consideration of the entire regime. Common art 1 of the Geneva Conventions requires '[t]he High Contracting Parties [to] undertake to respect and to ensure respect for the present Convention in all circumstances' (emphasis added). Read in conjunction with the basic principles and the fundamental principles of IHL enshrined in common art 3 of the Conventions, common art 1 requires States to ensure respect and compliance with the international instruments, and includes an obligation to prevent any infringements, breaches or violations, which may also amount to war crimes.⁶¹ The *travaux préparatoires* were inconclusive regarding the scope of common art 1. While some commentators are against an expansive interpretation as applied by the International Committee for the Red Cross ('ICRC'), States have generally not voiced criticism in relation to calls for necessary preventive and reactive responses to halt violations of IHL in accordance with the provision.⁶² This lack of criticism by States suggests that the obligation to ensure respect may also include a positive, preventive obligation of States vis-à-vis third States.

The obligation to prevent war crimes requires States to employ means reasonably available to them to prevent the commission of such crimes as far as possible where they are aware, or ought to be aware, of their real risk and are in a position to influence the course of events. So as to ensure the universal application of the Convention, this obligation also encompasses an extraterritorial dimension of third States, regardless of whether they are parties to the armed conflict.⁶³ The necessary due diligence standard is dependent on sufficient knowledge of the risk of war crimes, proximity to and the capacity to influence the at-risk situation, resulting in varying

⁶¹ The practice and case law of States, international organisations and judicial bodies in relation to Common Article 1 can be found on International Committee for the Red Cross, 'Practice Relating to Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes', *IHL Database*

<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule144>.

⁶² Eve Massingham, The obligation to respect and to ensure respect in all circumstances pursuant to Common Article 1 of the Four Geneva Conventions of August 1949 and Additional Protocols I and III: an Australian weapons law perspective (PhD Thesis, University of Queensland, 2016) 45–46. Cf André Nollkaemper, "'Failures to Protect" in International Law' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP, 2015) 437, 445; Frits Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' [1999] (2) *Yearbook of International Humanitarian Law* 3.

⁶³ See, eg, Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations' (2014) 96 *International Review of the Red Cross* 707, 728–732. The ICRC supports an extensive interpretation of art 1. See ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (Geneva, May 1948) 5; later reaffirmed by the UN International Conference on Human Rights, *Human Rights in Armed Conflict*, Resolution XXIII, 12 May 1968, at Preamble ('Resolution XXIII'); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)(Judgment)* [1986] ICJ 1986, [220] ('*Nicaragua Case*'). Others are of the view that Common art 1 refers to non-international armed conflict only. See, eg, Kalshoven (n 62).

obligations of third States. States with strong political, military or financial links to the main perpetrators and a belligerent party therefore incur a higher due diligence obligation than those with limited capacity.

The legal obligation of States to prevent war crimes not only stems from common art 1 of the Geneva Conventions, but from the provision's consideration within the framework of IHL, encompassing not only treaty but also custom, in conjunction with the basic rules and fundamental guarantees of IHL.⁶⁴ As with the obligation to prevent genocide, the obligation to prevent war crimes requires States to act within a due diligence standard, and employ all reasonably available measures to prevent war crimes as far as possible, where they have knowledge, or ought to have knowledge, of the real risk of war crimes and are in a position to influence the course of events.

3 The Legal Obligation to Prevent Crimes against Humanity

Crimes against humanity have not yet been comprehensively codified nor regulated in a single international instrument, let alone their prevention. There has, however, been a push for their uniform codification.⁶⁵ Crimes against humanity are predominantly comprised of serious violations of IHRL, including *inter alia*, the right to life, the prohibition of torture, inhuman or degrading treatment, as well as the prohibition of slavery and servitude, all of which are considered to be non-derogable under the

⁶⁴ Resolution XXIII (n 63); *Nicaragua Case* (n 63) [220]; *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [155], [158]–[159] ('*Wall Advisory Opinion*'). See also various UN documents and resolutions: SC Res 681, UN Doc S/RES/681 (20 December 1990) (regarding Israel and Palestine); SC Res 764, UN Doc S/RES/764 (13 July 1992) (regarding Bosnia and Herzegovina); SC Res 955, UN Doc S/RES/955 (6 November 1994) (regarding Rwanda); *Report submitted to the Security Council by the Secretary-General in accordance with Resolution 605 (1987)*, UN Doc S/19443 (21 January 1988); '[r]eiterating ... the need to promote and ensure respect for the principles and rules of international humanitarian law' at SC Res 1502, UN Doc S/RES/1502 (26 August 2003); GA Res 45/69, UN Doc A/RES/45/69 (6 December 1990)[3]; GA Res 60/105, UN Doc A/RES/60/105 (8 December 2005)[3]; GA Res 62/107, UN Doc A/RES/62/107 (17 December 2007) [3]; GA Res 63/96, UN Doc A/RES/63/96 (5 December 2008) [3]; GA Res 68/81, UN Doc A/RES/68/81 (16 December 2013) [3]; and GA Res 68/82, UN Doc A/RES/68/82 (16 December 2013) [7]. Importantly, no delegates to the Diplomatic Conference of Geneva of 1949 opposed the ICRC's proposition that States 'should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied'. Final Record of the Diplomatic Conference of Geneva of 1949, Vol 2 Section B, 53. Demonstrative are further measures taken by national, regional and international actors in the wake of alleged war crimes in Sudan, Libya and Syria etc. The ICRC maintains a database on State practice in relation to ensuring respect for IHL. See 'Practice Relating to Rule 144. Ensuring Respect for International Humanitarian Law Erga Omnes' (n 610). See also Dörmann and Serralvo (n 62).

⁶⁵ Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum, 2016) 30; Sean D Murphy, Special Rapporteur, *Fourth Report on Crimes against Humanity*, UN Doc A/CN.4/725 (18 February 2019) 9–12 [22]–[29] (on the push for a convention); [42]–[44] (on the scope of crimes against humanity); [47]–[51] (on the definition of crimes against humanity).

International Covenant on Civil and Political Rights ('ICCPR').⁶⁶ Significant overlap exists between the criminal nature of atrocity crimes and serious violations of IHRL.⁶⁷

The obligation to prevent these atrocity crimes is reflected by the International Law Commission's ('ILC') draft articles on crimes against humanity and supported by dedicated human rights treaties and other international instruments. These articles, treaties and instruments provide for the prevention and prohibition of some acts, which if committed in a widespread or systematic manner, may amount to crimes against humanity.⁶⁸ The draft articles highlight the importance of prevention in the preamble and multiple draft articles, including draft arts 1, 3(2) and 5. Draft art 4 provides for a more specific obligation, insofar as it requires '[e]ach State [to undertake] *to prevent* crimes against humanity, in conformity with international law' through effective preventive measures and multilateral cooperation (emphasis added). Active and anticipatory prevention measures may include 'effective legislative, administrative, judicial or other appropriate preventive measures'. The obligation extends to both *de jure* and *de facto* jurisdictions with a high degree of control, providing for an extraterritorial dimension dependent on a State's capacity to exercise influence and control.⁶⁹ In accordance with the draft articles, States are required to exercise due diligence so as to fulfil their obligation to prevent crimes against humanity.⁷⁰

The ILC's draft articles in themselves, however, do not impose formal legal obligations on States, but rather supplement existing customary international law obligations.⁷¹ While there is no international legal instrument which explicitly provides for an obligation to prevent crimes

⁶⁶ *International Covenant on Civil and Political Rights*, opened for signature, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6, 7, 8(1) and (2) in conjunction with Art 4(2) ('ICCPR'). The Human Rights Commission further considers that the *Rome Statute* in regards to atrocity crimes is relevant in the interpretation of Article 4 ICCPR and that, although not explicitly provided for in Article 4(2) ICCPR, certain norms of general international law including specific minority rights and IHL are not subject to derogation. Human Rights Committee, *General Comment No 29: States of Emergency*, 72nd sess, 1950th mtg, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [13].

⁶⁷ Antonio Cassese, *International Criminal Law* (OUP, 2008) 99.

⁶⁸ Draft Articles on Crimes against Humanity (n 46). See for example the *CAT, International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976) ('*Apartheid Convention*') and *Convention to Suppress the Slave Trade and Slavery*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

⁶⁹ Fourth Report on Crimes against Humanity (n 65) [111]–[112]. See also Schabas, 'Prevention of Crimes against Humanity' (n 50) 716.

⁷⁰ ILC, *Report of the International Law Commission on the Work of its 69th Session*, UN Doc. A/72/10 (2017) Chapter IV [12].

⁷¹ The ILC adopted the draft articles in its 71st session and recommended them to the UNGA for the elaboration of a convention on their basis. The UNGA took note of the draft articles, and consequently, included an item entitled 'Crimes against Humanity' in the provisional agenda of its 75th session in 2020.

against humanity, an argument may be made for such an obligation to be an emerging norm within customary international law.⁷² Relevant support may be found *inter alia* in the unanimous adoption of the political principle of R2P by 150 heads of State and government, the welcoming response and support for the inclusion of prevention in R2P and the draft articles by States,⁷³ as well as the jurisprudence of international tribunals and courts, and relevant UN resolutions.⁷⁴

B The Obligations of Third States vis-à-vis Atrocity Prevention in the Face of PHEICs

In broad terms, the obligations outlined above require States to prevent atrocity crimes where they have knowledge, or ought to have knowledge, of the serious risk of atrocity crimes and are in a position of influence or control. States must employ all reasonably available measures on the basis of their individual capacity to prevent atrocity crimes as far as possible. For obligations of conduct, States are, however, not required to employ measures beyond their capabilities. States already at-risk or experiencing atrocity crimes may, in reality, not have sufficient capacities and struggle to prevent or halt ongoing atrocities. Relevant to the notion of due diligence vis-à-vis atrocity prevention are the following: ‘the degree of effectiveness

⁷² *Fourth Report on Crimes against Humanity* (n 65) [22]–[29]. Almost 40 States have indicated their support for the draft articles, with many pushing for a convention on crimes against humanity. See ILC, *Crimes against Humanity: Comments and observations received from Governments, international organizations and others*, 71st sess, UN Doc A/CN.4/726 (28 March 2019) Chapter II.A (Australia), Chapter II.B.5 (Estonia, Panama, Sierra Leone and Switzerland, New Zealand expressed the desire for the provision of greater detail), Chapter III.B.3 (UN Human Rights Committee (OHCHR)); *Summary Record of the 20th Meeting*, UN GAOR, 6th Comm, 70th sess, 20th mtg, UN Doc A/C.6/70/SR.20 (13 November 2015) [7] (Sweden on behalf of the Nordic States), [19] (France), [33] (Austria), [50] (Greece), [59] (Czech Republic); *Summary Record of the 21st Meeting*, UN GAOR, 6th Comm, 70th sess, 21st mtg, UN Doc A/C.6/70/SR.21 (25 November 2015) [79] (Romania); *Summary Record of the 23rd Meeting*, UN GAOR, 6th Comm, 70th sess, 23rd mtg, UN Doc A/C.6/70/SR.23 (27 November 2015) [12] (Slovakia), [14] (South Africa), [20–21] (Russia); *Fourth Report on Crimes against Humanity* at 9–10 [22–3], 17–18 [42–4], 44 [106]. See also International Bar Association’s War Crimes Committee, *Comments on the International Law Commission’s Draft Articles on Crimes Against Humanity* (November 2018) 08; ‘Regional Roundtables and National Consultations’ in Thomas Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background* (IDRC 2001) 349–98. Few States, most notably China, France, the Islamic Republic of Iran and Turkey, have indicated their doubts as to whether the prohibition of crimes against humanity does amount to *jus cogens*, suggesting a need for further study. *Fourth Report on Crimes against Humanity* at 14 [34].

⁷³ *Ibid.*

⁷⁴ GA Res 3074 (XXVIII) (3 December 1973)[3]; GA Res 60/147, UN Doc A/RES/60/147 (16 December 2015) Annex [3(a)]; Committee on the Elimination of Racial Discrimination (‘CERD’), *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 67th sess, UN Doc CERD/C/GC/31/Rev.4 from A/60/18 (August 2005)[5(j)]; Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by State Parties*, 39th sess, UN Doc CAT/C/GC/2/CRP.1/Rev.4 (24 January 2008)[2]–[4].

of a State's control over certain areas of its territory',⁷⁵ 'the importance of the interest to be protected', and 'the degree of predictability of the harm'.⁷⁶

While legal obligations of prevention of territorial States are less controversial, this section argues that third States, in certain circumstances, also incur an extraterritorial obligation to prevent atrocity crimes and protect foreign vulnerable populations. In such circumstances, States' atrocity prevention obligations extend beyond their territories, where they are in a position to influence the course of events and are aware, or ought to have been aware, of the serious risk of the commission of atrocity crimes. Here similarly, the required due diligence must be considered on a case-by-case basis. Depending on their capacity, States may incur varying obligations based on their proximity to the at-risk situation, and the strength of any political, military and financial links to the main actors of the situation.⁷⁷ Where States incur such a prevention obligation, any inadequate response or inaction may not be excused on the basis that any action taken would not have been successful,⁷⁸ or by exceptional circumstances, such as a public health emergency.⁷⁹

In reality, PHEICs have the potential to severely weaken the capacity of third States to provide humanitarian, diplomatic or other assistance to fragile States. Not only does a global health emergency reduce the capacity to influence through extraterritorial measures, but any capacity to provide for the protection of populations, particularly in already vulnerable and at-risk States, may also be severely reduced. Mediation efforts are impacted through travel restrictions, as diplomatic initiatives for the prevention of the escalation of tensions are suspended. At-risk situations are no longer a priority on the global agenda, to the detriment of peace processes, crisis management and conflict resolution mechanisms.

In light of third States' international legal obligations to prevent atrocity crimes, it may, however, be argued that those with capacity to take reasonable operational preventive measures should do more to fulfil their obligations in accordance with international law. Short of a relevant UNSC resolution under Chapter VII of the UN Charter, third States are, however,

⁷⁵ In the *Corfu Channel* case, the ICJ noted that '[i]t cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the [perpetrators]'. Knowledge cannot be attributed to a State for all unlawful acts that occur within its territory. 'Exclusive territorial control' does, however, result in a more lenient standard of proof. ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)(Judgement)* [1949] ICJ 1949, [18] (*Corfu Channel* case).

⁷⁶ Pisillo-Mazzeschi (n 44) 44.

⁷⁷ See, eg, *Bosnian Genocide Case* (n 46) [430], *Fourth Report on Crimes against Humanity* (n 65) [111]-[112]. See also Schabas, 'Prevention of Crimes against Humanity' (n 50) 716.

⁷⁸ See, eg, *Bosnian Genocide Case* (n 46) [430].

⁷⁹ See, eg, art 2(2) *CAT*; art 3(3) Draft Articles on Crimes against Humanity (n 466); *Bosnian Genocide Case* (n 46) [430].

also limited in what measures they may lawfully and effectively employ. The establishment of prevention policies and mechanisms, integration and peaceful coexistence, as well as implementation of international human rights instruments on the national level, are squarely within the domestic domain of each State. However, the promotion of human rights mechanisms, continuous considerations before the UN Human Rights Council, and continued or enhanced assistance in the most at-risk States and conflict areas through third States may be a necessity of building truly inclusive peace processes. Germany, for example, has recently pledged to provide continued support to Iraq in its fight against ISIS and in ‘efforts to stabilize the region’,⁸⁰ and multiple States, including Australia, the European Union and the UN, committed to increased humanitarian aid for the Rohingya in Rakhine State and Bangladesh.⁸¹

The recent application before the ICJ by The Gambia against Myanmar, concerning acts committed by Myanmar’s State organs and its failure to preserve certain rights under the *Genocide Convention*, is reflective of growing international action in light of atrocity crimes.⁸² Importantly, the application was further supported by member States of the Organisation of Islamic Cooperation (‘OIC’) and the Independent International Fact-Finding Mission on Myanmar.⁸³ Canada and the Netherlands have since also joined the case with a focus on sexual and gender-based violence.⁸⁴ International criticism against China’s treatment of the Uighur has also been growing: a Canadian parliamentary subcommittee has recently labelled China’s abuses as ‘genocide’,⁸⁵ and a total of 39 States have condemned China’s policies in Xinjiang before the UNGA, despite the latter State’s threats to restrict trade in response.⁸⁶ Where third States may

⁸⁰ ‘Angela Merkel meets with Iraqi prime minister in Berlin’ *DW* (online, 20 October 2020) <<https://www.dw.com/en/angela-merkel-meets-with-iraqi-prime-minister-in-berlin/a-55333017>>.

⁸¹ See, eg, Australian High Commission Bangladesh, ‘Australia Assists Rohingya’ (online) <<https://bangladesh.embassy.gov.au/daca/rg.html>>.

⁸² *Rohingya Genocide Provisional Measures Order* (n 388).

⁸³ OIC, *Final Communiqué of the 14th Islamic Summit Conference*, OIC Doc OIC/SUM-14/2019/FC/FINAL (31 May 2019); Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, 42nd sess, Agenda item 4, UN Doc A/HRC/42/50 (8 August 2019)[40].

⁸⁴ Ministry of Foreign Affairs (the Netherlands) ‘Joint Statement of Canada and the Kingdom of the Netherlands regarding intention to intervene in the Gambia v Myanmar case at the International Court of Justice’ (2 September 2020) <<https://www.government.nl/documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice>>.

⁸⁵ See, eg, Canadian House of Commons Debates, 43rd Parliament, 2nd sess, Official Report (Hansard) (21 October 2020).

⁸⁶ ‘Pandemic Pushing Those Least Able to Adapt into Positions of Greater Risk, General Assembly President Tells Third Committee, amid Calls for Greater Protections’, UN GAOR, 75th sess, 3rd committee, 3rd mtg, UN Doc GA/SHC/4287 (6 October 2020).

only have limited capacity to influence, such statements on the international level are nevertheless meaningful measures.

In armed conflict zones, an immediate global ceasefire may be the push some belligerent parties require to put their differences aside. However, a ceasefire advocated by the UNSG has no binding force on States. The support for a global ceasefire by the UNSC carries more weight. In any case, a ceasefire does not address underlying root causes of conflicts. Although 170 UN member States, observers and others endorsed a global ceasefire,⁸⁷ it remains to be seen if national ceasefires will be implemented in practice. To date, the outlook appears rather bleak with violence resurging due to either the lack of architecture to implement ceasefires or the political will of belligerent parties.⁸⁸ Where this may not be the case, third States may continue to be under an obligation to exercise collective action to address the continued risk and imminent threat of atrocities. It is important not to neglect the opportunities for resolution, particularly through preventive diplomacy, as ongoing conflict and violence not only places civilians at risk of atrocity crimes, but may also be counterproductive for the containment and management of COVID-19 as ongoing displacement accelerates the spread of the virus.

V CONCLUSION

A number of important trends can be identified in times of a PHEIC in relation to conflict and atrocity prevention.⁸⁹ Firstly, vulnerable populations and at-risk States, devastated by armed or other conflict, natural disasters, or climate change *inter alia*, are faced with heightened risk of exposure to COVID-19, which has increased hate speech and exacerbated human rights violations as a result. Additional protection measures must be taken by States to ensure that their supportive and preventive measures also reach those most vulnerable. The needs of everyone in society, including marginalised groups, must be included and accounted for. It is essential that all persons, regardless of whether they belong to a marginalised group on the basis of ethnicity, identity, gender or religion, are free from discrimination, enjoy equal treatment, access to health services and their basic human rights.

⁸⁷ 'Statement on behalf of 53 countries in their national capacity and as members of the Group of Friends of Women, Peace and Security, the Group of Friends of Children and Armed Conflict and/or the Group of Friends of the Protection of Civilians' (Statement, 30 March 2020) <<https://consortiumnews.com/wp-content/uploads/2020/03/1Global-Ceasefire-scaled.jpg>>; '170 Signatories endorse UN ceasefire appeal during COVID crisis', *UN News* (online, 24 June 2020) <<https://news.un.org/en/story/2020/06/1066982>>.

⁸⁸ See, eg, Lisa Barrington, 'Violence surges in Yemen after coronavirus truce expires', *Reuters* (online, 16 June 2020) <<https://www.reuters.com/>>.

⁸⁹ See International Crisis Group, 'COVID-19 and Conflict: Seven Trends to Watch' (Special Briefing No 4, 24 March 2020).

Secondly, there is a risk of the exploitation of PHEICs for personal or political gain at the cost of human rights or as justification for inaction on other critical issues. Thirdly, PHEICs pose a significant threat to economic and social cohesion. Implications across various sectors may be conducive of enhanced public mistrust and pose risks to the social order, particularly in States within fragile conflict or post-conflict situations. While early indications of reduced social cohesion are already present, the extent of social and political implications of COVID-19 remains to be seen. While PHEICs and pandemics may exacerbate root causes and risk factors for conflict and atrocities, this may be mitigated through international cooperation. Fourthly, however, PHEICs have the potential to severely weaken and damage the capacity of States to provide humanitarian, diplomatic or other assistance to conflict- and atrocity-affected and fragile States. International cooperation appears to decrease in priority, although this cooperation to ensure the protection of human rights and international peace and security remains a necessity, especially in the face of a global pandemic.

Yet, opportunities still arise for the mitigation of potential crises. States are required to support cooperative approaches to mitigate public health, social, political and security challenges.⁹⁰ The recognition of the COVID-19 pandemic merely as a ‘likely’ endangerment to the maintenance of international peace and security is the result of the political considerations of the member States of the UNSC. The robust classification of the COVID-19 pandemic as a threat to international peace and security by the UNSC would in turn have the potential to strengthen the implementation of a variety of comprehensive measures and may be coupled with an emphasis on international cooperation in the face of economic, social, political and security implications. Such measures may be similar to or expand on primary measures already implemented by individual States but may also provide for secondary measures to mitigate the direct and indirect impact of the virus on various sectors. A resolution to this end would not only allow for the provision of urgent resources and assistance, but also combat isolation and enhanced discrimination of the most vulnerable when dealing with the outbreak, as well as the potential of serious violations of IHRL, IHL, and atrocity crimes.

The above demonstrates that a multilateral, multifaceted approach is necessary. States must be diligent in the fight against COVID-19 and threats to social cohesion in the face of increased intolerance and discrimination, as anxieties and root causes of crises and atrocity crimes increase in times of uncertainty. It remains equally important for States to take additional protection measures to reach the most vulnerable of populations to manage and contain an outbreak. PHEICs and pandemics

⁹⁰ For example, through multilateral assistance provided by the Global Humanitarian Response Plan to assist vulnerable States in the fight against COVID-19.

add another level of complexity to an already intricate landscape of atrocity prevention. States must not neglect their prevention obligations and, where reasonable, provide assistance to communities with heightened risks of exposure to ensure their protection. Only time will tell what tangible impact COVID-19 will have on the global conflict landscape.