EARLY NON-MILITARY INTERVENTION TO PREVENT ATROCITY CRIMES

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I. Introduction

The term "mass atrocities" does not have a technical legal definition. However, it is generally understood as the international crimes of genocide, war crimes, crimes against humanity, and ethnic cleansing. In the Rome Statute of the International Criminal Court ("Rome Statute"), these crimes are described as the "most serious crimes of concern," and since the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") was signed in 1948, the international community has been working to prevent and punish the perpetration of such crimes. The field in which scholars, policymakers, and others work toward the elimination of these crimes has become known as atrocity prevention.

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1 See generally RECONSTRUCTING ATROCITY PREVENTION (Tibi Galis et al. eds., Cambridge University Press 2016).

2 Id. Ethnic cleansing is not a legal term. It refers to the process by which a city, state, etc. is made ethnically pure, and can involve aspects of the other crimes listed above.


One of the preeminent issues in atrocity prevention, if it is working one hundred percent effectively, is that there will be no indication that the process is working at all, because there will be no more atrocities and thus no means of tracking whether said atrocities have been prevented.\(^5\) This is called the "non-event problem."\(^6\) Also, due to the fact that a lot of these mechanisms have developed so recently, they have not had time to take root on an institutional level, and their effectiveness cannot be easily assessed as such.\(^7\)

Many of the existing atrocity prevention mechanisms are designed to have a deterrent effect, and provide an \textit{ex post facto} condemnation of the atrocities and their perpetrators. These tools include a variety of treaties and tribunals, such as the Geneva Conventions\(^8\) and the International Criminal Court ("ICC").\(^9\) Proponents of these mechanisms argue that threat of punishment is a significant deterrent, but it should be noted that although some of these mechanisms have existed for decades, atrocity crimes continue to be perpetrated around the world.\(^10\) It is necessary to develop new mechanisms in order to move closer towards the complete elimination of atrocities.\(^11\)


\(^6\) The phrase "non-event" is used to describe events that did not happen. This is a phenomenon that exists across disciplines. See John T. Morris, \textit{Non-Events}, 34 \textit{Philosophical Stud.: Int'l. J. for Phil. Analytic Tradition} 321, 321–324 (1978).

\(^7\) See \textit{generally id.}

\(^8\) See infra Section II (A).

\(^9\) See infra Section II (B).

\(^10\) For further reading, see \textit{Past Genocides and Mass Atrocities, United to End Genocide}, http://endgenocide.org/learn/past-genocides/ (last visited Aug. 22, 2017); see also \textit{Watch List, United to End Genocide}, http://endgenocide.org/whos-at-risk/watch-list/ (last visited Aug. 22, 2017); \textit{Alerts and Warnings, U.S. Dept. of St.: Passports and Int'l. Travel}, https://travel.state.gov/content/passports/en/alertswarnings.html (last visited Oct. 8, 2016) (this is a list of countries which the U.S. State Department recommends avoiding due to violent conflict and political instability—the website also provides a description of the situation in each state listed, and it can be deduced from these descriptions which states are currently experiencing atrocity crimes); \textit{Situations Under Investigation, Int'l. Crim. Ct.}, https://www.icc-cpi.int/Pages/Situations.aspx (last visited Oct. 8, 2016); \textit{Preliminary Examinations, Int'l. Crim. Ct.}, https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx (last visited Oct. 8, 2016).

\(^11\) "At a time when international capacity to respond to current crises is strained, it is imperative that Member States and other international actors devote more energy and resources to effective prevention and accelerate efforts to put an end to the ongoing perpetration of such crimes." Report of the Secretary General, \textit{A Vital and Enduring Commitment: Implementing the Responsibility to Protect}, U.N. Doc. A/69/981-S/2015/500 (2015).
A developing and critical aspect of atrocity prevention is the doctrine of the Responsibility to Protect ("R2P"). R2P centers around the belief that sovereign states have a fundamental responsibility to protect their own citizens from atrocities such as those described above. States can request assistance from the international community in this endeavor. And, should a state fail to protect its own citizens, the international community is obligated to intervene. More often than not, the assistance provided by the international community takes the form of late-stage military intervention. However, this form of intervention is problematic for several reasons: military intervention has high costs, both with regards to finances and human life; this type of intervention is frequently interpreted as a violation of state sovereignty, and cast as a form of neo-imperialism; and, due to the consensus required, it often takes a long time to initiate.

Since the publication of Gregory Stanton’s “Eight Stages of Genocide,” atrocity prevention scholars have generally accepted that atrocities are a process rather than an event. It would therefore be prudent to intervene at a point in the process prior to the occurrence of mass killings. As noted atrocity prevention scholars Tibi Galis, Sheri Rosenberg, and Alex Zucker observe, “[w]e need to know what engagement points are available beyond structural assistance, but before the tipping point of direct killings has been reached.” With this in mind, in 2014 the United Nations (“U.N.”) proposed the Framework of Analysis for Atrocity Crimes (“U.N.

12 See generally Eileen F. Babbitt, Mediation and the Prevention of Mass Atrocities, in THE INTERNATIONAL POLICY OF HUMAN RIGHTS: RALLYING TO THE R2P CAUSE 29, 29–47 (Monica Serrano & Thomas Weiss eds., 2014); Galis et. al., supra note 1. It should be noted that R2P is a soft-law norm.
13 ICISS, supra note 4.
14 Id.
15 See generally id.; Galis et. al., supra note 1. See infra Section III for a more detailed explanation.
17 Galis et. al., supra note 1, at ch. 2.
19 United Nations, Framework of Analysis for Atrocity Crimes, (2014) [hereinafter U.N. Framework of Analysis]. In other words, there is no single moment in time that can be pinpointed and labeled as the precise moment at which a war crime occurred.
20 Galis et al., supra note 1, at 7.
Framework of Analysis”) which delineated a wide variety of Risk Factors21 and indicators.22 For example, the Risk Factors for crimes against humanity include “signs of a widespread or systematic attack against any civilian population” (“Risk Factor 11”), and “signs of a plan or policy to attack any civilian population” (“Risk Factor 12”). Within each Risk Factor is a list of corresponding indicators that describe specific events.23 These Risk Factors are arranged by specific crime, and can be understood as potential points for early intervention in line with the doctrine of R2P.24

An effective mechanism for prevention would incorporate the U.N. Framework of Analysis into the R2P toolbox, and act as a capacity building tool for the global atrocity prevention community.25 In theory, such a mechanism could work with any Risk Factor; however, this Note will focus on Risk Factor 7, “Enabling circumstances or preparatory action,”26 which is a common Risk Factor.27 The benefit of working with a common Risk Factor is that one system of prevention can work to reduce the risk of all three atrocity crimes. Additionally, the majority of the indicators within this particular Risk Factor are both tangible and quantifiable,28 and, as such, it will be difficult for the perpetrator to deny the presence of the indicators—which will allow for more effective intervention.

These developing methodologies should be merged into a new, more effective system of atrocity prevention. This Note explores the possibility of victim-offender mediation or negotiation29 as a means of early non-military intervention for atrocity crimes, in situations in which indicators from Risk Factor 7 of the U.N. Frame-

21 “Risk Factors are conditions that increase the risk of or susceptibility to negative outcomes. Those identified in this framework include behaviours, circumstances or elements that create an environment conducive to the commission of atrocity crimes, or indicate the potential, probability or risk of their occurrence.” U.N. Framework of Analysis, supra note 19.

22 “The indicators included in this framework are different manifestations of each risk factor, and therefore assist in determining the degree to which an individual risk factor is present.” Id.

23 Id.

24 Id.

25 See generally ICISS, supra note 4; U.N. Framework of Analysis, supra note 19.

26 In this context, “enabling circumstances” refers to those conditions that could be conducive to the perpetration of mass atrocity—situations in which potential perpetrators have taken positive steps toward executing atrocity crimes. A more detailed explanation of how these situations are conceptualized within the U.N. Framework of Analysis can be found in infra Section IV (C).

27 When a Risk Factor is described as “common,” this means that rather than serving as a warning sign for a specific atrocity crime, it is applicable to atrocity crimes in general.


29 Or other forms of Alternative Dispute Resolution. See infra Section III (B).
work of Analysis\textsuperscript{30} are present, and argues that the international community should turn to such forms of mediation and negotiation more often in order to prevent atrocities. Section II provides a brief history of atrocity prevention, and explores other proposals for early warning and non-military intervention. This section also highlights the shortcomings of existing atrocity prevention models. Section III evaluates situations in which victim-offender mediation and negotiation have been used to resolve situations of violent conflict,\textsuperscript{31} and analyzes the differences and similarities between those situations and the circumstances described in Risk Factor 7. The primary purpose of this section is to examine the various Alternative Dispute Resolution ("ADR") mechanisms that have been used in the past to combat violent conflict. Lastly, Section IV outlines what an interventionist system of victim-offender mediation and negotiation based on Risk Factor 7 of the U.N. Framework of Analysis would look like; discusses the potential effectiveness of such a system; and addresses what added value such a mechanism would have to the "preventative toolbox."\textsuperscript{32}

II. Background

A. The Origins of Atrocity Prevention: Naming the Problem

The roots of atrocity prevention can be traced to the end of World War II. One of the first efforts toward preventing atrocities was the creation of the United Nations. According to the U.N. Charter, the purpose of the U.N. is "to maintain international peace and security, and to that end: to take effective measures for the prevention and removal of threats to the peace . . ."\textsuperscript{33} To achieve these goals, the U.N. Charter created a complex system of international agencies and councils tasked with mandates on a variety of issues, ranging from human rights to security.\textsuperscript{34} One such

\begin{itemize}
\item \textsuperscript{30} U.N. Framework of Analysis, supra note 19. (Risk Factor 7 addresses enabling circumstances or preparatory action.).
\item \textsuperscript{31} Violent conflict is not necessarily an atrocity crime. While "atrocity crime" refers specifically to genocide, crimes against humanity, and war crimes, "violent conflict" is a broader term, encompassing any use of force by two or more parties. Payson Conflict Study Grp., A Glossary on Violent Conflict (2001), http://reliefweb.int/sites/reliefweb.int/files/resources/6C8E6652532FE542C12575DD00444F2D-USAID_may01.pdf.
\item \textsuperscript{32} See infra Section II (B).
\item \textsuperscript{33} U.N. Charter art. 1, ¶ 1.
\item \textsuperscript{34} See generally U.N. Charter.
\end{itemize}
body is the General Assembly, which is frequently described as the legislative branch of the U.N. The General Assembly can pass non-binding resolutions and adopt treaties. Perhaps the most important U.N. body for the purpose of preventing atrocities is the Security Council. The Security Council is effectively the executive branch of the U.N. Its resolutions are binding, and it possesses the authority to pass any resolution it deems necessary "for the maintenance of international peace and security." This includes authorizing the use of armed force. There are two situations in which it is permissible to use armed force: self-defense, and as a counter to threats to international peace and security. Typically, those acts that the Security Council deems threats to international peace and security are analogous to atrocity crimes. Although countless atrocities have been committed since the U.N. was created, the Security Council has authorized the use of armed force only twice. This is due to an inherent flaw in the structure of the Security Council. The Security Council is composed of fifteen U.N. Member States. Ten of these Member States have non-permanent seats, and serve two-year staggered terms. The other five states have permanent membership. These permanent members are China, France, Russia, the U.K., and the U.S. Each of the permanent members has veto power—if a single one of the five votes against a resolution, it does not pass. They all must reach a consensus. Recently, the five permanent members have been accused of using this veto to preserve their own interests.

35 See generally id.
40 Id.
41 Id.
42 U.N. Charter, art. 27.
43 Id.
reason that the Security Council has not authorized intervention in Syria is because Russia consistently votes against resolutions authorizing intervention.\textsuperscript{45}

Once the Security Council, Generally Assembly, and other U.N. bodies were established, one of the first measures taken by the U.N. was the signing of the Genocide Convention in 1948.\textsuperscript{46} The passage of this convention was the result of many years of work by Raphael Lemkin, a Polish lawyer whose family perished in the Holocaust.\textsuperscript{47} This document outlines a specific definition for the crime of genocide:

any of the following acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.\textsuperscript{48}

In addition, the Convention establishes a legal obligation to prevent genocide.\textsuperscript{49} However, it does not set up a framework for prevention, and enforcement mechanisms are broad and difficult to apply.\textsuperscript{50} The only preventative measures provided are that the alleged genocide should be brought to the attention of the Security Council and that state perpetrators of genocide can be prosecuted before the International Court of Justice\textsuperscript{51} ("ICJ"). However, the ICJ only possesses the authority to prosecute states. To date, no individual has been prosecuted for genocide in a permanent international tribunal, only in \textit{ad-hoc} tribunals.\textsuperscript{52}


\textsuperscript{46} Genocide Convention, supra note 4.

\textsuperscript{47} Samantha Power, \textit{A Problem From Hell: America and the Age of Genocide} 17–60 (2002).

\textsuperscript{48} Genocide Convention, supra note 4, at art. 2.

\textsuperscript{49} Id.


\textsuperscript{51} Genocide Convention, supra note 4, at art. 9. The International Court of Justice, or ICJ, is the judicial body of the United Nations. U.N. Charter, art. 92.

\textsuperscript{52} Both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have convicted individuals of genocide. However, all of the persons convicted by the ICC have been convicted either of war crimes or crimes against humanity.
The year after the Genocide Convention was passed, the international community came together to update the Geneva Conventions\textsuperscript{53} for the fourth time.\textsuperscript{54} These conventions form the basis of international humanitarian law ("IHL").\textsuperscript{55} The Geneva Conventions view war as an inevitability, and convey the idea that if war is going to be waged, it should be waged in such a manner as to preserve as many lives as possible.\textsuperscript{56} The Geneva Conventions are considered an essential part of atrocity prevention, and outline a wide variety of actions that can be labeled as war crimes. However, they do not establish a formal mechanism for prosecuting war criminals, nor do they propose a system for preventing the war crimes from occurring.\textsuperscript{57} There is no tribunal established by the Geneva Conventions—the expectation is that violators will be prosecuted in domestic tribunals, and this series of treaties relies upon reciprocity as its primary motivation for compliance.

In 1949, a new addition was made to the four Conventions. Because it is one of the features that each of the Conventions has in common, it has become known as Common Article 3. Previously, the conventions set forth rules to be applied in times of international violent conflict.\textsuperscript{58} However, the international community was aware that atrocities do not always extend beyond borders, so Common Article 3 was written to protect humanity in times of non-international violent conflict.\textsuperscript{59}

Common Article 3 establishes fundamental rules from which no derogation is permitted. It is like a mini-Convention within the Conventions, as it contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character.\textsuperscript{60}

\textsuperscript{53} There are four Geneva Conventions—Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. See Geneva I, Geneva II, Geneva III, and Geneva IV, supra note 4.


\textsuperscript{56} See 1949 Geneva Convention (I), supra note 4; 1949 Geneva Convention (II), supra note 4; 1949 Geneva Convention (III), supra note 4; 1949 Geneva Convention (IV), supra note 4.

\textsuperscript{57} See id.

\textsuperscript{58} See id.

\textsuperscript{59} Id.

\textsuperscript{60} Treaties and Customary Law, supra note 54.
The addition of Common Article 3 represents the formal establishment of what is known in human rights law as *jus cogens* norms.\(^{61}\) *Jus cogens* means "compelling law" in Latin,\(^{62}\) and the name is apt—the principles that comprise *jus cogens* are preemphory and non-derogable.\(^{63}\) States are compelled to adhere to these norms under any and all circumstances. In addition to the war crimes delineated in Common Article 3, prohibitions on genocide, torture, and slavery have all come to be considered *jus cogens* as well. There is a body of substantive law to support the idea that these acts are all *jus cogens*, including the aforementioned Genocide Convention, and the United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment ("CAT"). CAT, passed in 1984, specifies that, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."\(^{64}\) This language implies a preemphitory nature, and there is similar language in the international agreements pertaining to the other acts that are considered *jus cogens*.

Each of the three atrocity crimes discussed in this Note—genocide, war crimes, and crimes against humanity—are considered *jus cogens* norms.\(^{65}\) This means that the commission of the crime need not be connected to a state party—the grounds for criminal jurisdiction are different for *jus cogens* crimes than for other crimes.\(^{66}\) All states are not only permitted to prosecute alleged perpetrators of *jus cogens* crimes, they are obligated to do so.\(^{67}\) However, there are those who believe that prosecution may not be the most effective response to atrocities.

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\(^{62}\) *Jus Cogens*, BLACK'S LAW DICTIONARY (10th ed. 2014).

\(^{63}\) Id.

\(^{64}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 4.


\(^{66}\) BETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 13–21 (3d ed. 2014).

\(^{67}\) Id.
B. *Atrocity Prevention in the Modern Era: Mechanisms for Enforcement and Intervention*

The late 1990s and early 2000s represented a shift in the atrocity prevention paradigm—the international community began to push for the development of new enforcement mechanisms for the existing atrocity prevention schema. In 1998, a group of states came together at a conference to adopt the Rome Statute of the International Criminal Court ("Rome Statute"), which established the ICC. The ICC works towards holding individuals accountable for the perpetration of mass atrocities, with criminal accountability acting as a deterrent in the same way it does in many domestic systems of criminal law. This idea is derived from the primary functions of international criminal law. While many proponents of the ICC argue that prosecution is an effective deterrent to the perpetration of atrocity crimes, the Court certainly has its critics. In his discussion on transitional justice in Kenya, Amboko Wameyo highlights some of the issues with prosecutorial discretion. Several ICC member states feel that the Prosecutor would have too much power in this regard, but still can be swayed by political affiliations—a dangerous combination. While some member states and legal theorists were concerned about the ICC having too much power, other critics claimed that international legal institutions lack the enforcement mechanisms to act as a legitimate deterrent. This fear was legitimized when the United States withdrew from the ICC in 2001 after signing the Rome Statute in

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68 The states parties to the Rome Statute participate in the Assembly of States Parties, the managing body of the ICC. See Rome Statute, *supra* note 3.
72 See, *infra* Section III (A).
73 This discretion is called *propiro motu*, and can be used to initiate investigations and subsequent prosecutions in states that did not self-refer or were not referred by the Security Council. See Amboko Wameyo, *Transitional Justice, A Two-Prong Approach: Reconciliation and Criminal Responsibility for Kenya Post 2007 Elections Violence*, 17 S. AFR. YEARBOOK INT’L L. 411, 432 (2009).
74 Id.
2000, and again in 2016 when Russia withdrew.\textsuperscript{76} There is also a contingent of legal scholars who are of the belief that prosecution is a wholly inappropriate response to atrocity crimes, and that the law cannot adequately capture the nature of these crimes.\textsuperscript{77}

Proponents of international criminal prosecutions as a form of atrocity prevention argue that the ICC is one of most effective mechanisms developed by the international community. Located in The Hague, the ICC has jurisdiction over three international crimes: war crimes, crimes against humanity, and genocide.\textsuperscript{78} As of 2017, state parties have the ability to ratify a provision allowing jurisdiction over the crime of aggression.\textsuperscript{79} The Rome Statute details specific acts that fall under the umbrella of each crime.\textsuperscript{80} The ICC has jurisdiction over a defendant when:

the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the U.N. charter.\textsuperscript{81}


\textsuperscript{78} See generally Rome Statute, supra note 3. The Rome Statute defines crimes against humanity as widespread or systematic attacks against a civilian population that includes (but is not limited to): apartheid, forcible transfer, rape, and violations of \textit{jus cogens} norms.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

This means that the ICC’s primary means of gaining jurisdiction over an offender is state consent via ratification.\textsuperscript{82} Certain states involved in the development of the Court have actively refused to consent to the jurisdiction of the ICC.\textsuperscript{83} For example, after signing the treaty, the United States has not only issued a statement declaring its refusal to consent to the jurisdiction of the court, but it has concluded agreements with other states affirming that said states will not turn in U.S. nationals for prosecution by the Court.\textsuperscript{84} This imposes a limit on the power of the ICC, because these types of agreements are contrary to the Court’s object and purpose. As such, its capacity to act as an effective atrocity prevention mechanism is diminished.

Despite the fact that states must opt-in to the ICC’s jurisdiction, the Court has had a fair amount of success. To date, the Rome Statute has 124 states parties,\textsuperscript{85} and has commenced proceedings against individuals from multiple countries, including Kenya, Uganda, Mali, Côte d’Ivoire, and Libya.\textsuperscript{86} Proceedings at the ICC contain many phases, including Preliminary Examinations, Investigations, and Pre-trial.\textsuperscript{87} The Court examines the evidence to see whether there is cause to move forward, and then the court evaluates the evidence in pre-trial/indictment, and then later at full trial.\textsuperscript{88} A key aspect of the ICC’s proceedings is the reparations stage, in which the convicted perpetrator is obligated to make reparations to the affected population in a manner determined by the Court.\textsuperscript{89} Although the ICC has made efforts to remain impartial, one major criticism of the court is that the majority of the cases they take on are in African states;\textsuperscript{90} in fact, South Africa, Burundi,

\textsuperscript{82} However, there are other means by which a state or citizen of a state could come before the Court. The Security Council can refer a situation to the Court; or the Prosecutor can choose to investigate a situation. See id.
\textsuperscript{83} Schabas, \textit{supra} note 70, at 709–10.
\textsuperscript{84} \textit{Id.} at 701–02.
\textsuperscript{87} \textit{How the Court Works, supra} note 81.
\textsuperscript{88} \textit{Id.}
\textsuperscript{89} \textit{Int’l Crim. Ct., supra} note 86.
\textsuperscript{90} \textit{Id.}
and Gambia have chosen to withdraw from the ICC over this perceived bias.\textsuperscript{91}

In addition to the creation of the ICC, other attempts at strengthening atrocity prevention began to take shape in the early 2000s. In December 2001, the International Commission on Intervention and State Sovereignty ("ICISS") published a report entitled "The Responsibility to Protect."\textsuperscript{92} The ICISS wrote the report in response to the NATO intervention in Kosovo in 1999, and the failure of the international community to intervene in Rwanda in 1994.\textsuperscript{93} The international community was having a difficult time reconciling notions of sovereignty with the idea that certain acts, such as genocide and crimes against humanity, should be prevented at all costs.\textsuperscript{94} Many states viewed military intervention, such as the NATO intervention in Kosovo, as a threat to their sovereignty.\textsuperscript{95} However, other states viewed such intervention as a necessary facet of atrocity prevention.\textsuperscript{96} The ICISS report reconciles these concepts by arguing that protection of the civilian population is a crucial aspect of effective sovereign governance.\textsuperscript{97}

This report is considered the basis for the doctrine of R2P,\textsuperscript{98} and it outlines three pillars under which this responsibility can be carried out.\textsuperscript{99} The first pillar of R2P is that pursuant to the principles of sovereignty, the state has an obligation to protect its citizens from atrocity crimes.\textsuperscript{100} Should the state possess inadequate resources and capacity to protect its citizens, it may seek assistance from the international community.\textsuperscript{101} This is the second pillar of R2P.\textsuperscript{102} If both of the first two pillars fail to prevent the state from manifestly failing, the international community is then obligated to intervene under the third pillar of R2P.\textsuperscript{103} However, as of the writ-


\textsuperscript{92} ICISS, supra note 4.

\textsuperscript{93} See generally id.

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Id.

\textsuperscript{97} Id. at 19.

\textsuperscript{98} See generally Galis et. al., supra note 1.

\textsuperscript{99} See generally ICISS, supra note 4.

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id.
ing of the report, there has yet to be a consensus regarding the meaning of intervention.¹⁰⁴

Some would regard any application of pressure to a state as being intervention, and would include in this conditional support programmes by major international financial institutions whose recipients often feel they have no choice but to accept. Some others would regard almost any non-consensual interference in the internal affairs of another state as being intervention—including the delivery of emergency relief assistance to a section of a country’s population in need. Others again would regard any kind of outright coercive actions—not just military action but actual or threatened political and economic sanctions, blockades, diplomatic and military threats, and international criminal prosecutions—as all being included in the term. Yet others would confine its use to military force.¹⁰⁵

The definition of “intervention” provided in the ICISS report is effectively a laundry list of every possible type of intervention. The authors of the report chose to focus on non-consensual intervention against a state or its authorities.¹⁰⁶ They broke this down further into military intervention and its alternatives, such as sanctions and criminal prosecution.¹⁰⁷ The commission is careful to make a distinction between states having a “right to intervention,” and a responsibility to protect.¹⁰⁸

Pursuant to the doctrine of R2P, there are three criteria that must be met before successful prevention measures can be initiated.¹⁰⁹ First there must be a system of “early warning” in place to identify high risk situations; second, parties responsible for organizing preventative intervention must possess knowledge of all available policy and civil society mechanisms that could potentially affect change (preventative toolbox); and third, political leaders and bodies must have a desire to aid in prevention (political will).¹¹⁰ The tools that the ICISS identifies as currently being in the preventative toolbox are: economic sanctions; diplomatic sanctions, such as naming and shaming; legal means of intervention, such as international criminal prosecution, and others described above;

¹⁰⁴ *Id.*
¹⁰⁵ *See generally* ICISS, *supra* note 4, at 13.
¹⁰⁶ *Id.*
¹⁰⁷ *Id.*
¹⁰⁸ *Id.* The Commission states that the outcome of intervention should be the furtherance of the well-being of the civilian population, not the furtherance of the goals of the international community or of the intervening state(s).
¹⁰⁹ *Id.* at 20.
¹¹⁰ *Id.* System of early warning is addressed in Section IV, *infra.*
and military intervention. In addition, the ICISS emphasizes that in order for preventative mechanisms to be effective, they must involve civil society to the greatest extent possible, and maintain a sense of local ownership while using the resources and capacity of the international community and international organizations. Although the report addresses non-military intervention, its primary focus is when it is appropriate to use military force, and how such force should be used. Since R2P is an emerging norm, the international community has not had many opportunities to apply it.

C. Looking Ahead: The U.N. Framework of Analysis

In 2014, the United Nations Office of the Special Adviser on the Prevention of Genocide published its Framework of Analysis for Atrocity Crimes. This document outlines the significance of atrocity prevention, and further elaborates on some of the concepts expounded in the ICISS Report on R2P. Based largely on the notion that mass atrocities are a process rather than an isolated event, the U.N. Framework delineates broad Risk Factors that apply generally to all mass atrocities, as well as Risk Factors specific to each mass atrocity.

These Risk Factors cover a wide variety of potential issues spanning many phases of the process of mass atrocity. There are eight common Risk Factors, and two specific Risk Factors for each of the three atrocity crimes. The specific Risk Factors exist to address the elements of each atrocity crime, and their respective precursors. One such specific Risk Factor is Risk Factor 7: Enabling Circumstances and Preparatory Action. This Risk Factor

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111 ICISS, supra note 4, at 23–25.
112 See generally id.
113 U.N. Framework of Analysis, supra note 19.
114 Id.
115 Id.
116 See generally id.
117 U.N. Framework of Analysis, supra note 19;
addresses events such as "Marking of people or their property based on affiliation to a group,"118 "Imposition of emergency laws or extraordinary security measures that erode fundamental rights," and "[e]xpulsion or refusal to allow the presence of NGOs, international organizations, media or other relevant actors, or imposition of severe restrictions on their services and movements,"119 among many other such acts. The Framework explains that such acts are indicative of progression along the process of mass atrocity, and should be regarded as serious warning signs.

There are several reasons why this Note will focus on Risk Factor 7 as opposed to the other Risk Factors in the Framework. The first reason is that Risk Factor 7 is a common Risk Factor, which means that it applies to each of the three atrocity crimes.120 If this Note were to focus on one of the specific Risk Factors, the system of prevention would only serve to eliminate a single atrocity crime; or alternatively, the creation of three separate prevention systems would be required. Risk Factor 7 was also selected due to the visible nature of its indicators. Certain Risk Factors contain indicators that are difficult to observe or measure, which makes their presence refutable. For example, Risk Factor 6, Absence of Mitigating Factors, contains indicators such as "Limited or lack of empowerment processes, resources, allies or other elements that could contribute to the ability of protected groups, populations or individuals to protect themselves;"121 and "Lack of a strong, organized and representative national civil society and of a free, diverse and independent national media."122 Criteria such as these are difficult to measure, and their presence or absence is more easily refuted than the aforementioned indicators from Risk Factor 7. As such, this Note will solely focus on Risk Factor 7; however, that is

processes, it should be possible to identify events, actions or changes that point to the likelihood that certain actors are taking steps towards a scenario of mass violence and possibly atrocity crimes. Alternatively, such events, actions or changes can also serve to create an environment that favors or even encourages the commission of such crimes. Recognizing such indicators and establishing a causal link to the probability of atrocity crimes is not always easy, but it is of great relevance. As with all risk factors, analysis of this risk factor should take into consideration a context in which other risk factors might also be present.

Id.

118 Id.
119 Id.
120 Id.
121 U.N. Framework of Analysis, supra note 19, at 6.1.
122 Id. at 6.2.
not to say that it would be impossible to develop systems of early intervention based on other Risk Factors in the future.

III. DISCUSSION

A. An Overview of the Shortcomings of Prosecution and Military Intervention as Preventative Mechanisms

International criminal law has played a significant role in post-atrocity processes of conciliation and transitional justice for many years. And, much like in the domestic system, the threat of prosecution is designed to act as a deterrent to prevent individuals from perpetrating atrocity crimes. However, prosecution and military intervention should not be thought of as the only available means of atrocity prevention, and it can be argued that they are not wholly effective in the first place.

Military intervention is not only problematic for the reasons outlined in Section II (A), but so-called humanitarian intervention often costs more lives than it saves. While collateral damage is permissible under IHL, the primary purpose of atrocity prevention is to avert any and all unnecessary violence. It seems counter-intuitive to prevent violence with further violence. If there are less violent means for preventing atrocities, such methods should be utilized first.

Since the very first international criminal trials in Tokyo and Nuremberg after WWII, legal scholars have taken issue with their existence. Some, such as Justice R.B. Pal, a justice on the Tokyo Tribunal, believed that international tribunals were purely political tools through which nations asserted sovereignty over one another. This phenomenon is known as “victor’s justice.” In post-conflict situations, victor’s justice can lead to more animosity between the parties. Additionally, criminal prosecutions are not conducive to the parties feeling as though their voices have been

125 STRAUS, supra note 5.
126 VAN SCHAACK & SLYE, supra note 66, at 106.
127 Id. at 113.
128 Id. at 99–113.
heard. This feeling exists for two reasons. First, there are procedural limitations to prosecutions. Certain types of evidence may be inadmissible, and courts tend to be limited with regards to how much time they can spend on each case. Second, there is no incentive for honesty in criminal prosecutions. There is a school of thought that suggests that justice should be secondary to truth; truth allows the parties to put the animosity of the conflict in the past. Criminal prosecutions do not allow for this.

Modern criticisms of international criminal prosecutions revolve around the nature of the jurisdiction involved. As discussed above, several states have withdrawn from the ICC in recent years. If all of these states parties to the Rome Statute can withdraw at will without consequence, the Court has no power whatsoever—a state whose nationals are under investigation can simply remove itself from the jurisdiction of the court. The withdrawals of the African states are indicative of a larger issue in international human rights law. The ICC, like other international human rights mechanisms, is viewed by many in African, Latin American, and some Asian states as a tool of Western imperialism. This creates a lack of trust in the institutional foundations of the ICC. To be effective, atrocity prevention mechanisms should be viewed as promoting a state’s values rather than as attacking them. Another issue with the jurisdiction of the ICC is that it is not retroactive. That is, the ICC only has the authority to prosecute crimes that occurred on the territory of a state party after that state consented to the jurisdiction of the court, either by signing the Rome Statute, or by granting ad-hoc consent. This means that in theory, states could wait until their nationals have completed the commission of international crimes before consenting to jurisdiction, thus sheltering said nationals from ICC prosecutions. The final issue with the jurisdiction of the ICC is that it does not conduct trials in absen-

129 Id. at 17-28.
130 Id.
131 Id.
132 VAN SCHAACK & SLYE, supra note 66.
133 Id.
135 See generally STRAUS, supra note 5.
136 VAN SCHAACK & SLYE, supra note 66, at 144.
and perpetrators of international crimes often evade capture for years.\textsuperscript{138}

\textbf{B. Alternative Dispute Resolution, the R2P Toolbox, and Transitional Justice}

In addition to the legal enforcement mechanisms developed by the international community, the past seventy years have also seen the promulgation of a variety of complements\textsuperscript{139} to traditional methods. Human rights scholars and practitioners alike often feel as though these complementary mechanisms developed out of necessity—to compensate for the shortcomings of the legal enforcement mechanisms addressed above.\textsuperscript{140} Several of these complementary methods of atrocity prevention emerged as part of a multifaceted post-conflict process commonly referred to as transitional justice. Pablo De Greiff, the United Nations Special Rapporteur for the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence,\textsuperscript{141} asserts that "there have been very few attempts to articulate a conception of transitional justice systematically."\textsuperscript{142} There is no single agreed upon picture of what transitional justice looks like, or what it should be. In a 2004 report to the Security Council, U.N. Secretary General Kofi Annan\textsuperscript{143} defined transitional justice as "the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."\textsuperscript{144} This is a very broad definition, and the list of mechanisms that fall under the umbrella of transitional justice is long. The Secretary General goes on to say

\begin{itemize}
\item \textsuperscript{137} However, there are valid criminal law and human rights principles for not conducting trials in absentia.
\item \textsuperscript{138} Somini Sengupta, \emph{Omar al-Bashir Case Shows International Criminal Court’s Limitations}, N.Y. Times (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html?_r=0.
\item \textsuperscript{139} These methods are designed to work in conjunction with, as opposed to replace, international criminal prosecutions and, in extreme cases, use of force.
\item \textsuperscript{140} \textsc{Van Schaarck} & \textsc{Slye}, supra note 66, at 6–11.
\item \textsuperscript{141} This terminology has developed in recent years as a more extensive replacement for the phrase “transitional justice,” which some scholars find to be reductive. However, for purposes of length and clarity, the phrase “transitional justice” will be used almost exclusively in this note.
\item \textsuperscript{142} Pablo de Greiff, \emph{A Normative Concept of Transitional Justice}, 50 PoliTorbis 17 (2010).
\item \textsuperscript{143} Kofi Annan served as U.N. Secretary General from 1997 through 2006.
\end{itemize}
that “these [processes] may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”

The term “reconciliation” has become a popular phraseology in recent years. Legal scholars, such as Jens Meierhenrich, have called into question the legitimacy of the uses of this term. He feels that frequently oppressed or victimized groups are forced into compromise in the name of reconciliation. In this way, he argues, reconciliation and associated processes (such as transitional justice) are effectively a form of alternative or appropriate dispute resolution. It could also be argued that because many transitional justice mechanisms developed as an alternative to international criminal prosecutions, they are a form of ADR.

[ADR] refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass mediation, arbitration, and a variety of ‘hybrid’ processes by which a neutral [party] facilitates the resolution of legal disputes without formal adjudication. Traditionally, ADR is defined as comprising of mediation, negotiation, arbitration, and conciliation, however, it is not limited to these mechanisms—some ADR scholars assert that any legally-based litigation alternative is a form of ADR. Meierhenrich asserts that the process of reconciliation is most similar to the ADR process of conciliation. It should be noted, however, that effective transitional justice processes can still involve some form of traditional adjudication.

145 Id.
147 Id. at 197.
148 See generally id.
149 See generally id.
152 Meierhenrich, supra note 146.
One of the most well-known transitional justice mechanisms is truth commissions. Truth commissions have been used across the globe in states such as El Salvador, Guatemala, Rwanda, Somalia, Argentina, the Former Yugoslavia, and South Africa, among others.\(^\text{153}\) The specific structure of each truth commission is tailored to the needs of the state, but each one involves a degree of victim-offender mediation, and these commissions are typically implemented in situations in which litigation is thought to be inappropriate.\(^\text{154}\) Truth commissions can be viewed as a form of mediation in that they enable all involved parties\(^\text{155}\) to have their voices heard through a process of sharing, and feel as though they played a role in shaping reconciliation processes. This sharing is significant:

[n]ational reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their stories, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help move them beyond the pain of the past.\(^\text{156}\)

This assessment of truth commissions echoes analyses and applications of mediation. The primary purpose of mediation is to help the parties reach a mutually agreeable solution with the assistance of a neutral third party.\(^\text{157}\) Like mediation, truth commissions seek to insure that parties feel as though they have played an active role in the process.\(^\text{158}\) However, unlike traditional concepts

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\(^{155}\) Truth commissions hear the stories of all victims, many of whom are regular citizens. However, their capacities are often limited, and they are unable to address the needs of the entire population. Additionally, some critics of truth commissions feel that like traditional adjudication, truth commissions are another form of victors’ justice, and that they are structured to benefit the regime in power after the conflict and legitimize it.

\(^{156}\) Scharf, supra note 153, at 379.


\(^{158}\) Another key aspect of truth commissions is that they are typically state sanctioned and sponsored. This is for several reasons: first, the new state is more likely to govern effectively if there has been reconciliation, and if all of the nationals accept the legitimacy of the new state. It is therefore in the interest of the state to promote reconciliation. Second, truth commissions often function as an alternative to criminal prosecution, and some truth commissions grant amnesty to the perpetrators. Only the state can grant amnesty, thus truth commissions require mini-
of mediation, truth commissions work towards an objective truth, and are predicated on a right to truth. Additionally, there is no single individual acting as mediator, but rather, a commission; and the parties are society at large rather than private individuals. Additionally, the commission is not usually a third-party neutral, but is backed by the transitional government. Acknowledgement of the truth is believed to help a state collectively move beyond the atrocity and achieve a sense of closure, thus allowing it to develop a new, stable system of governance.

If transitional justice mechanisms such as truth commissions are supposed to “ensure accountability, serve justice and achieve reconciliation,” and it is accepted that atrocities are a process rather than an event, then would it not be prudent to simply apply these mechanisms earlier in the process—say, before the onset of mass killings, ethnic cleansing or other such horrors? Why not employ some sort of commission that functions as a human rights ombudsman?

In fact, it is not unprecedented for mediation or other forms of ADR to be suggested as a form of early intervention. In the ICISS Report on R2P, one of the categories of “direct prevention efforts” is legal methods, and the first legal method listed is mediation. Arbitration is also presented as a form a direct legal prevention, as is monitoring compliance. Following the adoption of the principles of R2P by the U.N. General Assembly, the U.N. Department of Political Affairs developed a Mediation Support Unit as part of their efforts to strengthen the U.N.’s capacity for preventative diplomacy. Many scholars argue that the reconciliation process is, in and of itself, a form of ADR. As Valerie

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159 Hayner, supra note 154, at 611; see also Henkin et. al., supra note 158.
160 See generally Hayner, supra note 154; Scharf, supra note 153; Henkin et. al. supra note 158.
162 See generally id.
164 U.N. Framework of Analysis, supra note 19; Stanton, supra note 18.
165 ICISS, supra note 4, at 23.
166 Id.
167 Id.
Rosouxs writes, "[c]ase studies indicate that the so-called 'reconciliation process' can actually be considered as a continuous negotiation after peace agreements are reached, sometimes through informal channels, but sometimes through more conventional negotiations."170 Transitional justice processes often involve an amalgamation of ADR mechanisms.

C. Applying ADR in Situations of Atrocity and Conflict171

There are many situations of atrocity and conflict in which various forms of ADR have been utilized to bring about an end to the hostilities. In certain instances, these ADR mechanisms were more effective than others. This subsection provides a summary and analysis of some of the ways in which ADR has been employed in situations of atrocity and conflict.

1. The South African Truth and Reconciliation Commission

One of the most well-known truth commissions is the South African Truth and Reconciliation Commission ("TRC").172 The TRC was created as a part of the broader transitional justice scheme in South Africa in order to bring about reconciliation following the atrocities of apartheid.173 The structure of the TRC is closely aligned with the general description of truth commissions provided in Section III (A) of this note. However, the TRC differs from the modern conception of truth commissions in that it possessed certain legal powers, such as subpoena and search and seizure, among others.174 In this way, the TRC combined more traditional, litigation-based mechanisms with tools that are most appropriately described as ADR. The process of sharing one's

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170 Id. at 472.
171 This Section discusses four specific conflicts. It would be impossible to capture the complexity and nuance present in each of these situations in just a few paragraphs. None of the following subsections, taken either in whole or in part should be interpreted as fully representing the situations that they describe. However, given the importance of developing context-specific conflict resolution mechanisms, this Note does provide a bit of context solely for the purpose of furthering the understanding the mechanisms used.
172 When attempting to conduct research on truth commissions in other states (such as Argentina), the majority of the scholarly articles suggested discuss the South African TRC.
174 Allen, supra note 158.
story and synthesizing it with the stories of others to construct an objective truth is a form of mediation. Superimposing a legal framework on top of this story-telling mechanism imbues it with a sense of legitimacy, much like traditional forms of ADR.175 The TRC and the effective transition process in South Africa demonstrate that in order to successfully end a period of violent conflict, one must apply ADR mechanisms in addition to, if not in lieu of, international criminal prosecutions.

2. Kenyan Transitional Justice Mechanisms

Like truth commissions, other forms of post-conflict ADR are designed to serve a similar purpose; that is, bring a sense of closure or conciliation, and allow the state to collectively move on from the crimes and/or atrocities of the past. However, not all forms of post-conflict ADR involve the entire affected population. For example, the reconciliation process in Kenya (called the Kenya National Dialogue and Reconciliation) following the 2007 election violence relied heavily on mediation, but did not involve each and every single victim.176

For 40 years, the Kenyan government was a single party system.177 The 2002 elections marked the first time that an opposition party won a majority of seats in the Parliament.178 However, the hopefulness wore off quickly, as Kenyans realized that the new government was not any less corrupt than the old government had been.179 The 2007 elections began amidst much unrest and ethnic tension, which was fueled by the slow vote counting process, amongst other issues.180 Violent riots erupted as the votes were still being counted, and after the incumbent was announced as the winner, the opposition leader declared that the election results were illegitimate.181 The violence escalated rapidly and lasted for two months, during which over a thousand people were killed and hundreds of thousands were displaced.182
The African Union ("AU") sent a team of religious and political leaders to mediate and negotiate an end to the conflict.\textsuperscript{183} One of the primary goals of this process was to promote reconciliation between the various ethnic groups in Kenya, and to enable marginalized Kenyans to feel as though they had an opportunity to be heard.\textsuperscript{184} The AU delegation's policy was based on the idea that the key to establishing lasting peace was "placing victims, rather than perpetrators, at the centre of public attention, [in order to] mobilize civic and governmental support for initiatives to provide them with much needed reparation."\textsuperscript{185} There were a variety of commissions and committees established to aid in the reconciliation process, including the Truth, Justice and Reconciliation Commission.\textsuperscript{186} While the effectiveness of these committees has been called into question in recent years, political analysts such as Halakhe believe that the judicial reforms lay the groundwork for strengthened accountability in the future.\textsuperscript{187} Some transitional justice scholars feel that the Kenyan process attained this level of success because it focused on the victims and their stories.\textsuperscript{188}

3. Alternative Dispute Resolution and the Israeli-Palestinian Conflict

Mediation is sometimes used in situations in which the conflict is ongoing—for example, the Israeli-Palestinian conflict began in 1948 and is unlikely to end in the near future.\textsuperscript{189} While Israel’s founding is cause for celebration in much of the Jewish community, it was a traumatic event for Palestinians, 80% of whom either fled or were forced off of their land.\textsuperscript{190} These events created land disputes that can be said to be the root cause of the modern Israeli-Palestinian conflict.\textsuperscript{191}

\textsuperscript{183} Wameyo, supra note 73.

\textsuperscript{184} See generally HALAKH, supra note 176; Wameyo, supra note 73.

\textsuperscript{185} Wameyo, supra note 73, at 420.

\textsuperscript{186} Id.

\textsuperscript{187} HALAKH, supra note 176.

\textsuperscript{188} Wameyo, supra note 73, at 445.

\textsuperscript{189} When Israel declared its independence in May of 1948, it was attacked by its neighbors, Jordan, Lebanon, Egypt, and Syria. See generally Dean G. Pruitt, Ripeness Theory and the Oslo Talks, 2 INT’L NEGOT. 237 (1997); Louis Kriesberg, Mediation and the Transformation of the Israeli-Palestinian Conflict, 38 J. PEACE RES. 373, 375 (2001).

\textsuperscript{190} Id.

\textsuperscript{191} What constitutes Israel or Palestine is defined differently by different people depending upon their relationship to the conflict. Tensions are exacerbated by outside actors, including the United States, Egypt, Lebanon, and others. See generally Pruitt, supra note 189; Kriesberg, supra note 189.
In 1993, American President Bill Clinton mediated a peace agreement between Israeli Prime Minister Yitzchak Rabin\textsuperscript{192} and the President of the Palestinian Authority, Yasser Arafat.\textsuperscript{193} This agreement became known as the Oslo Accords, and was instrumental in the creation and recognition of the Palestinian Authority.\textsuperscript{194} The Oslo Accords also led to mutual recognition between the Palestinian Liberation Organization and Israel, and created a roadmap for future negotiations.\textsuperscript{195} The Oslo Accords were the result of a series of negotiations, which are a form of ADR.\textsuperscript{196} While the Oslo Accords were highly successful in certain regards,\textsuperscript{197} they did not bring about an end to the conflict. And, in more recent years, they have come to be criticized for solidifying the preexisting power structure.\textsuperscript{198} This is a common issue in negotiations. If there is a power imbalance between the parties, the stronger party will likely have an advantage.\textsuperscript{199} In international, multinational, and national\textsuperscript{200} negotiations and mediation, there is frequently a power imbalance, as one party is always a state actor, and the other party is likely a non-state actor.\textsuperscript{201} In most cases, the state actor will have more power. Such issues must be taken into account when attempting to resolve conflict or an early atrocity situation—the mediator or facilitator must make it clear to the state actor that they are being asked to “give up more” because they have more to begin with.\textsuperscript{202}

\textsuperscript{192} Prime Minster Rabin was assassinated shortly after the Oslo Accords for his participation in the negotiation process which was viewed by right-wing extremists in Israel as a betrayal. Dexter Filkins, \textit{Shot in the Heart}, \textsc{New Yorker} (Oct. 6, 2015) http://www.newyorker.com/magazine/2015/10/26/shot-in-the-heart.

\textsuperscript{193} See generally Pruitt, \textit{supra} note 189; Kriesberg, \textit{supra} note 189. Yasser Arafat was the first head of the Palestinian Authority, and previously served as the head of the Palestinian Liberation Organization. The second, and present, head of the Palestinian Authority is Mahmoud Abbas, who changed the title from President to Prime Minister. \textit{Profile: Mahmoud Abbas}, BBC News (Nov. 29, 2016), http://www.bbc.com/news/world-middle-east-20033995.

\textsuperscript{194} See generally Pruitt, \textit{supra} note 189; Kriesberg, \textit{supra} note 189.

\textsuperscript{195} Pruitt, \textit{supra} note 189, at 237.

\textsuperscript{196} \textit{Alternative Dispute Resolution}, \textsc{Black’s Law Dictionary} (10th ed. 2014).

\textsuperscript{197} E.g. the creation of the Palestinian Authority, and the mutual recognition by the two parties.

\textsuperscript{198} \textsc{International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace} (Susan M. Akram, et al. eds., 2011).


\textsuperscript{200} As opposed to interpersonal situations, in which the balance of power varies.


\textsuperscript{202} The role power imbalance plays in negotiation was examined by Karen Cook and Richard Emerson in their 1978 study, the findings of which were confirmed by subsequent studies. \textit{See}
4. Loya Jirgas in Afghanistan

Other forms of ADR are frequently utilized in post-conflict states. For example, the *Loya Jirgas* that took place in Kabul, Afghanistan in 2002 and 2010 were negotiation processes intended to bring about reconciliation. *Loya Jirga* is Pashto for Grand Council, and these councils have long served as decision-making bodies in Pashtun culture. Following the collapse of the Soviet backed government, an extremist group of mujahedeen called the Taliban rose to power, taking advantage of the mujahedeen's inability to reconcile with one another. This group committed many atrocity crimes against the Afghan people, including denying women education and healthcare. The United States government did not intervene.

Following September 11th, 2001, however, when Taliban officials provided refuge to Osama Bin Laden and other Al Qaeda leaders, the United States decided to intervene and remove the Taliban from power. The *Loya Jirga* in 2001 was for emergency purposes, and was intended to legitimize the new Afghan government. In this process, the attendees of the *Loya Jirga* selected Hamid Karzai as President of Afghanistan. The 2011 *Loya Jirga* involved representatives of the Afghan government, including President Hamid Karzai, and representatives of Afghan Taliban. The traditional role of the *Loya Jirga* was to act as a legislative body, performing tasks such as ratifying the Constitution, or ap-


203 Afghanistan was the focus of several proxy wars between world powers which began in the late nineteenth century and lasted through the end of the Cold War. The United States, Great Britain, and the Soviet Union all vied for influence in Afghanistan leaving the country a volatile mess. During the Cold War, the United States supported anti-Soviet mujahedeen, or “those engaged in jihad.” Ebrahim Afsah & Alexandra Hilal Guhr, *Afghanistan: Building a State to Keep the Peace*, 9 MAX PLANCK Y.B. U.N. L. 373, 380; *A Historical Timeline of Afghanistan*, PBS NEWS HOUR (May 4, 2011), http://www.pbs.org/newshour/updates/asia-jan-june11-timeline-afghanistan/.

204 Sarah Darchshori, *Pursuing Peace in an Era of International Justice*, 50 POLIFORBES 83, 91 (2010); Afsah & Guhr, supra note 203, at 379.

205 Afsah & Guhr, supra note 203, at 380.

206 Id.

207 Id.

208 Id.

209 Id. at 413; Darchshori, supra note 204.

210 Darchshori, supra note 204.

211 Rosoux, supra note 169, at 473.
pointing an interim President. However, the 2011 Jirga served a different purpose—making peace between the Afghan government and the Taliban. The 2011 Loya Jirga was successful in that it integrated traditional methods into the transitional justice system in Afghanistan. However, it was less effective with regards to achieving its original goal of merging the former government (the Taliban) with the new government. Perhaps these negotiations failed because neither party was willing to compromise on their demands. This failure indicates the importance of integrating local customs into the transitional ADR mechanism so that the forum is one with which the parties feel familiar. But it is also important that the involved parties understand what they can expect to get out of the adjudication, otherwise the process could go on endlessly.

D. Application of Risk Factor 7 of the U.N. Framework of Analysis

This Section explores whether or not it would have been possible to intervene prior to the instigation of violence in any of the above circumstances pursuant to Risk Factor 7 of the U.N. Framework of Analysis. In retroactively applying Risk Factor 7 to the early stages of each of the conflicts discussed above, it is apparent that different indicators are relevant to different phases of each conflict. Different indicators, and different numbers of indicators are applicable to each situation.


213 Ruttig, supra note 212.

214 At the time this note was written, the Afghan government was still engaged in this process. See Hashmat Mosilhi, The Taliban and Obstacles to Afghanistan Peace Talks, AL JAZEERA ENGLISH (Feb. 25, 2016), http://www.aljazeera.com/indepth/features/2016/02/taliban-obstacles-afghanistan-peace-talks-160225095920107.html; U.N. GAOR, 71st Sess., 47th plen. mtg. at GA/11858 (Nov. 17, 2016).

215 Frequently, the goal of such negotiations is to reach a compromise. Negotiations are more successful when the parties are willing to compromise. See Susan M. Chesler, An Introduction to Negotiations for Future Transactional Lawyers, BUS. L. TODAY (Apr. 2011), https://www.americanbar.org/publications/blt/2011/04/training_tomorrow.html.
In each of the conflicts discussed in Section III (B), one could argue that both indicators 7.13 and 7.14 were present. Indicator 7.13 is “[i]ncreased politicization of identity, past events or motives to engage in violence,”\textsuperscript{216} and indicator 7.14 is “[i]ncreased inflammatory rhetoric, propaganda campaigns or hate speech targeting protected groups, populations or individuals.”\textsuperscript{217} Some of the other indicators are applicable to a single case from the analysis in the previous subsections of this note. For example, indicator 7.12 (“[m]arking of people or their property based on affiliation to a group”\textsuperscript{218}) was highly prevalent in pre-apartheid South Africa. Additionally, “[i]ncreased serious acts of violence against women and children, or creation of conditions that facilitate acts of sexual violence against those groups, including as a tool of terror,”\textsuperscript{219} indicator 7.9, was present in Afghanistan under the Taliban.

Although all of these situations were deemed serious enough to merit the use of ADR, they each involved a different number of indicators. However, this does not provide any clarity as to how many indicators must be present to warrant intervention. Unfortunately, the U.N. Framework of Analysis does not provide a definitive answer. The only insight it provides into the significance of the number of Risk Factors and or indicators present is that:

the more risk factors (and the greater number of relevant indicators) that are present, the greater the risk that an atrocity crime may be committed. Also, the greater the number of indicators of a particular risk factor that are present, the greater the importance and role of that factor in a particular situation.\textsuperscript{220}

While this is helpful with regards to highlighting the overall seriousness of a given situation, it does not specify a cut-off point.

In future instances, the U.N. Framework of Analysis should not be applied retroactively, but rather, should be used to monitor the situations in states as they arise, as that was the purpose for which it was created.\textsuperscript{221} In each of the aforementioned situations, adjudicative intervention was staged before the point at which the events could be labeled atrocities in the legal sense.\textsuperscript{222} While this was a step in the right direction, one of the goals of atrocity pre-

\textsuperscript{216} U.N. Framework of Analysis, supra note 19.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} See Section II (C); see also Rome Statute, supra note 3.
vention is to avoid the loss of human life or the destruction of cultural property altogether. This was certainly not the case in any of the above situations. Any future system of intervention should be set up in such a way that it is triggered at the first sign of the (confirmed and vetted) presence of indicators.

IV. PROPOSAL FOR A COMPREHENSIVE, INTERNATIONAL ADR MECHANISM FOR EARLY INTERVENTION

A. Why is ADR the Ideal Adjudicative Tool in Situations of Atrocity Crimes?

ADR is frequently utilized to resolve situations of atrocity, and should be utilized to prevent atrocities as well. This is because ADR offers a comprehensive solution to each of the root causes of atrocity crimes. By allowing individual victims and perpetrators to come forward and have their voices heard, ADR ensures that each issue that led to the process of atrocity is addressed, which builds a more resilient society. Criminal prosecution simply focuses on a single aspect of atrocity crimes, the perpetrator, and assigns them all of the blame, rather than addressing the issues that permeate society. Furthermore, criminal prosecutions are often viewed as being one-sided, and can be seen as sacrificing peace in order to bring about justice. The U.N. Framework of Analysis states that the ideal way to prevent atrocity crimes is “to build the resilience of societies . . . by ensuring that the rule of law is respected and that all human rights are protected, without discrimination. . . .” The best way to do this is to both build capacity and establish trust in state institutions. Processes of reconciliation facilitated through ADR mechanisms allow for this to happen because they provide individuals with a degree of involvement in the pro-

223 See generally Straus, supra note 5.
224 Atrocity prevention scholars, such as Dr. James Waller, consider the root causes of atrocity crimes to be issues of economic imbalance and social fragmentation, among other things. James Waller, Confronting Evil: Engaging Our Responsibility to Prevent Genocide (2016).
226 Van Schaack & Slye, supra note 71.
227 See generally Van Schaack & Slye, supra note 71.
228 U.N. Framework of Analysis, supra note 19.
cess. Furthermore, the nature of reconciliation and transitional justice is such that it is better served through ADR mechanisms than through international criminal prosecutions.

Not every atrocity prevention scholar would agree that it is preferable to use ADR in these situations. There are those, such as Kydd and Straus, whose default assumption is that military intervention is ideal.\textsuperscript{229} Others might argue, as did Sewall, that military intervention is actually preferable to other forms of intervention.\textsuperscript{230} Even those who propose ADR as an atrocity prevention mechanism are wary of its potential applications. Take, as an example, Nader and Grande, who say that; “mandatory mediation abridges freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view.”\textsuperscript{231} However, these adverse effects can be combated if the system is pluralistic and allows for the use of other legal methods, if it is collectivist in nature, and if it avoids strict adherence to a single form of ADR.\textsuperscript{232} Being that this would not be the only legal system available, its primary purpose would be reconciliation, individual victims would choose to opt-in, and the procedures have the capacity to evolve as the state and international community see fit, Nader and Grande’s concerns are not particularly relevant. However, these are factors that do need to be reevaluated on a regular basis to make sure the mechanism is not being abused by the state, the international community, or other entities.

Both the international community and atrocity prevention scholars have considered mediation as a viable option for combating atrocities. The U.N. recently created a Mediation Support Unit, which now functions as part of its Peacekeeping Department.\textsuperscript{233} James Waller also proposes mediation as a potentially useful preventative method in his book, \textit{Confronting Evil: Engaging Our Responsibility to Prevent Genocide}.\textsuperscript{234} However, what this


\textsuperscript{232} See generally id.


\textsuperscript{234} See \textsc{Waller}, supra note 224.
Note seeks to propose is something new—a standardized international system of mediation as a mechanism for early intervention.

B. Structure of the Mechanism

The international community should establish a mechanism that would enable states to set up customized ADR systems and bodies designed to reconcile any issues that arise under Risk Factor 7 of the U.N. Framework of Analysis. These systems will allow for local ownership—they will be designed by the states and members of civil society, and customs and social norms of each state will play a role in how the ADR system functions. However, assistance can, and should, also be provided by the international community on an as-needed basis, as states in volatile situations tend to lack capacity for structural changes.

There will be a multi-national monitoring and compliance body that will determine when it is necessary for a state to employ its ADR system. This monitoring body will consist of a panel of experts in atrocity prevention. Ideally, the individuals on the panel will come from a variety of cultural backgrounds, so as to better understand the idiosyncrasies of the states that they are observing. Once the monitoring body has determined that a state is at risk for the perpetration of atrocities under the U.N. Framework of Analysis, the state will be obligated to use their established ADR system under the first pillar of R2P. Should they require assistance, it will be provided as per the second pillar of R2P. And, pursuant to the third pillar of R2P, if a state should fail to engage their ADR system, an international reconciliation team will be sent in. Should all forms of ADR fail, the state will


237 This idea is based on the significance of maintaining a degree of local ownership in transitional justice processes—if panel members understand the culture of a particular state, they will be more likely to understand the logic behind structuring the ADR mechanism in a specific way.

238 It is unclear whether it is better for there to be an established “cut-off point,” i.e. a set number of indicators at which ADR processes become obligatory, or if this sort of thing should be more discretionary and on a case-by-case basis.

239 ICISS, supra note 4.

240 Id.
face further action (i.e. sanctions, criminal prosecutions, use of force, etc.) under existing U.N. doctrine.\textsuperscript{241}  

C. Factors That Should be Taken Into Consideration in the Development of Each State’s Mechanism

The structure of the ADR mechanism employed will not only vary by state, but will be influenced by which indicators are present. For example, the reconciliation process for the development of militias would look different than the reconciliation process for the propagation of hate speech. This distinction is because the mechanisms employed will need to be designed to combat the specific issues arising under the U.N. Framework of Analysis—this mechanism cannot be a one-size-fits-all system. In most, if not all cases, an amalgamation of ADR mechanisms may be necessary for an effective transition.\textsuperscript{242}

Past experience and local context and practices will inform the specific mechanisms used. This concept of local ownership is a necessary component of transitional justice.

The tendency to exclude local communities as active participants in transitional justice measures is a primary flaw, raising fundamental questions of legitimacy, local ownership, and participation. Simply involving local people at the implementation stage of these initiatives is not enough. For a fully participatory process (we will argue) they should also take part at every stage in the process including; conception, design, decision making, and management.\textsuperscript{243}

In order to maximize sustainability, the structure of each state’s mechanism should be influenced by the culture of that state. If a state has traditionally employed a specific style of ritual negotiations, or of trials, elements of this traditional adjudication should be incorporated into the preventative mechanism. Incorporating traditional tools into the modern mechanism will also help address root causes.

Additionally, in order to ensure an effective and lasting transition, the balance of power must be taken into account.\textsuperscript{244} Being that many of these situations involve non-state actors, it is important that a neutral third party be present in order to ensure that the

\textsuperscript{241} Id. One of the means by which this could be accomplished would be through a Security Council Resolution.

\textsuperscript{242} See generally Meierhenrich, supra note 146.

\textsuperscript{243} See Lundy & McGovern, supra note 233, at 268.

\textsuperscript{244} See Cook & Emerson, supra note 20.
state does not use the adjudication to reinforce the preexisting power structure. If the power structure is reinforced, the root cause of the conflict will go unaddressed, and the conflict will not be resolved by the adjudicatory process. In order to avoid this issue, an effective ADR prevention mechanism should rely upon a collective form of ADR that involves a neutral third party, such as mediation or conciliation. The third party should be fully aware of the context in which they are mediating, in order to adequately address the root causes of the conflict.

V. Conclusion

While the field of atrocity prevention has come a long way since its inception, there is still progress that must be made in order to completely prevent these crimes. Current mechanisms allow for rebuilding post-conflict, but there is no existing system that takes into account all of the root causes of atrocity crimes, and uses methods other than criminal prosecution—which is not the most effective deterrent, to address these root causes and develop resilient state and civil structures.

Any future atrocity prevention mechanisms implemented must apply both R2P and the U.N. Framework of Analysis, as these mechanisms provide the necessary tools to confront the root causes of atrocity crimes and prevent recurrence. R2P enables the international community to act as a support system without violating state sovereignty, and the U.N. Framework of Analysis highlights which behaviors states should look out for. The nature of criminal prosecution and traditional legal methods alone are not conducive to effective prevention. When implementing the U.N. Framework of Analysis as part of the R2P toolbox, it would be in the best interests of the international community to incorporate various forms of ADR. This is because effective transitional justice and reconciliation mechanisms are characteristically similar to ADR both in their purposes and structures.

245 See id.
246 See WALLER, supra note 224.
247 VAN SCHAACK & SYE, supra note 71.
248 STRAUS, supra note 5.
249 ICISS, supra note 4.
250 U.N. Framework of Analysis, supra note 19.